CENTRE DE DROIT
BANCAIRE ET FINANCIER

Accountability

What are the obligations of the party paying retrocessions ?

Par Philipp Fischer le 4 June 2022

The Swiss Federal Supreme Court recently examined the scope of a bank's obligation to render an account to its client, not in relation to retrocessions received by the bank (a question which has been the subject of abundant case law, cf. cdbf.ch/1145), but in relation to retrocessions allegedly paid by the bank to a third party (TF 4A_436/2020 of April 28, 2022).

This ruling was issued in the context of the contractual relationship between a Lebanese company (client) and a Swiss bank (execution-only relationship) and a Lebanese bank (advisory relationship). The Lebanese bank had power of attorney over the customer's account with the Swiss bank. In practice, the customer gave instructions to the Lebanese bank, which in turn communicated them to the Swiss bank.

The abandonment of the EUR/CHF floor rate in 2015 led to substantial losses for the customer. The Swiss bank made a margin call, as a result of which the customer's accounts showed a negative balance of around EUR 430,000. The Swiss bank sued for payment. The customer, for her part, brought an action for the rendering of an account. The outcome of the action for settlement (excluding retrocessions) is discussed in a separate commentary (see cdbf.ch/1238/). This summary focuses on the duty to provide information in relation to the retrocessions paid by the Swiss bank, one of the points at issue in the client's action for the rendering of an account.

The Federal Court begins by recalling that, according to well-established civil case law and transcribed into regulatory law in art. 26 LSFin, there is a duty on the part of the agent to inform his principal of the retrocessions the agent has received from a third party. However, in the present case, the action for rendering an account is directed against the party who allegedly paid the retrocessions to a third party, and not against the recipient of the retrocessions.

In order to resolve this issue, the Federal Court recalls that one of the objectives of the action for rendering an account (art. 400 CO) is to enable the principal to control the agent's activity. However, information on the retrocessions paid does not constitute a necessary element in the control of the agent's activity, and therefore does not fall within the scope of art. 400 CO. The client must therefore contact the Lebanese bank (which received the retrocessions) directly to obtain information on this subject (depending, of course, on the Lebanese law presumably applicable to this relationship).

First of all, it should be noted that this decision contrasts with the position reflected in SBA Circular no. 7578 of October 17, 2008, in which the SBA recommended that banks inform customers, on request, of any retrocessions paid to an independent asset manager. However, this Circular was issued in a different regulatory environment, with independent asset managers not subject to prudential supervision (unlike the situation now prevailing under LEFin).

Furthermore, the Federal Court's reasoning is based on the objective of the civil law action for rendering an account. Today, however, the question of retrocessions also has criminal and regulatory dimensions :

Under criminal law, a third party who collects retrocessions without informing his customer may be guilty of unfair management (art. 158 StGB / cdbf.ch/1030), or even potentially of passive private bribery (art. 322novies StGB), criminal offences which could, by reflex effect, also affect the bank as a potential accomplice (or guilty of active private bribery / art. 322octies StGB). In order to reduce this risk, it is customary for the bank to mention in its customer documentation the principle that the bank may pay remuneration to third parties (e.g. asset managers or business introducers), and sometimes also the calculation ranges for retrocessions. In addition, the bank generally reserves the right, in its contracts with these counterparties, to disclose the precise amounts to customers at their request.
From the point of view of the LSFin, several provisions impose a duty of information on the bank towards the customer. Art. 16 LSFin stipulates that financial service providers must report on the costs of financial services. In our view, however, the retrocessions paid to a third party do not constitute a cost (but rather the bank's use of the income received, which in turn represents a cost from the customer's point of view). Furthermore, according to Art. 72 of the Financial Services Act, the customer is entitled to a copy of his file, as well as any other documents concerning him drawn up by the financial services provider in the context of the business relationship. The question of whether, on the basis of art. 72 LSFin, the bank must inform the customer at the latter's request of the retrocessions paid to a third party seems more open, even if it is generally considered that the scope of art. 72 LSFin should be aligned with that of art. 400 CO.

To sum up, while this case law provides useful clarification of the bank's duty to inform in the event of the payment of retrocessions to a third party, it must be emphasized that the Federal Court's reasoning is based on the obligations arising from art. 400 CO, and not on other provisions which might impose a broader duty to inform on the bank (or encourage it to provide such information in order to limit its legal risk). This decision does, however, set a welcome precedent for banks in that it clearly places responsibility for full disclosure of any indirect remuneration received on the customer's direct agent (in this case, the Lebanese bank).

Reproduction autorisée avec la référence suivante: Philipp Fischer, What are the obligations of the party paying retrocessions ?, publié le 4 June 2022 par le Centre de droit bancaire et financier, https://cdbf.ch/en/1237/