

Consumers and the Lugano bank

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The consumer rules of Articles 15 to 17 are the most sensitive part of the Convention for the Lugano private banking market. A consumer is a person who concludes a contract for a purpose outside his trade or profession. The protective regime applies to instalment sales and to loans for the purchase of goods. Under Article 15(1)(c), it also covers any other contract concluded with a person who pursues commercial or professional activities in the consumer's state of domicile or, by any means, directs such activities to that state, provided that the contract falls within the scope of those activities.¹ Where the regime applies, the consumer may sue the professional at the consumer's own domicile or at the professional's domicile (Article 16(1)), while the professional may sue the consumer only in the consumer's state of domicile (Article 16(2)). A choice of court clause binds the consumer only if it was concluded after the dispute arose, if it allows the consumer to bring proceedings in other courts, or if both parties were domiciled in the same state when the contract was concluded (Article 17).

The general terms and conditions of Swiss banks almost always contain a clause choosing the courts of the bank's seat, often with the reservation that the bank may also sue the client at his domicile. For an Italian private client of a Lugano bank, the validity of that clause depends on whether the bank "directed" its activities to Italy. The Court of Justice has interpreted the notion broadly in the context of internet sales and services. Its list of indicia includes the international nature of the activity, the use of a language or currency other than that of the trader's state, telephone numbers with an international code and references to clients from other states.² The Swiss Federal Supreme Court has applied these criteria to banks with some restraint. In a judgment of 6 May 2013 it held that a bank had not directed its activities to Germany merely by conducting offshore business or keeping accounts in Deutschmarks, and that the client bore the burden of proving the conditions of Article 15.³ In a judgment of 9 February

2016 concerning a client domiciled in France near Geneva, the court required a qualified link between the bank's activities and the consumer's state. It held that the general attraction of Swiss banks for foreign capital did not amount to directing activities abroad.⁴

For Lugano banks, the decisive facts are usually different from those in the Geneva case. Many Ticino banks served Italian clients for decades through relationship managers who travelled to Italy, held meetings in hotels in Milan or Como, used Italian language documentation and, before 2015, promoted the advantages of Swiss accounts to Italian residents. Chapter E.IV described the regulatory side of these practices. In civil litigation, the same facts can make Article 15(1)(c) applicable, with the effect that a bank seeking to recover a margin shortfall from an Italian client must sue in Italy, while the client can sue the bank in Italy for alleged mismanagement. The consumer status of a wealthy investor is not excluded by the size of the portfolio or by investment experience, as the Court of Justice confirmed for a private trader on the foreign exchange market.⁵ Banks therefore examine, before any litigation, how the client relationship was acquired and managed, and they keep records of where meetings took place.

1 Notes

1. LC 2007, Art. 15(1) (above); LC 2007, Art. 16 and 17 (above). ↩
2. Court of Justice, judgment of 7 December 2010, Pammer and Hotel Alpenhof, joined cases C-585/08 and C-144/09, operative part, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0585>; judgment of 6 September 2012, Mühlleitner, C-190/11, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0190> (the contract need not have been concluded at a distance). ↩
3. Federal Supreme Court, judgment 4A_27/2013 of 6 May 2013, summarized by the Centre de droit bancaire et financier, University of Geneva, <https://cdbf.ch/fr/885/>. ↩
4. Federal Supreme Court, judgment 4A_430/2015 of 9 February 2016; Nicolas Béguin, "Le TF atténue la portée de l'art. 15 par. 1 let. c CL", cdbf.ch, 3 March 2016, <https://cdbf.ch/fr/939/>. ↩

5. Court of Justice, judgment of 3 October 2019, Petruchová v FIBO Group Holdings, C-208/18, operative part, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0208> (value of transactions, risk and expertise irrelevant to consumer status). ↩

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