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The bank must prove the customer’s losses

Par Célian Hirsch le 7 August 2024

When the bank liquidates the customer’s positions and the result is a negative balance, it is up to the bank to prove the losses. Otherwise, the bank does not prove the existence of its claim against the customer (judgment 4A_301/2023 of 16 July 2024).

In 2011, a client used a Vaud bank’s IT platform to speculate on fluctuations in the USD/CHF exchange rate. On 15 January 2015, the SNB announced that it was abandoning the CHF/EUR floor rate. This caused panic and made the CHF/USD market temporarily illiquid. In accordance with the general terms and conditions, the bank liquidated the customer’s positions and informed him a few days later that his account had a negative value of USD 929,075.

The Bank brought an action for payment against the client before the Chambre patrimoniale du canton de Vaud. In allegations 83 to 86, the Bank stated that the automatic liquidation of the customer’s positions had resulted in a loss of USD 1,125,991.40 and that, after deducting the customer’s account balances of USD 193,325.62, the account had been debited USD 929,075.

In his reply, the client contested these four allegations and filed a counterclaim requesting that the amount of USD 193,325.62 in his account prior to the liquidation be returned to him.

The Wealth Division upheld the bank’s claim and rejected the customer’s counterclaim. On appeal, the Cantonal Court reached the opposite conclusion. The onus was on the bank to prove the losses. However, some of the evidence produced by the bank in support of its claim was incomprehensible and inconsistent. In addition, the evidential value of these documents is reduced because they were prepared by the bank. As a result, the bank did not prove the alleged losses and must reimburse the customer for the balance of his account prior to the announcement of the abolition of the floor rate (PT16.021199-201668).

In its appeal to the Federal Supreme Court, the bank raised two objections. Firstly, the customer did not contest the overall amount of the negative balance on his account. Secondly, the Cantonal Court had arbitrarily assessed the documents produced.

On the first point, the Federal Court reiterated its case law on the burden of proof and the burden of reasoning in a dispute. In short, it is up to the plaintiff to allege the relevant facts and, only in exceptional cases, up to the defendant to substantiate his challenge (cf. e.g. Hirsch, cdbf.ch/1112). In this case, the client simply indicated “Contested” to a set of nine allegations, including the four relating to the amounts of the losses. In the view of the Federal Court, this contestation was express and clearly demonstrated that the customer had contested these amounts. He was not required to give reasons for his objection, especially as the bank had not detailed the numerous positions that had been liquidated.

With regard to the second complaint, the Federal Court emphasised that the bank had not even attempted to explain the documents it had produced, which the cantonal court had described as incomprehensible. Since the bank did not provide details of each liquidation operation in a comprehensible manner, the Federal Court confirmed the cantonal court's assessment that only an expert opinion could prove the alleged losses.

The bank therefore failed to prove its claim against the client. As a result, it could not pay itself by direct debit from the customer's bank account. As a result, the customer has a claim for the return of his assets.

This case is not isolated. Other cases linked to the end of the CHF/EUR floor rate have occupied our courts, but in these the question of proof of the bank's claim was not raised (see in particular Hirsch, cdbf.ch/1208 and Ollivier, cdbf.ch/1242). To our knowledge, this is the only case to end with a victory for the client against the bank.

This judgment underlines the importance of alleging the damage precisely, even when it is claimed by the bank, and of producing precise documents that are understandable to the courts. In addition, the bank's computer system should be configured in such a way as to be able to detail each liquidation operation. Failing this, the bank will have to commission an expert report to prove its claim.

In addition, this ruling is reassuring for the party that contests the facts alleged by the opposing party without giving reasons. In fact, in judgment 4A_126/2019, which also concerned a banking dispute, the Federal Court held that the bank should have given reasons for the customer's challenge to the damage ; in the absence of a reasoned challenge, the Federal Court held that the damage was admitted by the bank (for a critique of this judgment, see Hirsch, cdbf.ch/1112 and Hirsch Célian/Geissbühler Grégoire. La charge de la contestation en procédure civile – précise ou motivée ?, Revue de l'avocat, 2020, p. 268-271). In the decision summarised above, the Federal Court reiterated its theory that a block challenge (*pauschale Bestreitung*) is not sufficient. Fortunately, however, it seems to have put this theory into perspective in practice, since it considers that the client's "Contested" statement, even though it relates to nine allegations, is clear and "requires no further interpretation". The customer therefore did not have to give any reasons for his dispute.

Finally, as of^{1} January 2025, private expert opinions will be considered as securities within the meaning ofart. 177 of the Code of Civil Procedure. They will therefore constitute evidence, which the court will be free to assess (cf. art. 157 CPC). This change could prove particularly useful for the party bearing the burden of proof.

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