Before the Arbiter for Financial Services

Case ASF 038/2022

CE

('the Complainant')

vs

OANDA Europe Markets Limited

(C 95813) ('the Service Provider' or 'OANDA Europe' or 'the Company')

Sitting of 16 June 2023

The Arbiter,

Having seen **the Complaint** relating to the claimed loss resulting to the Complainant from the Service Provider's refusal to accept payment (from an account the Complainant held with an electronic money institution), to service the open positions he held in his trading account with the Service Provider where such payment was refused given that it was not from sources aligned to the Company's compliance procedures. Failure to accept such payment resulted in margin calls not being met in respect of the Complainant's open positions, with such positions consequently closed resulting in the claimed loss.

The Complaint

The Complainant explained that on the 6 October 2021, a payment intended to fund his trading account with the Service Provider was declined because it was made from an account in his name held with Papaya Limited (C 55146), an Electronic Money Institution licensed by the Malta Financial Services Authority ('MFSA').

He further explained that on 11 November 2021, he received a reply from the Service Provider to his formal complaint made with OANDA Europe where he was informed that his attempt to fund his account with the Company was declined because OANDA Europe was not accepting payments from Papaya Limited.

In the said response, the Complainant was also informed that *'the only acceptable funding method and channels for our clients' deposits and withdrawals are: credit/debit cards and bank transfers, and the associated credit institutions must be regulated under the Banking Act (Cap. 371) of Malta'*. [1]

He submitted that the Service Provider's stance was discriminatory towards the IBANs utilized by customers of other credit/financial institutions licensed in other EU Member States.

The Complainant explained that this came as a surprise to him given that OANDA Europe had previously accepted payments from his account held with Papaya Ltd as recently as 25 May 2021, 7 June 2021 and 12 August 2021, and the Service Provider had allowed him to trade and open positions on its trading platform.

He submitted that nobody from the Service Provider ever asked him, throughout his various exchanges with them, whether he had another account held with a credit institution licensed and regulated under the Banking Act (Cap. 371).

It was noted that the Complainant has already communicated to the Service Provider that he does not hold an account with another credit institution regulated and licensed in another EU Member State. He only held an account with a banking institution in Switzerland, however, such type of institution was also not acceptable to OANDA Europe for the purpose of transfers to the platform.

The Complainant explained that he was only able to fund his trading account to cover the margin in relation to the positions he had opened via his Maltese Papaya Ltd's account or his Swiss bank a/c. He claimed that he was however not allowed to do so, in an arbitrary manner given that his previous payments from Papaya Ltd had been accepted by the Service Provider.

He noted that Clause 15.1, of the Company's own Terms of Business state that:

[1] Page (P.) 7

'We will treat any money we hold on your behalf, irrespective of your classification as a Retail or Professional Client, as Client Money in accordance with the Investment Services Act (Control of Assets) Regulations of Malta'.

The Complainant submitted that in terms of the Investment Services Act (Control of Assets) Regulations (Subsidiary Legislation 370.05 of the Laws of Malta), the Company had an obligation to safeguard assets belonging to its customers which are held and controlled for and on behalf of, and in the interests of its customers. Failure to do so exposes OANDA Europe to be:

'liable for any loss or prejudice suffered by the customers due to the subject person's fraud, wilful default or negligence including the unjustifiable failure to perform in whole or in part the subject person's obligations arising under these regulations, the terms and conditions of the agreement entered into with the customers, the conditions of any investment services licence or such other requirements as may be laid down by the competent authority'.

The Complainant claimed that OANDA Europe was grossly negligent when it misled him into believing that payments from Papaya Limited were accepted, and later refused to accept additional payments from Papaya Limited which would have allowed him to continue funding his trading account to cover the margin in relation to the positions he had opened, thus exposing him to a loss in excess of EUR 32,000.

He further claimed that OANDA Europe's actions towards him were in breach of its own Terms of Business and the Control of Assets Regulations, as they were not safeguarding his assets in his interest by not letting him to continue to fund his trading account to cover the margin in relation to the positions opened. Furthermore, it would not be in his interests to simply close the open trades as such a move could result in him not realizing profits.

It was also claimed that the Company's actions amount to IBAN discrimination and were illegal under EU and Maltese law.

