CENTRE DE DROIT
BANCAIRE ET FINANCIER

Asset management

Approval of investments contrary to the investment strategy

Par Sébastien Pittet le 15 April 2024

An asset manager who does not comply with the conservative investment strategy agreed with his client is not in breach of his contractual obligations if the client has validly approved the investments (Federal Court ruling 4A_507/2023 of 29 February 2024).

In this judgment, the client consults an asset manager to manage part of his assets. Over the years, the client entered into three different management relationships with the service provider. In the third relationship, which gave rise to the dispute, the management contract stipulated that the investment objective was medium-term capital preservation and investment mainly in negotiable funds and hedging products. According to the Zurich Court of First Instance, this strategy should be described as conservative.

The relationship ran smoothly for several years, until the client suffered significant losses between 2007 and 2010. He then terminated the management mandate and sued the asset manager for damages of CHF 718,018. According to the client, the asset manager did not comply with the agreed investment strategy, thereby breaching its duty of care (art. 398 para. 2 CO).

In fact, it appears that the investments made by the asset manager were not in line with a conservative investment strategy. In fact, the portfolio consisted of an increasing proportion of equities and structured products, which – according to the Zurich Court of First Instance – was more in line with a balanced strategy.

The asset manager failed to demonstrate at first instance that the originally agreed conservative investment strategy had been changed. The courts must therefore determine whether the client validly consented to the investments that were not in line with the investment strategy, with the burden of proof resting with the asset manager.

According to the Zurich Obergericht, the client was experienced and had investment knowledge. He was regularly informed of the risks associated with non-compliant investments, through management reports and numerous personal meetings with representatives of the manager. At half-yearly meetings, the client discussed – sometimes for several hours – the investments made in his portfolio and any other investment opportunities. They also regularly provided the manager with investment suggestions.

As a result, the client was aware of investments that were not in line with the investment strategy and was also aware of the risks involved. According to the Obergericht, the non-compliant investments were therefore validly approved – in an informed manner ('informierte Genehmigung') – by the client. This reasoning convinced the Federal Court, which upheld the decision of the cantonal court and dismissed the client's claims.

Two factors were decisive in this case in ruling out the provider's liability : (i) the client's knowledge and experience in financial matters and (ii) the manager's repeated information to the client about the contents of the portfolio. The conclusions of this judgment would probably have been different if the client had not had the knowledge and experience necessary to understand the financial transactions carried out by the manager or if he had not been regularly informed of the contents of the portfolio.

As the Federal Court points out, the case in point must be distinguished from the situation where an inexperienced client ratifies – through the mechanism of a fiction of ratification clause contained in the general terms and conditions – the investments made by the service provider. In this case, not only was the client experienced, but above all the management statements were discussed in detail between the client and representatives of the manager.

To avoid having to consider the issue of a posteriori approval of non-compliant transactions, it is recommended that the service provider act before the problem arises, by modifying – with the client's agreement – the investment strategy initially agreed, if necessary by adapting the risk profile. In these situations, however, the service provider must bear in mind that it cannot deviate indiscriminately from the customer's risk profile (or change it without limit). If the client's desired investment strategy deviates from his risk profile, the service provider has at least a duty to warn, which stems from his duty of care under art. 398 para. 2 CO (from a regulatory perspective, art. 14 para. 2 LSFin imposes a duty on the service provider to advise against the inappropriate service).

In the extreme, if the investment strategy envisaged by the client deviates too far from his risk profile, the service provider might even have to refrain from providing the service if he did not wish to expose himself – from a private law perspective – to too great a risk of liability. This hypothesis was not relevant in the case in point, as the balanced investment strategy implemented by the service provider corresponded to the client's risk profile, in particular his objective capacity for risk and the evolution of his subjective risk appetite.
