CENTRE DE DROIT
BANCAIRE ET FINANCIER

Asset management

A strong endorsement of the investment strategy

Par Yannick Caballero Cuevas le 1 February 2021

In a ruling dated 14 January 2021 (4A_556/2019), the Federal Supreme Court examined the question of whether the ratification of a portfolio valuation by the client constitutes a tacit change to the investment profile.

In November 2010, a Panamanian company gave a management mandate to a Swiss bank. They agreed that the management would be carried out conservatively in accordance with the pre-printed '*Investment instructions for management mandates*'. However, following a decline in performance, the beneficial owner (ADE) of the company, who had signing authority for the account, requested that the performance of the portfolio be improved and that the currency mix be diversified. The bank then proceeded to purchase *futures*. At the request of the AWE, the bank also purchased shares in an American biopharmaceutical company for USD 1,000,000, the position of which was subsequently consolidated. On 6 June 2011, the AWE signed a portfolio valuation with discharge in favour of the bank. Due to high volatility on the financial markets during the summer of 2011, the portfolio recorded a loss of -25.38 % in December 2011, representing an estimated loss of USD 18,200,000 compared to a conservative portfolio, according to a private expert opinion.

The Geneva Court of First Instance dismissed the company's claim for damages against the bank, in particular because the ADE had not objected to this management and had signed a portfolio valuation. This judgment was upheld by the Court of Justice, which specified that both the management carried out until 6 June 2011 and the change in the structure of the portfolio for the subsequent period had been ratified by the ADE.

In its considerations, the Federal Court first recalled the obligation of the manager to determine the risk profile, which enables it to propose an investment strategy to the client. In the event of a dispute over the established profile, it must be determined in concrete terms by applying the general principles for the conclusion and interpretation of contracts (see Art. 1 para. 1 CO and 18 CO). In light of these principles, it concluded that the company wanted a conservative profile, as evidenced by the pre-printed form on which the company had ticked the '*conservative*' box. Furthermore, the bank had recorded the conservative profile in its IT system. Although the company had also signed a supplement to the management mandate for non-traditional and alternative investments, this did not affect the investment profile initially established.

The Federal Court then examined whether the company had accepted a change from a conservative strategy to a dynamic strategy by ratifying the transactions carried out during the

mandate. As a reminder, a change to the contract is merely a specific form of contract formation and is subject to the same rules as those mentioned above. The Federal Court specifies that a change in the initial strategy may be tacitly accepted, in particular when the client countersigns the statement of his portfolio after asking the manager to increase its performance. In the event of disagreement with the new transactions, the client must contest them and not wait for the corresponding investments to develop before contesting them several months later when losses have been incurred. The Federal Court also notes that the general terms and conditions of banks generally include a so-called complaint clause, according to which any complaint relating to a transaction must be made by the client within a certain period of time after receipt of the notice or statement, failing which the transaction or statement is deemed to have been accepted.

The rules of good faith therefore impose a duty of care on the customer, since, in the absence of a challenge, the customer will be bound by a fiction of ratification, except in cases of abuse of rights under Art. 2 para. 2 CC.

In the present case, the email of 19 May 2011 in which ADE requested that the portfolio's performance be increased must be understood as an offer by the company to modify the initial strategy. This offer was accepted by the bank by purchasing '*futures*'. In addition, the ADE signed the portfolio valuation dated 6 June 2011, which stated that the signatory declared that he had examined all the documentation relating to the banking relationship up to that date, had received all the explanations necessary to be able to assess and evaluate all the transactions carried out, and gave the bank full discharge for the transactions carried out up to 6 June 2011. Furthermore, all opinions had been forwarded to the company's director, who had not contested them.

Having failed to demonstrate its lack of information, its error or the invalidity of the statement, the Federal Court concluded that the company had not only ratified the transactions up to 6 June 2011 but had also accepted the change in strategy for transactions after that date.

Thus, due to the disclaimer contained in the portfolio valuation signed by the ADE on 6 June 2011, the Federal Court accepted the tacit modification of the investment profile by ratification.

We believe it is important to reiterate here that clients must be proactive in reviewing their bank statements and portfolio valuations in order to detect any discrepancies between the investment strategy and the strategy initially agreed upon. This review should be all the more thorough as these documents may contain disclaimers in favour of the banks, not to mention the so-called complaint clauses contained in the banks' general terms and conditions. If no objection is raised, the client risks having the tacit modification of his investment profile ratified.