The Complainant noted that on 11 February 2022, he filed a judicial protest against OANDA Europe which was duly served on the Company on the 25 February 2022, by virtue of which he requested it to immediately cease its abusive and illegal conduct and held it responsible in bad faith (*dolo, moro et culpa*) for all legal intents and purposes. He had also warned the Company that it will be held accountable for all damages he has suffered and was still suffering and could continue suffering in the future.

Remedy requested

In his Complaint Form, the Complainant requested that OANDA Europe should allow him to fund his trading account to cover the margin in relation to the positions he opened by making payments to it from his account held with Papaya Limited.

Once the positions were eventually closed (as shall be considered later on in this decision), the Complainant claimed compensation for the realised loss on his open positions.

In its reply, the Service Provider essentially submitted the following:[2]

1. That preliminary, the Complaint is unfounded in fact and at law and should accordingly be rejected with costs against the Complainant for the reasons outlined in its response.

   As a Preliminary Plea, it highlighted that the remedy requested does not fall under any of the remedies allowed by law.

2. That the Complainant in his Complaint demands that the Company is to allow him to fund *'his trading account to cover the margin in relation to the positions I opened by making payments to it from my account held with Papaya Limited'*.[3]

   It submitted that this remedy cannot be sought as it does not fall under any of the remedies which fall under Article 26(3) of Chapter 555 of the Laws of Malta.

   It noted that as shall be explained in its reply, the Company is licensed as an investment services firm by the Malta Financial Services Authority and so operates within a tightly regulated environment including various anti-money laundering regulations and has therefore implemented various Board and regulator-approved client funding processes.

   The remedy sought is a *carte blanche* order for the Company to accept payments from electronic money institutions ('EMI') which is not within the Company's risk appetite.

[2] P. 113 - 117
[3] P. 113

It submitted that, should the Arbiter uphold this Complaint, OANDA Europe would have no choice but to treat the Complainant differently to other customers which would be against the principle of equal treatment of all customers as disparate treatment of customers is unacceptable.

Additionally, the implementation of internal AML policies and procedures is a commercial decision that does not fall within the jurisdiction of the Financial Services Arbiter.

3. That on the merits, the Service Provider agrees with the facts described in the first and second paragraph of his Complaint. With regards to the third paragraph, the Complainant states that *'Oanda's stance is discriminatory towards IBAN's utilized by customers of other Credit/Financial Institutions'*.[4]

   The Company submitted that this statement is however incorrect. Apart from the fact that the Arbiter does not have jurisdiction to determine matters of human rights and discrimination as it is outside his competence, it noted that the choice of use of an EMI rather than a credit institution is not a right which is protected from discrimination.

   Discrimination can occur only with personal rights based on race, age, colour, religion, sex, marital status and national origin. The choice of a regulated entity to disallow payment transactions from EMI cannot be held to be discriminatory towards IBAN's as IBANs are not persons and have no rights and is simply a decision taken by the Company which is discretionary.

4. That the Complainant states that OANDA Europe had previously accepted payments from his account held with Papaya.

   It pointed out that the Arbiter is to note that the IBAN numbers of accounts do not clearly identify whether the account pertaining to the IBAN account is a bank account or a money transfer account or an EMI account. Personal IBAN's can also be created for SWIFT payments.

   When the payment method was registered, the Complainant did not indicate whether his IBAN number corresponded with a credit institution or a financial institution. Thus, the Service Provider could not have known that the previous payments were being made from an EMI account. Also,

[4] P. 113

the payment transfers in all previous occasions were of a lesser value than the payment transaction which was stopped.

The Service Provider also made reference to Clause 10.2 of OANDA Europe's terms of business which clearly states that *'the fact that they have confirmed any Transaction(s) shall not prevent us from taking such corrective action'*.[5]

It submitted that it was thus in the Company's right to determine that it shall discontinue accepting the payments through an EMI payment account.

5. That the Complainant stated in his Complaint that he was never asked whether he has another alternative bank account and that his Swiss bank account was not accepted since it is not an account held with a credit institution in another EU state.

   It noted that as can be seen from the correspondence provided, the Complainant was asked several times whether he has a bank account with a credit institution licensed under the Banking Act (Chapter 371 of the Laws of Malta), or a bank account with a credit institution in any other EU state.

   However, the only bank account he said he had was a Swiss bank account and not an EU bank account.

