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Nature of the service

The conduct of the parties takes precedence over the title of the contract

Par Sébastien Pittet le 18 November 2026

Where the client, through her representative, takes all investment decisions alone, the banking relationship may be classified as '*execution only*' even if the parties have signed an asset management contract. The bank's obligations towards its client are thereby significantly reduced (Federal Supreme Court 4A_567/2025 of 3 September 2026).

In October 2008, a client signed an asset management agreement with a bank in Geneva. In September 2009, the client granted her son a power of attorney authorising him, amongst other things, to manage the portfolio, dispose of the assets, pledge them as security and close the account.

The portfolio initially followed a diversified strategy in line with a proposal from the bank. Gradually, the son became increasingly active in managing the portfolio, sometimes sending several emails a day to place orders. In particular, he invested in exchange-traded funds speculating on a market downturn, using significant leverage. In 2013, after the value of the portfolio had fallen from USD 4,126,348 to USD 1,586,915, the client informed the bank that she no longer wished her son to carry out any transactions. The client nevertheless persisted in maintaining her investments in leveraged funds despite the bank's recommendation to reduce risk, and the portfolio continued to decline, reaching USD 27,474 by the end of 2019. In 2020, the client finally accused the bank of having authorised investments in such high-risk assets and brought legal proceedings against it to recover her money.

To determine the scope of the bank's obligations, the Federal Supreme Court first examined the legal nature of the contractual relationship and analysed the actual and shared intention of the parties (a subjective interpretation in accordance with Art. 18(1) of the Swiss Code of Obligations (CO), which includes, in particular, the parties' conduct following the conclusion of the contract). It considers that the Court of Justice did not act arbitrarily in holding that, even though the parties had signed an asset management contract, the parties' conduct following the conclusion of the contract corresponded to an '*execution only*' relationship. Indeed, the bank did not manage the client's account, as this was managed exclusively by the son.

The Federal Supreme Court then considers whether the bank complied with its duty of care (Art. 398 CO). In particular, it examines whether the bank sufficiently warned the son of the risks involved in the transactions he was ordering.

The judgement notes that, in an *execution-only* relationship, the bank is not obliged to ensure the general protection of its client's interests nor to fulfil a general duty to provide information. In certain exceptional situations, a duty to warn may be recognised where (i) the bank realises, or ought to have realised, that the client has failed to identify the risk associated with the investment they are considering, or (ii) a special relationship of trust has developed between the parties.

In this case, the client's son had a background in economics and finance, as well as many years' experience in these fields, and understood how the funds in which he was investing operated. He also actively monitored the portfolio's performance through almost daily contact with the bank. Finally, the bank had warned the son on several occasions, advising him to adopt a more diversified and conservative approach. The bank therefore fulfilled its obligations.

The judgement finally notes that the son did not exceed the powers granted by the power of attorney, nor did he act in his own interest. The son's actions are therefore binding on the client (Art. 32 et seq. CO), who also bears the consequences of her representative's knowledge and experience (see also : Pittet, cdbf.ch/fr/1471).

The judgment – which is convincing in its conclusion – calls for a few observations.

With regard to the classification of the contract, the judgment suggests that the parties intended to enter into an *execution only* relationship from the moment the management contract was concluded. The parties' initial intention could also change as orders are executed by the client (or their representative). This interpretation is partly in line with the description provided by the Court of Justice, which refers to a relationship that has 'evolved' into an *execution-only* relationship (para. 4.2). To avoid ambiguous situations on the bank's part, where the client instructs a large number of transactions, it would be advisable to recommend that the client segregate their assets into a specific separate account in the form of an *execution-only* account, the contents of which will no longer be subject to the institution's supervision (and, a fortiori, will no longer be subject to remuneration).

The bank's conduct might have warranted more thorough scrutiny at the stage of determining the nature of the contract. The bank's repeated warnings regarding the risky and inappropriate nature of the son's transactions imply continuous monitoring of the portfolio, which could constitute an indication of the continuation of the management relationship, or even the establishment of ongoing advice (rather than ad hoc advice, as held by the Court in section 4.2 – on the various forms of investment advice : see Pittet/Mentha/Fischer).

The cantonal judgement considers that the management fees charged by the bank do not, in this case, demonstrate the existence of a management contract (para. 4.2). According to a bank employee, the management contract had been signed solely to reduce transaction costs. The Federal Supreme Court does not address this interesting point. The charging of management fees could in fact – depending on the circumstances – constitute an indication of a management contract (see, in particular, Federal Supreme Court 4A_364/2013 of 5 March 2014, where the method of remuneration constituted a '*starkes Indiz*' for classifying the contractual relationship as asset management, para. 5.5).

Another possible explanation for the conclusion of a management contract, which is not mentioned in federal or cantonal judgements, is access to certain specific products. In

accordance with Article 10(3)(f) of the aLPCC (the spirit of which remains the same today), access to certain products is restricted to qualified investors, which includes, in particular, investors who have entered into a written asset management contract with a financial intermediary.

Irrespective of the nature of the contract, the judgement ultimately assesses the entire relationship solely in the light of the son's knowledge. However, from January 2013, the client decided no longer to authorise her son to carry out transactions and chose herself to retain the leveraged funds, despite the bank's recommendation to reduce risks (cantonal judgement, para. 8.2). For this period, one might have wondered whether the analysis should not have focused on her own knowledge. The solution adopted in this case is, in fact, similar to the regime set out in Art. 16 OSFin.

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