CENTRE DE DROIT
BANCAIRE ET FINANCIER

Claims clause

The existence of a client instruction may remain undecided in a residual banking relationship

Par Benjamin Vignieu le 6 May 2024

A recent Geneva ruling illustrates the effects of a residual bank agreement combined with a claims clause when the existence of a client instruction is disputed by the parties in a one-off investment advisory relationship (ruling ACJC/231/2024 of the Civil Division of the Geneva Court of Justice of 13 February 2024).

In 2003, a company based in the British Virgin Islands opened a relationship with a Swiss bank. The bank's general terms and conditions provided to the client contained a complaints clause stating that account and deposit statements must be contested upon receipt of the corresponding notice, but no later than the deadline set by the bank. The opening documentation also stipulates that correspondence must be held in safe custody and that, unless otherwise indicated, the date indicated on the bank document must be considered as the date of receipt by the customer.

In May 2008, the bank acquired bonds issued by a Hong Kong company active in the aluminium industry on behalf of the client. The bonds were listed on asset statements sent to the bank with the note that any discrepancies must be reported within four weeks. The Hong Kong company was liquidated in July 2009 in the wake of the financial crisis, resulting in a substantial loss for the client.

The Court of First Instance dismissed the client's claim for payment. She lodged an appeal, arguing in particular that the bank had made the disputed investment without her consent.

The Court began by interpreting the parties' expressions of intent in order to qualify the contractual relationship. A 'long-term' investment advice contract was ruled out because of the sophisticated profile of the client's representatives, the lack of regular investment proposals and the absence of a close relationship between the parties. Accordingly, the parties are bound by a custody account agreement accompanied by 'one-off' investment advice agreements where the bank provides advice. With regard to the disputed investment, the Court held that the bank had recommended it to the client because it was surprising that such an "exotic Chinese aluminium" security should be held by some of the bank's other clients.

After recalling the validity and effects of the fictions of receipt and ratification in remaining bank developed by the jurisprudence of the Federal Court (cf. Hirsch, cdbf.ch/1028 ; Hirsch, cdbf.ch/1051), the Court comes to the conclusion that the existence, or not, of an instruction

from the client regarding the disputed investment is not decisive in this case for the following reasons :

Either the client agreed to the disputed investment following advice from the bank, in which case the bank could be held liable for breach of its contractual obligations in relation to the advice given. In this case, according to the Court, the bank had complied with its duty to inform and exercise due care, the client had sufficient knowledge to understand the advice and the advice was in line with the agreed risk profile. This argument is partly debatable insofar as the compliance of the investment with the risk profile was not evident from the judicial expert's report, which considered that the security was speculative and that such a position was not a good diversification in the context of a portfolio with a low risk tolerance.
Alternatively, in the absence of an agreement, the client would have ratified the contentious investment after the fact. In this case, the client had in fact consulted the asset statements showing the investment and had the necessary knowledge to understand this type of transaction, but had not contested it within the four-week period in accordance with the complaint clause. Consequently, irrespective of the existence of the client's agreement to the execution of the disputed investment, the bank's liability must be denied. This reasoning is convincing insofar as it penalises the customer who waits for the losses to be realised before contesting the transaction. It is also in line with civil case law in this area, according to which the fiction of ratification arising from the claims clause is fully applicable when the existence of an instruction is disputed and/or not proven (cf. Hirsch, cdbf.ch/1178 ; Fischer, cdbf.ch/984).

The judgment under review is interesting in two respects. On the one hand, it reiterates the strict application of the claims clause and its fiction of ratification in the remaining bank. Secondly, it shows that the classification of financial services in civil law differs from that provided for in the regulations since the LSFin came into force on 1 January 2020. The Court analysed whether the investment fell within the client's risk profile in order to assess whether the one-off investment advice had been properly provided. This is tantamount to verifying the adequacy of the service. However, in regulatory terms, such a check is only required in the case of investment advice services that take account of the client's entire portfolio or asset management services (art. 12 LSFin). Thus, in civil law, the classification of the investment advice contract ("one-off" or "long-term") does not necessarily follow that provided for in the LSFin ("isolated investment advice without taking the entire portfolio into account" or "investment advice taking the entire portfolio into account"). In particular, the concept of "one-off" investment advice developed by the civil courts does not correspond to that of "isolated" investment advice under art. 11 of the Sarbanes-Oxley Act. It will be interesting to see whether civil case law will be influenced by the classification adopted at regulatory level for assessing the proper performance of the contractual obligations of financial service providers. It would be preferable to standardise the classification in favour of that provided for in the LSFin to enable financial services providers to control their legal risk.