   The only acceptable funding methods and channels for the Service Provider's clients' deposits and withdrawals are credit/debit cards and bank transfers, and the associated credit institutions must be regulated under the Banking Act. This had been repeatedly said to the Complainant who failed to understand the fact that Papaya Limited is an EMI regulated by the Financial Institutions Act (Chapter 376 of the Laws of Malta) and therefore, falls outside the acceptable and permitted institutions.

6. Reference was made to the correspondence attached to the Complaint, (particularly in page 4), where the Complainant stated that the *'maltese tax authorities know everything about my revenues as all banks and other institutions I'm holding funds with are reporting directly to them'*.[6]

[5] P. 114
[6] *Ibid.*

The Service Provider noted that it fails to understand why the Complainant is adamant on using his EMI account rather than his bank account whereby it is evident that the term *'all banks'* refers to other bank accounts which he holds and makes use of on a frequent basis.

7. That also on the merits, the Arbiter is to note that every subject person such as OANDA Europe is allowed and is obliged to set its own risk appetite. The Service Provider decided that it will only accept transactions from credit institutions licensed under the Banking Act.

   There is no law prohibiting the Company from taking that decision. The Service Provider further noted that in fact, Clause 20 of its Terms of Business[7] allows a discretionary right for the Service Provider to provide for the introduction of new systems, services, procedures, processes and/or products or to incorporate such changes as they deem necessary as well as to remove an existing service.

8. That OANDA Europe offers financial instruments which can be bought or sold through their platform on an execution-only basis. As stated in its terms of business, trading in its products carries a higher degree of risk than ordinary share or foreign exchange dealing.

   It submitted that therefore, it must take a rather cautious approach on its anti-money laundering procedures and internal policies to ensure that the transactions are both seamless as well as legitimate.

   The Service Provider understands that electronic money issuers and payment institutions are sectors that are more exposed to risks in relation to the transparency of transactions and identities of end-customers involved in payment transactions. For example, one of the key risk-increasing factors highlighted is the fact that most KYC is conducted online by EMIs and there is very limited to no direct face-to-face contact with the customer at account opening stage. In this regard, the Service Provider contends that the use of EMI accounts is a use of a less transparent means of payment which was outside the scope of OANDA Europe's risk appetite.

9. Reference was made to a decision of the Financial Services Ombudsman *Mr F vs Barclays Bank plc (DRN 7539094)* where it was decided as follows:

[7] P. 24

'I recognise that anti-money laundering is a very serious issue. Financial businesses are both encouraged to use their own judgment, and potentially face extremely serious consequences if they do not deal with matters in an appropriate way. I therefore accept that in these circumstances it was reasonable for Barclays to have anti-money laundering policies, which they operated with caution,'

and

'I fully understand that this can seem excessive and inflexible. But it is not me or this service to say how a business should interpret anti-money laundering responsibilities (unless it does so in a manifestly unfair or prejudicial manner) - Mr W vs JP Morgan Trustee and Administration Services Limited (DRN 1735048)'.

10. That the Complainant is a Russian national holding a Maltese passport and as stated in fol. 55 of the Complaint, the Complainant *'had an experience with Oanda in the very beginning when I provided funds from the sources not approved by the platform as nobody provided the list of approved banks/ payment institutions'*.[8]

    On further investigation of the client, the Service Provider noted that the IBAN account was an EMI account and hence informed the Complainant that the request for trading EUR 24,500 on 6 October 2021 was not acceded to unless *'an alternative payment method'* which is acceptable to the Company is used.

    From a risk perspective, the Service Provider notes that international prudential standards are well-established for banks, insurers and securities intermediaries, but not yet for EMIs.

    The ultimate objective of prudential supervision is to protect financial stability. To achieve these objectives, prudential regulation and supervision pursue safe and sound financial groups, financial systems and markets. In the interest of OANDA Europe and OANDA Group (which is a world leader in currency data, offering forex and CFD trading, corporate FX payments

[8] P. 115

and exchange rate services for a wide range of organisations and investors), the Company has taken the cautious, yet prudent approach, that financial soundness and sound financial groups such as credit institutions ensure high-quality supervision and regulation.

11. That, furthermore, the Complainant states that *'in terms of the Investment Services Act (Control of Assets) Regulations (subsidiary legislation 370.05 of the Laws of Malta) Oanda has an obligation to safeguard assets belonging to its customers which are held and controlled on behalf of, and in the interests of, its customers'*.[9]

    The Company submitted that it has and shall continue to act according to the regulatory frameworks it is exposed to including the Investment Services Act and has and shall continue to safeguard assets belonging to its customers.

