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Retrocessions and execution only

The Handelsgericht saga continues

Par Sébastien Pittet le 30 October 2023

The issues surrounding the return of retrocessions can be simplified into two questions : (i) must a retrocession be returned to the client ? If so, (ii) how much information must the client be given in order to validly waive this return ?

In its ruling HG210223-O of June 21, 2023 (now in force), the Zurich Handelsgericht confirms its case law to the effect that a bank bound by an execution-only relationship with its customer is obliged to make restitution. The court also provides further clarification on the waiver of the right to restitution. In addition to this classic analysis, the ruling also deals with the validity of a waiver clause contained in general terms and conditions.

Two spouses domiciled in Germany opened a bank account and maintained an execution-only relationship with the Zurich branch of a Swiss bank. Between 2009 and 2013, the spouses invested their assets in various financial products, including collective investments. The bank received retrocessions of CHF 58,944 during this period.

The Swiss Federal Supreme Court has consistently ruled that retrocessions received in an asset management report (i) must be returned to the client, unless (ii) the client has validly waived them (4A_355/2019, commented in cdbf.ch/1145/). A waiver is valid when the customer receives full information, including an estimate of retrocessions based on the amounts managed (Asset under Management).

To date, however, the Swiss Federal Supreme Court has left open the question of the application of this case law to execution-only relationships (4A_601/2021, commented in cdbf.ch/1252/).

With regard to the obligation to make restitution, the Zurich Handelsgericht reiterates its position that the obligation under art. 400 para. 1 CO also applies to execution-only relationships, even in the absence of any conflict of interest. This view is not shared by other cantons, such as St. Gallen (HG.2018.11, c. III.3) or Geneva (JTPI/4669/2023).

With regard to the waiver of restitution, the Handelsgericht here seems to suggest that an estimate of retrocessions based on financial instruments could be sufficient in an execution-only report. In the present case, however, the waiver clause proposed by the bank is unclear and does not express the idea of an express waiver by the customer of his right to restitution. Consequently, the customer did not validly waive his right to restitution.

Finally, this ruling adds a new element to the problem of retrocessions by dealing, in two parts, with the validity of the waiver clause in the light of the specific rules governing the review of general terms and conditions.

Firstly, the Handelsgericht analyzes the validity of the clause from the angle of the rule of the unusual. This rule stipulates that objectively and subjectively unusual clauses are not incorporated into the contractual relationship, unless the customer's attention has been specifically drawn to the clause. In this case, given the husband's good knowledge of the financial sector, the clause is not subjectively unusual and therefore not unusual.

Secondly, the Handelsgericht examined the compliance of the waiver clause with art. 8 UWG. This provision prohibits the use of general terms and conditions that create a significant and unjustified disproportion to the detriment of a consumer. The Zurich court adopts a broad interpretation of the notion of consumer, not limiting its scope to everyday consumer services (the Federal Court also seems to favor this broad interpretation in its decision 4A_54/2021, c. 6.4.2, commented in cdbf.ch/1208/). Without going into an in-depth analysis of the other conditions of art. 8 of the UWG, the Zurich judges are content to note that the waiver clause deviates from the legal regime of art. 400 of the Swiss Code of Obligations, without validly warning the customer that he is waiving a right. This situation, which creates a significant and unjustified disproportion, leads to a violation of art. 8 of the UWG and consequently to the nullity of the waiver clause.

While the Handelsgericht's position on the question of the return of retrocessions in an execution only relationship is not surprising, the developments relating to the scope of the information and the analysis of the clause's validity are new. In our view, the ruling raises three interesting questions that have not been specifically addressed :

If the obligation to make restitution presumptively also applies to an execution-only relationship, what exactly must be the scope and granularity of the information provided to the client for the latter to validly waive retrocessions in an execution-only relationship ?
Is a waiver of retrocessions objectively unacceptable ? If so, the clause would be unenforceable against the client even though it contained sufficient information under art. 400 CO, unless (i) the client had, as in this case, financial knowledge (which would rule out the subjectively unusual nature of the clause) or (ii) his attention had been specifically drawn to the clause.
Can a waiver clause that contains sufficient information under art. 400 CO still be unfair under art. 8 UWG ? If so, a waiver of retrocessions in general terms and conditions would a priori simply be impossible.

It should be noted that the last two questions can be analyzed as much from an execution-only perspective as from an asset management or investment advisory perspective.
