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Retrocessions and execution only mandates

In the absence of a Big Bang, some useful clarifications

Par Philipp Fischer le 12 October 2022

The Swiss Federal Supreme Court has handed down its ruling (TF 4A_601/2021 of September 8, 2022) in a case followed with some trepidation by practitioners, but without providing a federal jurisprudential answer to the question of whether retrocessions received in the context of an execution-only relationship are subject (or not) to the duty of restitution.

The suspense was at its height, as the Federal Supreme Court had the opportunity to consider, for the first time to our knowledge, the scope of the duty to restitute retrocessions in the case of an execution-only relationship. In the cantonal ruling which gave rise to the appeal, the Zurich Handelsgericht had held that the obligation to return retrocessions, which has been developed in case law relating to asset management, would also apply to execution-only relationships. In the judgment under review, however, the Federal Court makes it clear from the outset that it will not rule on this question : “Auf die umstrittene Frage, ob grundsätzlich auch im Execution only-Verhältnis eine Pflicht zur Herausgabe von Retrozessionen besteht (…) muss vorliegend nicht weiter eingegangen werden” (c. 7.2).

Having said that, this ruling is nonetheless worth commenting on, as it deals with issues that, while peripheral to the duty of restitution, are nonetheless important for practitioners. The factual situation can be briefly summarized as follows.

A pension fund has had an execution-only relationship with a bank since 2001. The bank receives retrocessions during the course of the relationship. The pension fund takes the view that these fees should be passed on to it, as it has not validly waived them. The bank, on the other hand, takes the view that, in the absence of a conflict of interest, the retrocessions should not be returned to the customer in an execution-only relationship. The Handelsgericht ruled that the retrocessions received by the bank in the ten years preceding the interruption of the statute of limitations must be retroceded.

Only the pension fund appealed to the Federal Supreme Court, arguing that the Handelsgericht’s reasoning on the statute of limitations was open to criticism.

The judgment reviewed here can be divided into three parts :

Firstly, the Federal Court confirms its case law in a landmark decision (ATF 143 III 348, commented in cdbf.ch/978/), according to which (i) the limitation period (under civil law) is ten years and (ii) the dies a quo corresponds to the time when the bank receives the retrocession

(and not to the time when the customer becomes aware of the retrocession or at the end of the contractual relationship).

Secondly, the Swiss Federal Supreme Court makes an interesting clarification regarding the statute of limitations for the right to information under art. 400 of the Swiss Code of Obligations (CO), ruling that this period of limitation should be modelled on that applicable to the duty of restitution (c. 8.2 : “Im Übrigen ist auch nicht ersichtlich, welches Interesse die Beschwerdeführerin an der Durchsetzung der Auskunftsansprüche noch haben sollte, wenn die entsprechenden Herausgabeansprüche bereits verjährt sind.”). This opinion of the Federal Supreme Court seems to contrast with that widely expressed in the literature, according to which, in short, the dies a quo of the prescription of the contractual right to information corresponds to the end of the contractual relationship and not to the collection of the retrocession. Furthermore, the Federal Court’s reasoning focuses on civil law. It cannot be ruled out that a broader right to information could potentially derive from other legal provisions, such as art. 16 of the FLSA, art. 72 of the FLSA (if the FLSA is applicable to the complex of facts analyzed) or art. 8 of the DPA.

Finally, the Federal Court examined whether the bank had acted contrary to good faith in encouraging the customer not to interrupt the statute of limitations, and then raised this exception in the proceedings. In the customer’s view, the letters sent to her by the bank would have dissuaded her from taking legal action to interrupt the statute of limitations. In the event, the bank always maintained its position that no retrocession was to be returned due to the characteristics of the execution-only relationship. This behavior should have prompted the customer to take steps to interrupt the statute of limitations as quickly as possible. In our view, the Federal Court rightly ruled out any abuse of rights.

In short, this decision (i) does not rule on the application of the restitution obligation to execution-only relationships (several cantonal decisions have been handed down on this issue, with divergent results) and (ii) confirms the approach to the prescription of the restitution claim. It should be noted that the Swiss Federal Supreme Court (iii) provides interesting clarifications regarding the statute of limitations on the right to information under art. 400 CO (statute of limitations aligned with that of the right to restitution) and (iv) sets limits on the possibility for the customer to rely on abusive conduct on the part of the bank in an attempt to defeat the statute of limitations exception raised by the recipient of the retrocessions.