    It submitted that it takes its obligations on the safeguarding of assets very strictly and adheres to all regulatory regimes and guidance notes to achieve a high-level of security of its customer assets.

    The Complainant must prove such a serious allegation and the Complainant was asked to desist from making such flippant accusations which are of a very serious nature to the Company.

12. That, furthermore, the Complainant states that OANDA Europe was *'grossly negligent'* in allowing previous payments which derived from the same EMI. The Service Provider contends that the Complainant must prove such gross negligence to the highest degree according to law. As shall be evidenced, OANDA Europe did not act grossly negligent, cannot be found to have acted wrongfully, cannot be found to have acted recklessly and only acted in adherence with the risk-based approach it is obliged to take according to law.

13. That finally, with regards to any possible loss suffered by the Complainant, the Service Provider notes that, as the Complainant is aware, the Complainant is responsible for managing his own open positions and for ensuring sufficient funds are available to cover the impact of adverse

[9] P. 116

market movement and thereby avoid margin closeout should he wish to retain market exposure.

It submitted that the Complainant was given sufficient time to make alternative arrangements (such as by moving funds from a credit institution or by opening the same position at an alternative broker) to ensure and mitigate any trading losses.

It further submitted that accordingly, the Service Provider cannot and should not be held liable for the losses (if any) sustained by the Complainant as such loss (if any) has only been sustained due to the Complainant's inertia and inaction.

Having heard the parties and seen all the documents and submissions made,

Further Considers:

Preliminary Plea

The Service Provider highlighted in its reply that the remedy sought by the Complainant as detailed in his Complaint Form to the Office of the Arbiter for Financial Services ('OAFS'),[10] (where the Complainant had asked the Arbiter to order the Service Provider to allow him to fund his trading account from the account he held with his EMI), *'does not fall under any of the remedies which fall under Article 26(3) of Chapter 555 of the Laws of Malta'*.[11]

The Arbiter notes that the Complaint[12] was filed with the OAFS on 25 March 2022, at a time when the trading positions were still open. The remedy sought at the time was for the Arbiter to order the Service Provider to continue accepting payments from sources not aligned to OANDA Europe's compliance procedures as indeed they seem to have done with three payments totalling EUR 26,500 which funded the original investment and open positions that the Complainant had.

The positions were closed by the Service Provider on 24 May 2022 for lack of liquidity to support margin calls.[13] From that point onwards, the Complaint

[10] P. 4 & 8
[11] P. 113
[12] P. 1 - 107
[13] P.170

morphed into an issue of claim for damages due to the loss incurred[14] as shall be explained further on.

Although the preliminary plea referred to above that was raised by the Service Provider[15] was superseded by events and does not seem to have been followed up by the Company either once the closure of the position morphed the complaint into a claim for quantifiable damages, the Arbiter wishes to, in any case, dismiss the said preliminary plea.

This is in view that the Arbiter considers that Article 26 (3) of Chapter 555 ('the Act') gives him the facility to consider even the remedy sought originally at the time of the open positions. This is particularly by virtue of sub-article 3(c)(i) of Article 26 of the Act which duly provides the following:

> *'(c) If the complaint is found to be wholly or in part substantiated, the Arbiter may direct the financial services provider to do one or more of the following:*
>
> *(i) to review, rectify, mitigate or change the conduct complained of or its consequences; ...'*

Having dismissed the preliminary plea and given that the remedy ultimately requested falls within the adjudication powers that the Arbiter may take in terms of Article 26(3)(c) of the Act, the Arbiter shall proceed to consider the merits of the case next.

The Merits of the Case

Facts of the Case - Timeline

For a better understanding of the Complaint, this is the timeline of the material events:

25.05.2021 - Transfer of EUR 2,500 by Complainant to his account with Service Provider.

07.06.2021 - Transfer of EUR 16,000 same as above.

12.08.2021 - Transfer of EUR 8,000 same as above.

[14] P. 122; P. 330
[15] P. 113

The three payments of EUR 26,500 in total as mentioned above[16] were sourced from an electronic money institution that was licensed to effect payments and hold clients' funds but was not licensed as a bank or credit institution. These funds were invested by the Complainant in open positions which would require additional funding for any margin calls which may be requested by the Service Provider in accordance with their Terms of Business.

