

Retrocession

Waiver valid according to the volume invested on an annual basis ?

Par Nicolas Ollivier le 28 March 2025

The Geneva Court of Justice, in its ruling [ACJC/1653/2024](#) of 19 December 2024, ruled that a clause waiving retrocessions indicating percentage ranges of the '*volume invested on an annual basis*' by product category is valid within the framework of a management mandate.

The Court of Justice begins its reasoning by recalling the principle that the agent must not be impoverished or enriched by the mandate apart from his agreed fees. Referring to the judgment [4A_266/2010](#) (commented in *Fischer*, [cdbf.ch/773](#)), it emphasises that the principal must be fully informed of the parameters for calculating the overall amount of retrocessions. This includes the decisive values of the retrocession agreements with third parties and the order of magnitude of the expected refunds. The client must be able to compare the expected retrocessions with the agreed fees for asset management. This requirement makes it possible to understand all the costs and potential conflicts of interest for the manager. In the event of early waiver, the expected retrocessions must be indicated within a specified range, as a percentage of the assets under management. This rule makes it easier to understand the extent of the retrocessions in relation to the management fees and therefore the overall management costs.

In the case in point, in January 2011, the bank sent its customers new general terms and conditions, accompanied by a letter and two information sheets. These documents drew attention to the changes, in particular clause no. 14 and the ranges of the retrocessions potentially received.

The ranges were expressed as a percentage of the 'invested assets' (sic) and not of the managed assets. According to the Court, case law does not require that retrocessions be calculated on the basis of managed assets, but rather that the information be relevant and transparent to enable clients to know the order of magnitude of the retrocessions. Ranges based on the invested assets are even more relevant in the case of a management mandate because the retrocessions are deducted from the invested assets.

The Court considers that the percentage ranges were broken down by product category, in accordance with the requirements of the Federal Tribunal ([4A_496/2023](#) commented in *Fischer*, [cdbf.ch/1338](#)). Clients, especially experienced ones, could thus calculate the order of magnitude of the retrocessions by cross-referencing this information with the composition of their portfolio as shown on their year-end bank statements.

Consequently, the Court of Justice ruled that the waiver clause was valid and dismissed the client's action.

In our opinion, the Court of Justice erred in its judgement for the following reasons :

- It conflates two concepts that are not identical, namely 'volume invested' and 'wealth invested'. The notion of volume invested on an annual basis is distinct from that of wealth invested on average during a year. The frequency of transactions on an account during a year can result in a higher invested volume than the invested wealth indicated on a wealth statement at the end of the year. The invested volume represents the purchases and sales of assets during the year and can be a multiple of the invested assets on a given date. By way of illustration, a portfolio of one million generates an investment volume of five million if the *turnover rate* is five. The clause in this case did not refer to the invested capital but to the invested volume. Without knowing the turnover rate, clients could not calculate the expected amount of retrocessions.
- The Federal Court has already ruled that a clause referring to the 'volume invested' in the case of a management mandate is invalid considering that it is '*an inadequate criterion, which could only be known as and when the one-off investments decided by the management company are made*' ([4A 355/2019](#), commented in Fischer, cdbf.ch/1145). The volume invested on an annual basis can only be known if the *turnover figure* is communicated to the client.
- The [4A 496/2023](#) ruling cited by the Court concerned a case outside asset management, where the waiver conditions are more flexible in *execution only* and advice on isolated transactions ([4A 574/2023](#), [4A 576/2023](#), commented in Ollivier, [cdbf.ch/1358/](#)).

In this technical area, it is also essential to take a step back. The objective of the Federal Supreme Court's case law is to ensure that the client can give informed consent to the fees for banking services, including the expected retrocessions. In terms of management, the Federal Court considers that the client must be able to understand all the costs associated with asset management from the beginning of the relationship, in order to be able to approve them ([4A_355/2019](#) ; [ATF 137 III 393](#)). In our opinion, by delegating management to a professional, the client cannot be required to constantly monitor the management of his portfolio or to devote disproportionate efforts to it. The requirement to present the expected retrocessions as a percentage of the assets under management allows the client to perform a simple calculation : he or she simply adds this percentage to that of the management fees, also expressed in relation to the assets under management in the contractual documentation signed at the beginning of the relationship. Conversely, requiring the client to constantly recalculate retrocessions throughout the relationship, even though he has delegated management and is paying management fees, is unjustifiable.

In the context of global advice, where the advisor receives his fees on the deposited assets, the same principle should apply to obtain a valid waiver. In other words, the expected retrocessions should, in our opinion, be expressed in proportion to the assets deposited.

On the other hand, for one-off advice on isolated transactions, a different approach may be considered : the parameters for calculating retrocessions could suffice, as it is reasonable to expect the client to assess their amount for each transaction he chooses to carry out.

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