

Non-acceptance of new general terms and conditions by client

Topic: **Miscellaneous** Case number: **2017/23**

Disagreeing with the new General Terms and Conditions (GTC) sent to her by the bank, the client requested the Ombudsman's mediation due to the bank's refusal to maintain the GTC previously applicable to the business relationship. Having reviewed the contractual documentation, the Ombudsman was unable to find any justified legal claim by the client to obtain maintenance of the existing GTCs however. In his decision, he informed the client about the options open to her.

Having received new GTC from the bank, the client wrote to the bank to express her desire to maintain the existing contract. The bank refused to accommodate this request and informed the client that the changes to the GTC would take effect on 1 June 2017. By way of justification, the bank availed itself of number 6 of its GTC under which the bank reserves the right to change the GTC at any time. Under the terms of that provision, the client may be notified of such changes by a circular or by any other means appropriate, and these will be deemed to have been accepted by the client if the latter does not terminate the business relationship.

The client then asked the Ombudsman to intervene with the bank. She did not feel she was obliged to accept the bank's response, something a free legal advice service also confirmed. In her request however, the client did not specify to what extent the new GTC were problematic for her.

According to the Ombudsman, a change to the GTC constitutes a contractual amendment requiring the agreement of both parties to the contract. On that basis, the client is therefore perfectly entitled not to accept it. The question then becomes what happens when the client is unwilling to accept the contractual amendments in question.

The previous GTC limited the client's options. Under the terms of number 6 of the GTC referred to by the bank, any amendment of the GTC communicated to the client is deemed accepted if the client does not terminate the business relationship or continues to use the bank's services. The ability to continue to benefit from the bank's services without accepting the contractual amendments was not provided for however. Therefore, under the terms of the contractual provisions, the client only had the following alternatives: to forego using the bank's services in the future or accept the new GTC. In this case, the Ombudsman was unable to establish the existence of any legally founded claim to maintain the existing GTC.

As far as he was concerned, these contractual provisions complied with the legal provisions governing the law of agency applicable to banking services. In fact, the law of agency stipulates that any agency contract may be revoked or terminated at any time by either party to the contract (Art. 404 (1) of the Swiss Code of Obligations). In addition, no party may find themselves forced to enter into a contractual relationship with unacceptable terms and conditions and may not be forced to maintain such a contract. This basic principle of private autonomy and contractual freedom applies to both individuals and companies.

In light of these considerations, the Ombudsman had no choice but to advise the client to either accept the new GTC or to terminate her business relationship with the bank and contact another institution. In his decision, he did point out to the client however that she could contact him again if she felt that the new GTC contained unlawful provisions. To do so however, in accordance with the principles applicable to mediation proceedings before the Ombudsman, the client should first contact

the bank herself and obtain from it a written statement of position in response to her request.