06.10.2021 - The Complainant made a further transfer of EUR 24,500 from the same source of the above payments to his account with the Service Provider.[17]

12.10.2021 - OANDA Europe informed the Complainant that it cannot accept this last payment as they are not accepting payments from institutions without an EU banking or credit licence and that payment will be returned.

05.11.2021 - The Complainant complains formally for refusal to accept his 4th transfer and says he was given 3 different and conflicting reasons for such refusal[18]:

1. OANDA Europe has changed policy, so it now accepts transfers only from EU licensed Banks and Credit institutions
2. The remitter of his transfer holds only a payments institution license
3. The remitter does not satisfy OANDA Europe's criteria as an eligible payments provider.

Nov. 2021 - The Service Provider admits[19] that the first three payments should not have been accepted as the remitter is an Electronic Money Institution (EMI) that falls outside the scope of permitted institutions (by OANDA Europe's own internal compliance procedures).

11.11.2021 - Following more protests from the Complainant, the Service Provider replied[20] that the Complainant has known the new situation since 12 October 2021 and thus had sufficient time to

[16] P. 119
[17] P. 164
[18] *Ibid.*
[19] P. 163
[20] P.161

make alternative arrangements by transferring funds from an acceptable source or moving his positions to an alternative broker.

Furthermore, OANDA Europe informed him that it was the Complainant's sole responsibility to maintain the open positions (with sufficient liquidity for margin calls) and thus remains solely responsible for trading losses that may result.[21]

11.02.2022 The Complainant filed a judicial protest against OANDA making the same claims as in his Complaint to the OAFS.[22]

25.03.2022 - An official complaint was filed with the OAFS.[23]

13.04.2022 - The Service Provider filed its official reply at the OAFS.[24]

24.05.2022 - The Service Provider closed the Complainant's open positions resulting in the claimed loss citing insufficient funds on account, and that the positions were subjected to a margin close-out.[25]

Other pertinent issues arising from the hearings

The first hearing was held on 14 June 2022 where the Complainant made his case repeating that once his first three deposits were accepted from the same source and his fourth payment was refused, then OANDA was responsible for his loss due to misrepresentation.

Furthermore, it was revealed that the Complainant had *'received 69 margin alerts … since the 30th November* (2021) *when the first margin alert came when I had insufficient funds in my accounts to keep my positions open'.* [26]

A second hearing was held on 19 September 2022 for cross-examination by the Service Provider.[27]

On being shown evidence that the Service Provider made clear in its communications that deposits will be accepted only if sourced from a personal account of the customer held with EU bank, the Complainant indicated that the

[21] *Ibid.*
[22] P. 8 & P. 63 - 67
[23] P. 1
[24] P. 113
[25] P. 170
[26] P. 121
[27] P. 302

Service Provider also stated that *'we accept payments from credit and debit cards provided by Mastercard and Visa'* without any indication that these had to be issued by EU banks.[28] He also emphasised that he fully disclosed his source of account with an EMI at the start of the relationship.

On his residency and citizenship status, it is noted that when asked if he is a Russian national with a Maltese passport, the Complainant replied:

'... what about a Maltese national with a Russian passport? I think both would be correct. I never tried to hide that I had a Russian passport; and nobody asked me about this'.[29]

When asked why all this resistance to sourcing the payment from a bank account acceptable to OANDA Europe, the Complainant replied:

'if OANDA warned me of the problem, I would have acted very friendly. But, since OANDA started working in an intolerant, unfriendly manner, I could not afford it'.[30]

A third and fourth hearing were held on 18 October 2022 and 25 October 2022 for cross-examination of the Company's Head of Compliance/Director following her sworn declaration.[31]

From these sessions what mostly emerged is that there was confusion between the internal compliance policies to accept only transfers from banks or credit institutions licensed in EU generally or in Malta specifically either under the Banking Act[32] or the Financial Institutions Act,[33] and whether institutions licensed under the Financial Institutions Act, but are not credit institutions, were within or out of scope for OANDA Europe.

