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Proof of investment damage

Passive hypothesis still not sufficient

Par Sébastien Pittet le 16 August 2023

What are the requirements for proof of investment damage in an investment advisory relationship ? In its ruling 4A_131/2022 of June 20, 2023, the Swiss Federal Supreme Court reiterates that the customer cannot simply claim, without supporting evidence, that the damage was too difficult to quantify, or that no investment would have been made if the bank had provided adequate advice (see also 4A_202/2019 commented in Laurent Hirsch, cdbf.ch/1110/).

Between March 2012 and May 2013, a client had an investment advisory relationship with an aggressive profile at the branch of a bank. Dissatisfied with the results of his investments, the customer filed a liability claim against the bank approximately one year after the end of the banking relationship. His claim, which he quantified at EUR 232,616.25, broke down as follows : (1) EUR 88,000 in connection with two foreign exchange transactions and (2) EUR 144,616.25 in connection with three transactions executed on a structured product advised by the bank.

The Pretore del Distretto di Lugano partially accepted the customer's claim and ordered the bank to pay EUR 144,616.25 (excluding the claim relating to the foreign exchange transactions). Ruling on the bank's appeal and the customer's joint appeal, the Tribunale d'appello found in favor of the bank and dismissed all the customer's claims. The customer then appealed to the Swiss Federal Supreme Court.

With regard to the foreign exchange transactions, the customer argued that they had been carried out without his knowledge. The Federal Court was not convinced by his reasoning, and held that the cantonal court had not acted arbitrarily in holding that the customer had himself ordered the foreign exchange transactions and was therefore aware of them.

With regard to the various investments in the structured product, the Federal Court recalls that, in a fiduciary relationship, the plaintiff bears the burden of proof of the damage (art. 8 CC). In the event of improper performance of an investment advisory contract, the loss is in principle the difference between (i) the hypothetical value of the assets had the investments been made in accordance with the contract, and (ii) the actual value of the investments made in breach of the contract (calculated according to the "alternative investment hypothesis").

Exceptionally, when the customer can prove with a preponderance of probability that he would not have made any alternative investments in the absence of a breach of contract (e.g. in the absence of the disputed advice), the loss can be determined by calculating the difference

between (i) the amount of the initial investment and (ii) the actual value of the investments made in breach of contract (calculation according to the “passive hypothesis”). This method benefits the customer, since he does not need to establish hypothetical investments.

In this case, the customer relies solely on the passive hypothesis to determine his damages. In his opinion, it is not possible to construct a hypothetical portfolio managed in accordance with the contract. Furthermore, with regard to his last investment in the structured product, the customer argues that this transaction was carried out solely to cover the loss caused by the disputed foreign exchange transactions, which is why the passive hypothesis should apply.

According to the Federal Court, the customer has not demonstrated with a preponderance of probability that he would not have made an investment if the contract had been properly executed. The customer’s aggressive profile demonstrates his interest in actively investing his assets, and also reinforces this conclusion.

In the absence of a situation leading to the application of the passive hypothesis, it is up to the customer to prove and quantify the damage by basing his calculation on hypothetical investments in conformity with the contract, which the customer did not do in this case.

Accordingly, the Federal Court confirms the cantonal decision rejecting the claim for compensation.

This decision reiterates the importance of alleging and providing sufficient evidence to prove the exact and concrete damage suffered by the customer. To do this, the customer must calculate the hypothetical value of the assets had the investments been in accordance with the contract, even if this task can prove complicated and costly in practice.

Exceptionally, if the customer is able to prove, with a preponderance of probability, that no investment would have been made had the bank not breached its contractual obligations, he can quantify his loss using the passive hypothesis. This could be the case, for example, if the breach of contract occurred at the time of the first or only advice (4A_297/2019 commented in Célian Hirsch, cdbf.ch/1141/).

Finally, it should be noted that these requirements for proof of damage relate to the investment advisory relationship, which differs from the asset management contract. In an asset management relationship, it is up to the bank and not the client to prove the hypothetical development of a portfolio managed in accordance with the contract (4A_449/2018 commented in Célian Hirsch, cdbf.ch/1061/).

It is possible to question the nature of this distinction, which leads to significant consequences for the customer. Indeed, the asymmetry of information and expertise between the customer and the bank does not necessarily differ according to the nature of the relationship (advisory or management). What’s more, even if the final investment decision rests with the customer in an investment advisory relationship, it may be difficult for the latter to allege an investment hypothesis based on the advice the bank would have provided had it acted in accordance with the contract.

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