



We master many terrains

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Judgments of the Federal Supreme Court of Switzerland dated October 9, 2014, case nos. 4A_208/2014 and 4A_212/2014, as well as judgments of the Commercial Court of the Canton of Zurich dated February 21, 2014, case nos. HG080025 and HG080027

The Plaintiffs were two bank customers, who had each entered into an Investment Management Agreement with a Swiss private bank based in Zurich and represented in both cases by two employees authorised to sign jointly for the bank. The agreements provided for an initial investment of EUR 25 million and EUR 30 million respectively, which had to remain at the disposal of the bank for the fixed term of the agreements. The agreements further contained a provision regarding an annual "Guaranteed Performance" of at least Euribid (Euro interbank bid rate of 3.8 %) plus 3.77 % p.a. in favour of Plaintiffs. As the bank was, for a number of reasons, not willing to honour these agreements, Plaintiffs in February 2008 each filed a claim against the bank that was approved in its main points by the Commercial Court in February 2014 after complex proceedings. The bank was sentenced to pay around EUR 8 million plus default interest of 5% since October 2009 on approx. EUR 3 million as well as around EUR 11 million plus default interest of 5% since October 2009 on approx. EUR 3.8 million to each of the Plaintiffs respectively. The Federal Supreme Court, thereafter, essentially dismissed the appeals lodged by the bank against these judgments.

Among various issues, these decisions discussed the scope of competences of authorised representatives of a company, namely which legal acts such persons may carry out on behalf of the company that are consistent with the company's purpose (article 718a (1) and (2) of the Swiss Code of Obligations). The Commercial Court held that the conclusion of the agreements in question clearly was consistent with the purpose of the bank, and did not find that Plaintiffs had disregarded any noticeable indications that such competences had been exceeded by the bank employees.

One of the main issues at stake was the good faith of Plaintiffs, i.e. the bank customers. Such good faith is presumed by law (article 3(1) of the Swiss Civil Code). Therefore, the bank could either try to defeat such presumption by proving that Plaintiffs had acted in bad faith when accepting the agreements at hand. Or the bank, assuming the good faith of Plaintiffs, could try to demonstrate that Plaintiffs may not invoke the presumption of good faith given that they had failed to exercise the diligence required by the circumstances (article 3(2) of the Swiss Civil Code). The Commercial Court rejected all such attempts by the bank, providing detailed reasoning for the criteria that may be applied in determining the degree of attention/diligence required from bank customers and spelling out those elements of the cases at hand that it considered as decisive for its ruling.



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