It is particularly noted that the Company's official testified *inter alia* that:

'It is being said that our policy says something, our website says something else, then internally we discuss something different. I say the policy states that EU financial institutions are accepted; this is what the policy says. And the way we have explained this to Mr CE might not have been clear to him. And this is what probably led to this misunderstanding. This is what I can say about the

[28] P. 303
[29] P. 304
[30] P. 305
[31] P. 312 & 320
[32] Chapter 371 Banking Act 1994
[33] Chapter 376 Financial Institutions Act 1994

contradiction. I am not saying that our policy is contradicting what we are doing, but I am just saying that miscommunication must have occurred here'.[34]

Consideration

Following due analysis of the evidence, arguments and documentation resulting during the proceedings of this case, the Arbiter has to reach conclusions on the following issues:

A. Whether there was misrepresentation/miscommunication through negligence on the part of the Service Provider at the onboarding stage in not informing the Complainant about their internal compliance policies for accepting funds transfer from restricted sources in terms of its risk appetite.

B. Whether such misrepresentation/miscommunication through negligence, if it results, contributed in part, or in full, to the loss subject of this Complaint.

C. Whether the Service Provider had the right to correct such misrepresentation/miscommunication, if it results, in the course of the relationship, and to refuse to accept additional transfer of funds from sources beyond its risk appetite.

D. Whether such right as may result in paragraph (C) above was applied diligently or whether its rigid application contributed in part, or in full, to the loss subject of this Complaint.

E. Whether the Complainant, having discovered even at a late stage about the Service Provider's restriction about sources of funding to his account, reacted prudently to avoid the resultant loss subject of this Complaint and whether he had enough space and time to react prudently to avoid such loss.

Following this analysis, the Arbiter will, in terms of Art. 19(3)(b) of the Act, determine and adjudge the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of this case.

[34] P. 315

Analysis

(i) The question as to whether there was misrepresentation/ miscommunication through negligence on the part of the Service Provider at the onboarding stage in not informing the Complainant about its internal compliance policies for accepting funds transfer from restricted sources in terms of its risk appetite.

As indicated above, at the time of the onboarding stage, there were references to deposits being accepted if sourced from EU Banks and only from the personal account held by the customer.

However, the point has also been made that the Service Provider's website included a declaration that *'we accept payments from credit and debit cards provided by Mastercard and Visa'* [35] without specifically stating that these cards had to be issued by EU banks.

In the testimony of the Company's Director/Head of Compliance, there is sufficient evidence about *prima facie* contradictions between the internal compliance policies of the Service Provider, which are not disclosed to the Customer, what is stated in their website and what was being communicated to the Complainant at onboarding stage.

Such contradictions also result in the sworn declaration[36] of the said official which at times refers to accepting payments from EU Banks only (such as in para. 6 of the declaration)[37] and at times refers to the acceptance of payments from credit institutions regulated by the Financial Institutions Act (Chapter 376).[38]

Whilst it is true that Chapter 376 licenses institutions performing different activities and the licence could be restricted to specific activities which does not render them *'credit institutions'*, it is undeniable that reference to two different mechanisms is confusing to a customer who transfers funds from institutions licensed under Chapter 376, but which are not credit institutions.

In fact, in her testimony the Company's official states:

[35] P. 303
[36] P. 186-190
[37] P. 187
[38] P. 188

'... I say the policy states that EU financial institutions are accepted; this is what the policy says. And the way we have explained this to (the Complainant) might not have been clear to him. And this is what probably led to the misunderstanding. … I am just saying that miscommunication must have occurred'.[39]

Be as it may, the facts are that soon after the onboarding stage, the Complainant made three transfers which were accepted by the Service Provider from the same source which was later declined due to not fitting the internal compliance policies of the Service Provider. These transfers were:

Euro 2,500 on 25.05.2021

Euro 16,000 on 07.06.2021

Euro 8,000 on 12.08.2021

The 4th transfer that was refused was:

EUR 24,500 on 06.10.2021.

With the funds of the first three transfers, the Complainant opened trading positions that needed regular liquidity support for margin calls and the 4th transfer refused was intended to provide such liquidity support.

The Arbiter opines that, in the circumstances, the Complainant is correct in arguing that he had legitimate expectations that a transfer from the same source of the three accepted payments would be acceptable to the Service Provider.

(ii) Whether such misrepresentation/miscommunication through negligence, if it results, contributed in part, or in full, to the loss subject of the Complaint

There is enough evidence to prove that the loss incurred upon forced closure by the Service Provider in May 2022 due to absence of sufficient liquidity support for margin calls resulted in a loss to the Complainant. The quantification of this loss will be treated by the Arbiter in the Decision that follows.

