CENTRE DE DROIT
BANCAIRE ET FINANCIER

Investment fund

Delegation of tasks to an external manager and employment contract

Par Teymour Brander le 7 March 2022

In rulings 4A 365/2021, 4A 366/2021, 4A_367/2021 and 4A 368/2021, the Federal Court looks at the contractual relationship between an asset management company and external managers : in this case, it will be categorised as an employment contract, despite the employer's attempt to attribute a different assessment to it from the perspective of the delegation of tasks.

Four managers approached an asset management company with a view to a collaboration agreement for the creation and management of an investment fund. The company has FINMA authorisation to manage and represent investment funds.

To this end, the managers each enter into a contract with the company entitled '*Employment contract*' under which they are hired as '*Portfolio Manager'* and '*Business Developer'* respectively. The contracts contain a whole series of clauses that are usual in an employment contract (obligations of diligence and loyalty, working hours, level of employment, holidays, etc.).

The contracts also provide for a salary and a bonus, although the amount of these is not specified. It is stated in this regard that no remuneration will be paid to the managers 'for the time being'. Finally, the contracts stipulate that all costs relating to the creation and management of the fund are to be borne by the managers.

The management company rents premises that will be specifically allocated to the administration of the fund. The managers receive a business card bearing the company's logo and have a professional e-mail address in the company's name. They are also presented internally as new employees of the company.

The fund was created in May 2016. However, it has not been as successful as expected. The company requires the managers to raise more investment, otherwise it will put the fund on hold. At the same time, the managers are not yet receiving any remuneration.

As the fund still did not have enough investors, the company dismissed the managers in February 2017 and asked them to reimburse the costs incurred in connection with the administration of the fund (in particular office rental costs, IT costs, etc.). The company argues that the contracts in fact corresponded to a delegation of tasks within the meaning of Art. 18b

para. 1 LPCC, allowing the managers to operate their fund while benefiting from its FINMA licence. Contrary to the title of the contracts, no working relationship would therefore bind the parties.

The managers are demanding payment of their salary for the duration of the working relationship. They are also opposed to the reimbursement of expenses, arguing that the clause in the contract stating that they are responsible for covering these expenses is null and void under art. 327a para. 3 CO.

Based on a subjective interpretation of the contract (art. 18 para. 1 CO), the Geneva Court of Justice had reached the conclusion that the parties had the real and common intention of entering into an employment contract. The Federal Court will, however, verify that the essential elements of an employment contract were present *in casu*, namely (i) the provision of labour, (ii) an element of duration, (iii) a relationship of subordination and (iv) remuneration. The management company argued in particular that the relationship of subordination was lacking.

In this case, the company had taken care of the procedures for renting offices and obtaining a work permit for one of the managers. It had also been involved in the search for investors. In addition, the managers had contractually renounced the pursuit of other gainful activities, so that they were economically dependent on the company. Consequently, there was a relationship of organisational subordination between the parties, although the managers had a certain degree of independence in the administration of the fund.

The Federal Supreme Court therefore ruled that the Geneva Court of Justice was right to classify the disputed contract as an employment contract.

This Federal Supreme Court ruling emphasises that the criterion of a relationship of subordination must be put into perspective, particularly with regard to people in managerial roles. Depending on the chosen business model, a simple relationship of organisational subordination may be sufficient to establish an employment relationship. In the contested judgement CAPH/106/2021, the Geneva Court of Justice also specifies that the delegation of tasks – as provided for in art. 18b LPCC – did not require the conclusion of an employment contract and could therefore take the form of other types of contract. This delegation is now governed by, among other things, Article 14 of the LEFin, but there is no reason to believe that this freedom in the choice of contract type has been altered. When concluding such a task delegation contract, it is therefore up to the parties to pay particular attention to the choice of the desired legal qualification. The concrete relationship between the contracting parties must then of course reflect the text of the contract, otherwise there is a risk of a qualification that deviates from the literal meaning.
