CENTRE DE DROIT
BANCAIRE ET FINANCIER

Failure to repay

Several options available to the bank

Par Besart Buci le 23 August 2024

In ruling ACJC/201/2024 of February 13, 2024, the Geneva Court of Justice confirms the validity of a clause excluding the benefit of real discussion (*beneficium excussionis realis*), under which the bank is free to choose between taking action against the customer personally (and thus attacking his entire estate) or realizing the pledged assets in his bank account.

The facts are as follows :

On May 4, 2013, a Saudi customer entered into a framework credit facility agreement and a deed of pledge by which he pledged all his assets held with the bank in favor of the bank. The bank is aware that the customer, although a billionaire, faces a problem balancing the volume of liquid and illiquid assets.

On November 20, 2013, the heirs of the customer's late mother opened a bank account with the bank, into which a sum of USD 150'000'000.- was paid on December 2, 2013. On December 25, the heirs signed a pledge agreement pledging all the assets in the account to the bank as security for all present and future claims against the customer. The two pledge deeds are similar and include the following clauses :

> 0. "7 (…) the Bank may, up to the amount of its claims, either immediately realize by mutual agreement the securities of its choice (including acquiring them) and this without any liability on its part and without recourse to the formalities provided for in the [LP] (…), or institute proceedings by way of realization of a pledge or by way of bankruptcy, whether it be a movable or immovable pledge.
>
> (…)
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> 0. 11. The Bank shall not be liable for any failure to exercise its rights under this deed of pledge, or for any partial exercise thereof. The [Customer] (…) hereby waives the right to raise any exception or objection in this respect."

Under the framework agreement, the customer will receive a total of USD 43'424'000.- and CHF 1'422'000.- respectively. As early as summer 2018, the bank notes that the customer's personal account is no longer funded and that he is heavily in debt. On September 4, 2018, the bank denounces the credits (due on August 9, 2018) for March 4, 2019. As no repayments have been made, the bank files a claim for payment against the customer on April 29, 2020, and is

successful in the first instance.

In the appeal proceedings, the customer argues that the bank breached its duty of care and loyalty (art. 398 para. 2 CO) by not realizing the pledged assets in the heirs' account as a matter of priority. It should therefore be required to compensate the customer for the loss suffered, equivalent in this case to default interest on the amount of the loans.

The Court of Justice sets out the conditions for the bank's contractual liability (art. 398 para. 1 *cum* *321e* para. 1 *cum* 97 para. 1 CO), recalling federal case law to the effect that in the absence of an investment advice contract or management mandate, the bank is not bound by a general duty to safeguard its client's interests (TF 4A_369/2015 of April 25, 2016, consid. 2.3). It also noted that the pledge contract did not impose such a duty on the bank.

The Court went on to qualify clause no. 11 of the pledge deeds (reproduced above) as a clause excluding the benefit of real discussion. The customer had in fact waived the possibility of requiring the creditor to first pay off the pledged assets before taking action against him personally (as would have been the case in the absence of such a clause and by application of art. 41 al. 1bis LP). By virtue of clause no. 11, the bank therefore had the right, not the obligation, to realize the pledged assets. As the bank could not be accused of any breach of contract, the court ordered the customer to repay the loans obtained.

This cantonal case law is in line with the rulings of the Swiss Federal Supreme Court (ATF 140 III 180, TF 5A_295/2012 of October 9, 2012, TF 5A_863/2009 of January 15, 2010).

As the exclusion clause is almost systematically incorporated into banks' contractual documentation, it makes the benefit of real discussion the exception rather than the rule. In this context, it is important for the customer (who in practice often has only limited negotiating power) to be aware of the discretionary choice available to the bank in the event of default on repayment, and of the consequences that may ensue.

Finally, it should be remembered that the customer could not have argued either the insolvency clause or the unfair contract clause (art. 8 of the Swiss Unfair Contract Law) to the bank. Our High Court has in fact settled this question, stating that a general waiver of the benefit of real discussion cannot be qualified as unusual or unfair in the context of a banking relationship (TF 7B.249/2003 of January 7, 2004, consid. 5).