[39] P. 315

Consequently, there is no doubt that the failure by the Service Provider to accept the 4th liquidity transfer contributed to the loss subject of this Complaint, although it may not be the sole factor contributing to such loss as shall be considered further on.

(iii) Whether the Service Provider had the right to correct such misrepresentation, if it results, in the course of the relationship and refuse to accept additional transfer of funds from sources beyond their risk appetite

The Arbiter is in full agreement with the reply of the Service Provider where it states that:

'... every subject person such as OANDA Europe is allowed and is obliged to set his own risk appetite'.[40]

The requirements of the law are the minimum threshold which subject persons must adhere to, but there is no question that subject persons have discretion to fix their risk appetite above such threshold provided such adoption of tighter threshold is applied clearly and indiscriminately.

Furthermore, it is relevant that the Terms of Business Clause 20 states that:[41]

'20.1 We may change these terms at any time for any reason, including (without limitation):

(a) to comply with or reflect a change in Applicable Law or a decision by a relevant ombudsman or regulator;

(b) to make them more favourable to you or to correct a mistake or oversight (provided that any correction would not be detrimental to your rights);

(c) to provide for the introduction of new systems, services, procedures, processes and/or products or to incorporate such changes in technology as we deem necessary (provided in each case any change would not be detrimental to your rights); or

[40] P. 115
[41] P. 95

(d) to remove an existing service, provided we have given you appropriate notice its removal in accordance with this Agreement'.

The question here is whether in removing a service about which the Complainant had built legitimate expectations, the Service Provider was acting detrimentally to the rights of the Complainant and whether the Service Provider gave appropriate notice for removal of service.

This will be considered further hereunder.

(iv) Whether such right as may result as in section (iii) above was applied diligently or whether its rigid application contributed in part, or in full, to the loss subject of this Complaint.

Having agreed that the Service Provider has a right to adopt its own risk appetite above the minimum thresholds of the law, and also agreeing that the Service Provider has a right to change such risk appetite provided the terms of Clause 20 quoted above are respected and that the more restricted terms and their further restrictions are applied clearly and indiscriminately, the Arbiter has to consider whether this in fact happened when the 4th transfer was refused and when the position was closed resulting in the loss subject to this Complaint.

The Service Provider argued that once they gained clarity about their error in accepting the three initial transfers to the Complainant's account from sources outside their risk appetite, they had an obligation to refuse the 4th transfer as *'we cannot bend our own policy rules and all rules must be applied equally to all our customers'*.[42]

The Arbiter has reservations about this non-discrimination argument. Each case has its peculiarities and there would have been no discrimination if in view of the misrepresentation or miscommunication related to the first three payments resulting in an open position that needed support by the liquidity for margin calls, the Service Provider would have adopted a more flexible approach to nurse the open position to a satisfactory close for the client.

[42] P. 190

The Arbiter has no disposition to speculate whether the refusal of the 4th payment was inspired from other considerations that could not be disclosed to the client because of Anti-Money Laundering (AML) regulations.

However, if there existed such AML issues specific to the client, it would be inappropriate for the Service Provider to declare that it would accept a transfer sourced from EU licensed Banks. Accordingly, the Arbiter has to conclude that the refusal of the 4th payment was solely based on the rigid application of the risk appetite of the Service Provider without any weight to the misrepresentation/miscommunication related to the first three payments.

(v) Whether the Complainant, having discovered even at a late stage about the Service Provider's restriction about sources of funding to his account, reacted prudently to avoid the resultant loss subject of this Complaint and whether he had enough space and time to react prudently to avoid such loss.

The Arbiter notes that there was an interval of 7 months from when the Service Provider removed all doubt about any misrepresentation/ miscommunication related to which sources of funds were acceptable and which were not, and the closure of the position which resulted in the loss subject of this Complaint. There were also nothing less than 69 reminders of margin calls and the consequences of not meeting such margin calls.

The Complainant being a Maltese citizen residing in Malta had a right to open a bank account for payment purposes[43] through which he could have channelled the funding required for liquidity support for margin calls to keep the position open.

There is no evidence that the Complainant made any effort to open such an account and therefore resolve the problem. Seven months is a long enough time to address and resolve such an issue. On the contrary, the Complainant relied on the perceived right to enforce transfer from his

[43] Basic Payments Account refer to Consumer Awareness and Campaigns - MFSA

account that sourced the first three payments and made no effort to find a different solution to avoid the loss in the first place.[44]

This is not unlike someone who could avoid a loss for which he is insured and doing nothing about it, just relying on his insurance to pay up for the damage which he could have avoided and was within his powers to avoid.

