Fiction of delivery and assumption of approval

Topic: **Charges and commissions** Case number: **2017/01**

> The bank introduced new charges and significantly increased certain existing charges. It then terminated the account relationship and debited considerable administrative charges from the client who had not provided any account closure instructions. This exhausted the savings initially credited to the account and the account balance became negative. Correspondence in relation to this matter was delivered to the client, who was resident abroad, using the “hold mail” service. The client did not check these messages. This raised the question of whether or not such correspondence could be deemed to have been received and whether or not the client could be deemed to have approved the content thereof. During the mediation procedure, the bank declared its willingness to refund a large portion of the charges incurred. The client accepted this offer on the Ombudsman’s recommendation.

In 1988, the client, residing in an Eastern European country and working for a German company, deposited close to 10,000 CHF saved from her salary into a savings account held with the bank. Given that she had to rely on considerable discretion, she agreed with the bank that all her correspondence would be retained at the bank. Maintenance of the account was free of charge. The client was not aware of the fact that she should have checked her mail regularly. Given her situation and the travel restrictions in force within her country of residence, she would not have been able to check her mail in this way anyway. In 1998, she authorised a third party to enquire about the account balance with the bank. At that time, the balance was still as it should be. In 2008, the bank contacted the client by phone to ask if her contact details were still correct. During this telephone conversation, the client was not informed about any fundamental changes regarding the business relationship.

In 2016, the client’s situation changed such that she needed the money in question. She returned to Switzerland and, upon visiting the bank, found that her account had been closed in 2014 due to a slightly negative balance. It emerged that the bank had terminated the contract with the client in 2013 as a result of strategic changes to its business model. The balance had already been reduced quite considerably before due to the introduction or increase of charges. Since the client had not provided any account closure instructions after the termination, substantial administrative charges were also debited from her account which resulted in the account balance, already significantly reduced, becoming negative. Correspondence in relation to this matter was delivered to the client using the “hold mail” service. The client had not checked these messages and was unaware of the introduction of or increase in charges or the termination. Given that she could not have anticipated such changes, the client believed that the bank had acted inappropriately and requested that the balance in her savings account be refunded.

The bank refused. It told the client that she had been charged the usual rates applicable to customers, rates the bank claimed it was free to change at any time in accordance with its general terms and conditions. Clients are able to view the applicable charges at the bank and on the internet. The bank also reiterated that the client had signed an agreement upon opening the account under which all of her correspondence would be retained at the bank and that, in so doing, she acknowledged that a charge would be incurred for this service. Under the terms of said agreement,

the correspondence would be deemed to have been delivered upon its submission to the “hold mail” service whether or not the client actually reads it. In addition, clients are obliged to check their mail on a regular basis. Furthermore, in accordance with the bank’s general terms and conditions, such correspondence is deemed to have been accepted if not disputed within a reasonable period. The bank further stated that all of the charges debited were deemed to have been approved in light of the client’s failure to object to them in a timely manner. The client did not find the bank’s response acceptable and expressed her shock at losing her savings. She asked the Ombudsman to initiate mediation proceedings.

First of all, the Ombudsman reminded the bank about the principles he relies upon when assessing disputes relating to bank charges and commissions. Firstly, bank charges and commissions are only payable where they are usual or agreed upon. Secondly, the introduction of or change to charges constitutes a contractual amendment which clients must be notified of in the usual manner and in good time so they can change their behaviour accordingly and terminate the contract if they do not agree with said amendment. The opinion expressed by the bank, claiming that it may modify the charges at any time and believing that clients are obliged to actively check the current charges applicable, at the counter or online, is not in keeping with these principles. In general, where changes to charges are announced in this way only, the Ombudsman deems that they are not valid.

In the case in point however, the question arises whether or not the correspondence delivered to the client via the “hold mail” service could be deemed to have been validly served. The Ombudsman answered this question in the affirmative. The parties had agreed that the bank would retain all of the client’s correspondence and that such correspondence would be deemed to have been delivered once placed in “hold mail”. This principle would apply even if the client did not actually check her correspondence. This effect, referred to as “deemed delivery”, is recognised in Swiss law.

Furthermore, in principle, general terms and conditions of banks also state that correspondence will be deemed to have been accepted if clients fail to object to the same within a certain period following delivery, for example within 30 days. Such scenarios are referred to as “deemed approval” and this concept is also generally recognised in Swiss law. With this in mind, the Ombudsman often reminds clients to check the correspondence delivered by banks, in particular the transaction receipts issued by them in accordance with their accountability, and the periodic statements.

Since deemed approval can have major, and sometimes negative, repercussions for the client, legal scholarship and case law set limits where these are concerned. The prohibition of the abuse of rights can render deemed approval unacceptable where, based on the circumstances, the result obtained in this way is not consistent with the sense of justice and fairness. Thus, the bank may not act on the basis of deemed approval if it uses it to intentionally harm the client. Such deemed approval also implies that it was objectively possible and reasonable for the client to object. Finally, it can be rebutted with evidence that the bank was aware of the lack of actual approval.

In this case, the Ombudsman felt that the client could have anticipated some revision of the charges over the years and that the bank was therefore entitled to believe that such changes would have been accepted. That said, the bank increased the “hold mail” charges several times, sometimes at short intervals, such that these charges seemed disproportionate to the savings amount and to the work actually done in providing this service. It is clear that the bank’s primary aim in increasing the “hold mail” charges was to dissuade clients from taking advantage of this service. A banking relationship is, after all, a long-term one. The client could therefore not have foreseen that the bank would terminate the business relationship due to fundamental changes to its business model, or that such a termination would give rise to considerable “administrative charges” in the absence of any account closure instructions from its clients. According to the Ombudsman this raises doubts that the bank could have considered in good faith that the client would have accepted the various charges had

she actually had knowledge of them. On the contrary, it would appear that the bank should have assumed that the client would not consent.

That said, it is clear that the client, for her part, violated her obligation to check the correspondence delivered via the “hold mail” service regularly as she agreed to do in writing. For the first few years of the business relationship, the client may have acted in this way for understandable reasons, however she did not check her mail after that time when the reasons not to do so no longer applied. According to legal scholarship, the instruction to retain correspondence at the bank exchanged between the bank and the client is, in theory, issued by the client to guarantee the requisite level of discretion. In general, the client must therefore accept the risk of missing the deadline for objection stipulated in an acceptance clause when correspondence is not delivered to the client’s home.

Ultimately, the bank declared its willingness to refund 6000 CHF to the client and the latter accepted this proposal on the Ombudsman’s recommendation.