

Asset seizure by the bank against its clients

(High) requirements relating to the plausibility of the claim

Par Romain Dupuis le 23 April 2024

A bank that wishes to obtain a receivership against its clients in order to recover an overdraft resulting from an unsuccessful margin call and a liquidation of positions must make its claim plausible by means of detailed explanations and documents. Failing this, the judge must refuse – or revoke – the receivership (Federal Court ruling [5A 515/2023](#) of 23 February 2024).

The dispute that gave rise to this judgment arose from a lombard loan granted by a Zurich bank to two spouses domiciled in the United Arab Emirates to enable them to make financial investments. The loan was secured by investments deposited with the bank by the couple.

Due to a loss in the value of the investments in question, which resulted in insufficient cover for the loans, and after an unsuccessful margin call, the bank liquidated the investments. However, the liquidation proceeds were insufficient to repay the loan, leaving an overdraft of almost CHF 5 million.

The bank then applied for – and obtained – the sequestration of the spouses' assets held with another local bank. However, on opposition, the sequestration order was revoked, as the bank had failed to make its claim sufficiently plausible. This decision was upheld on appeal by the Zurich *Obergericht*.

In its appeal to the Federal Supreme Court, the bank – in addition to a procedural complaint relating to the admissibility of its determinations, which is not addressed in this commentary – complained that the Zurich courts had made excessively stringent demands regarding the plausibility of the claim.

After reviewing the principles applicable to plausibility, the burden of proof and the burden of the allegation, the Federal Court went on to analyse the case in question (from the point of view of arbitrariness ; cf. [art. 98 FSCA](#)).

Relying on the *Obergericht* judgment, the Federal Court found that the claim alleged by the bank arose from various items : (1) the credit granted to the spouses, (2) the overdraft resulting from the loss in value of the investments provided as collateral and (3) the proceeds from the liquidation of the spouses' investments and other assets deposited with the bank.

The High Court then set out the reasoning of the *Obergericht*, which can be summarised very simply as follows : the creditor cannot simply allege the total amount of his claim, but must on

the contrary present and establish the calculation of the various items in a sufficiently substantiated manner to allow a detailed challenge.

Taking each item in turn, the Federal Court has the following comments to make :

1. *In relation to the credit* : insofar as it is not a question of a single credit drawn down in one go, but of a balance of different credit amounts used at different times and in relation to different financial transactions (within the authorised limit), it is not arbitrary to demand more details from the creditor bank than the total amount of the balance. The bank must show how this amount was obtained by establishing how the credit was used and how it has evolved over time.
2. *In relation to the loss of value of the investments and the resulting overdraft* : it is not arbitrary to require more from the bank than the mere allegation of a total collateral value. On the contrary, the creditor bank must break down the various positions deposited as collateral, at least by investment category. It is only in this way that the bank will be able to establish a “credible” collateral value enabling it to justify (i) the overdraft, (ii) the resulting margin call and (iii) the liquidation following the failure to comply with the margin call.
3. *In relation to the liquidation proceeds* : here again, it is not arbitrary to require the bank to set out in detail how it arrived at the amount of its claim. It must set out (i) all the positions liquidated (i.e. – in this case – both OTC derivatives and equities and bonds), (ii) the result of the liquidation and (iii) how this result was offset against the overdraft to arrive at the amount of the claim being asserted. In doing so, the bank cannot simply refer to a statement of account showing a “multitude of transactions”, insofar as it is neither the judge’s nor the debtor’s responsibility to assemble the various items of information appearing on such a document themselves in order to reconstitute the total amount. The documents produced must make it possible to verify the bank’s calculation of the set-off.

The Federal Court found that the creditor bank had not met these requirements. It had not sufficiently substantiated the composition and development of the loans claimed, the pledge value of the positions provided as collateral or the calculation used to arrive at the amount of the claim. The documents produced, some of which were for the bank’s internal use only, did not enable the various stages leading up to the claim to be reconstructed precisely, nor did they enable the calculation of the set-off used to arrive at the final result to be verified. Consequently, the *Obergericht* was right to uphold the revocation of the receivership.

Two concluding remarks :

1. The Federal Supreme Court examines the decision of the Zurich *Obergericht* from the standpoint of arbitrariness only. While it considers that the court’s reasoning in this case was not arbitrary, the fact remains that there are still some cantonal disparities with regard to sequestration, so that practices are not identical throughout Switzerland.
2. On the other hand, although plausibility implies a reduction in the degree of proof, this does not relieve the sequestering creditor of the burden of allegation and proof. The obligation to break down the factual situation into individual facts in a manner that is sufficiently complete and clear to enable them to be proven and counter-proven remains. In banking matters, this obligation requires the lawyer to set out in detail the various transactions involved, which are often complex, and to produce directly all the

documentation needed to reconstruct the calculation of the amounts alleged.

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