The Arbiter feels that the Complainant did not act prudently to avoid the loss he is claiming compensation for, even though he had the time and space to take loss avoidance measures.

Conclusion

The Arbiter notes that when the case morphed into a quantifiable loss following closure of the position as above explained, the Service Provider argued that the loss is wholly attributable to the Complainant for failing to abide by the Terms and Conditions of the relationship and after being given ample time (7 months) to rectify his position from any misunderstanding that may have been caused by OANDA Europe accepting the first three payments from sources that were later discovered to be outside their internal compliance procedures.

Given the particular circumstances of this case and for the reasons mentioned above, the Arbiter's conclusion is that both the Complainant and the Service Provider contributed to the resultant loss.

The Service Provider, on its part, by miscommunicating/misrepresenting procedures to the Complainant at the onboarding stage and in the process accepting the first three payments, and also in applying a too rigid approach regarding acceptance of the 4th payment. This fault is mitigated by the length of time (7 months) that they allowed to the Complainant before closing out the position for lack of liquidity support for possible margin calls.

The Complainant is, on its part, also at fault for not taking the necessary steps within the reasonable time provided to open a bank account which could have sourced the funding to sustain his open position and relying exclusively on the Service Provider to make him whole once the loss is crystallised.

[44] In fact, the complaint at the OAFS was filed on 25 March 2022 when the position was still open and, expecting as a remedy, the Arbiter forcing the Service Provider to accept funding from the same source of the three original payments. Complainant should have known that complaint process was not instant delivery and meanwhile he was at risk of position closure resulting in the loss complained of.

Quantification of the loss

The parties have different interpretations for the loss. The Complainant expects the loss to amount to EUR 25,048.75 being the loss upon closure of the transaction complained of.[45]

The Service Provider maintains that the loss amounts to EUR 7,000.66 less than that claimed by the Complainant (i.e., the loss of EUR 25,048.75 less EUR 7,000.66 which would equal to EUR 18,048.09) as this takes into consideration profit accumulated during the course of the transaction and the loss should be calculated on the basis of the original amount invested.[46]

Decision

The Arbiter is obliged by Chapter 555 to decide the Complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.[47]

The Arbiter feels that the Complainant has to carry a fair part of the claimed loss as his inaction to find a practical solution over a long span of seven months was a significant contributor to the resulting loss.

The Complainant acted unreasonably in obstinately demanding the Service Provider to continue accepting business beyond its risk appetite even though he was given ample time to find a solution to bring continuing business within OANDA Europe's risk appetite.

Having discovered its error to accept the first three payments from sources not aligned to its internal compliance procedures, the Service Provide had reason to insist on future payments being aligned with its then clearly and fully disclosed compliance procedures, provided it gave the client sufficient notice period to align himself accordingly. Seven months was a sufficient notice period.

On the other hand, the Service Provider by the confusion it self-admittedly created at the onboarding stage had created a situation where the client opened positions that needed to be supported by margin call liquidity support and it could have been more flexible by temporarily accepting some deposits

[45] P. 347
[46] P. 360
[47] Art. 19(3)(b)

from the same source as the first three payments so as to nurse the positions to a close without forcing margin close-out.

It is evident that the loss was caused by evident attitude of inappropriate pique that developed between them following refusal to accept the 4th payment.

Art. 26(3)(c)(iv) of Chapter 555 provides the Arbiter a margin of discretion to fix any compensation he considers fair and equitable on the basis of Art. 19(3)(b).

Accordingly, the Arbiter decides that, in the circumstances, the loss is to be determined on the basis of the original investment, that is, the calculated loss of EUR 18,048.09. The Arbiter hereby decides that this loss is to be shared 50:50 between the parties.

Therefore, in accordance with Article 26(3)(c)(iv) of Chapter 555 of the Laws of Malta, the Arbiter orders the Service Provider to pay the Complainant the sum of EUR 9,024.05 (nine thousand and twenty-four Euros and five cents) in full settlement of this claim. (This is apart from the return of the remaining balance of EUR 7,709.97 on the Complainant's account).[48]

With legal interest from the date of this decision till the date of effective payment.

Each party is to bear its own costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

[48] P. 360