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Margin calls

What duties does the bank have in an execution only relationship ?

Par Nicolas Ollivier le 21 May 2024

The Geneva Court of Justice dismisses a client's case concerning a margin call. The Court qualified the contract as execution only, exonerating the bank from monitoring the positions and warning the customer. Without a stop loss, the bank was not obliged to liquidate the positions automatically (ACJC/378/2024 of 16 March 2024).

A client entered into a business relationship with a Geneva bank in 2016. They signed an investment advice agreement in March 2018. In autumn 2018, the client undertook future transactions in WTI US crude oil and quickly complained about the fees. The bank offers an execution-only report with reduced fees and direct access to the trading room. The customer asks the bank to apply these new pricing conditions from 1 February 2019. On 20 April 2020, in the midst of the COVID-19 pandemic, WTI plummets. The buffer and then the additional margin were reached during the day. The following day, between 11.23am and 12.55pm, the customer exchanged telephone calls and correspondence, criticising the bank for not automatically closing his positions at USD 19 and refusing to do so at a lower level. The bank finally closed the positions, resulting in an overdraft of USD 918,584.

The bank files a claim for payment against the customer to validate the escrow obtained on another of the customer's accounts in Switzerland. The customer filed a counterclaim claiming the lost profit on expiry of the forward contracts. The Court of First Instance upheld the bank's action and dismissed that of the customer, who appealed to the Court of Justice.

The Court of Justice applied a two-part methodology in its reasoning. The first examines whether the bank complied with the contractual conditions for margin calls and liquidation of positions. The second involves qualifying the contract to determine whether the bank was obliged to monitor investments and inform the customer immediately if his positions deteriorated.

First, the bank must prove that it had liquidated the positions in accordance with the contractual terms of the margin call, thereby justifying its claim for the debit balance. The Court held that the margin protected the bank's interests exclusively. The customer's complaint that the bank had delayed in notifying a margin call by tolerating a margin shortfall on 20 April 2020 was rejected.

The Court of Justice then examined the details of the margin call and settlement procedure. The client argued that the email of 21 April at 12.11pm did not meet the requirements of a formal margin call, that the calculation was incorrect and that clear and quantified information from the time of the margin shortfall would have enabled him to provide additional collateral. The Court noted that, during the telephone conversations, the customer clearly refused to contribute additional funds, criticising the absence of automatic closing at USD 19. The customer did not prove that he would have acted differently if the bank had given him figures other than those he had received at 12.11pm. Knowing the exact amount of additional collateral required would not have changed the customer's attitude. The absence of any indication of a deadline for providing the additional funds was of no consequence given the customer's refusal to provide any additional collateral. In other words, again according to the Court, despite the fact that some authors consider that a margin call, in order to be valid, must contain the precise amount to be contributed and set a deadline pursuant to art. 108 CO, the customer's conduct broke the causal link of a possible breach of contract by the bank. The question of whether the e-mail of 12.11pm informing of an overdraft of USD 1,222,294 constitutes a valid margin call can be left open.

Secondly, the Court will examine whether the customer is entitled to damages for breach of the duty to inform and advise. This requires the contract to be classified and the extent of the contractual duties to inform, advise and warn to be determined. The question of whether the consultancy contract had lasted until April 2020 due to the absence of written termination, sporadic advice and the invoicing of counsel fees, may remain undecided. The communication of a summary table of the surplus or deficit of positions with and without buffer was part of the bank's risk management and was carried out independently of the type of contractual relationship. In the absence of a contractual provision, the bank had no obligation to monitor the portfolio. The parties did not intend to be bound by a comprehensive advisory contract, and the Bank was therefore not obliged to safeguard the client's interests or constantly monitor his positions. Accordingly, the Bank did not breach its obligations by failing to inform the client of market developments on the morning of 20 April 2020 or 21 April 2020. It was not established that the parties had agreed on a stop loss at the USD 19 threshold.

This ruling is in line with previous case law on margin calls (e.g. 4A_450/2010, commented on in Gomez Richa, cdbf.ch/732/). The lesson for customers is that it is better to provide additional funds by reserving their rights. The bank's obligations are very limited in the event of an execution only relationship, and the customer's behaviour can break the causal link when the bank does not apply the margin call procedure correctly. On the other hand, an ongoing advisory contract or the existence of a special relationship of trust imposes on the bank more extensive duties of information, advice and warning.