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Retrocessions and execution only

The saga that became a soap opera

Par Philipp Fischer le 17 April 2024

According to a popular German expression, “Totgesagte leben länger. Despite their oft-heralded demise, retrocessions continue to enrich the civil case law of the Federal Supreme Court. However, practitioners are still waiting for the Federal Supreme Court to take a definitive stance on whether retrocessions in execution-only relationships should be subject to restitution. Unfortunately, these hopes were dashed in the ruling presented here (TF 4A_496/2023 of 27 February 2024) :

“*Damit braucht auf die umstrittene Frage, ob grundsätzlich auch im Execution only-Verhältnis eine Pflicht zur Herausgabe von Retrozessionen besteht, nicht weiter eingegangen zu werden*” (recital 4.2).

The backdrop to this decision was a banking relationship between a customer and his bank, which lasted from December 2008 to July 2022. According to the bank’s documentation, the client had extensive experience in finance, including structured products and private equity.

The client did not sign a management mandate, but the banking relationship included investment advice, in all cases from 2018 onwards. That said, it would appear that the client mainly invested on his own initiative, rather than following the investment proposals emanating from the bank.

In terms of documentation, the 2008 General Terms and Conditions contained a simple reference to the existence of retrocessions. From 2013 onwards, the General Terms and Conditions detailed retrocessions by product (collective investments and structured products), as well as by assets under management (AUM) for asset management and investment advisory relationships.

The client has assigned any claims against the bank for repayment of retrocessions collected by the bank to a company specialising in debt collection. In February 2022, the debt collection company brought an action before the Handelsgericht in Berne for repayment of various amounts collected between 2011 and 2021.

In its decision of 6 September 2023, the Cantonal Court granted the request for reimbursement for the years 2011 and 2012, but rejected it for subsequent years. The debt collection company appealed to the Federal Supreme Court, which upheld the cantonal court’s decision.

In its appeal, the collection company put forward three main arguments :

1. The General Terms and Conditions had not been provided to the client, which meant that he could not validly waive his right to the return of the retrocessions.
2. The “Ungewöhnlichkeitsklausel” (rule of the unusual) precludes the application of the waiver clause in the General Terms and Conditions.
3. The General Terms and Conditions do not meet the case-law requirements for a valid waiver of the right to the return of retrocessions.

The Bern Handelsgericht described the relationship between the client and the bank as an execution-only relationship, which also included subordinate investment advice (“*ein Execution only-Verhältnis mit untergeordneter Beratungskomponente*“). On the basis of the facts recounted in the cantonal decision, the relationship between the parties should probably be described as a “transactional” advisory relationship (according to the terminology of art. 11 LSFin) and a “one-off” relationship (according to the civil case law of the Federal Court). That said, the facts also show that the disputed retrocessions relate to investments chosen by the client spontaneously (and without any prior recommendation from the bank). The courts’ analysis therefore rightly focuses on the treatment of retrocessions in an execution-only relationship.

As mentioned above, the Federal Court has left open the question of whether the case law on art. 400 para. 1 CO applies to execution-only relationships. On the other hand, the Federal Court notes that :

- the customer had received the General Terms and Conditions in all cases from the 2013 version onwards and had therefore been able to familiarise himself with them.
- the clause waiving the right to restitution was not ‘unusual’, given the specific features of the case. The customer’s experience in financial matters seems to have played a decisive role in this context.
- information on the method of calculation and the ranges (in percentage terms) of retrocessions was provided to the client. The ranges were indicated according to the financial instruments. In the case of asset management and investment advisory services (nb : two types of financial services that are not relevant in this case), the ranges were also indicated according to the AUM. Declining to define precisely the content of the information required with regard to execution only, the Federal Court held that in this case the collection company had failed to demonstrate that the information provided from the 2013 version of the General Terms and Conditions was insufficient. In addition, the Federal Court noted that the customer had the opportunity to request more detailed information before or after making the disputed investments.

In our view, the following conclusions can be drawn from this ruling :

- This judgment confirms that the principles adopted by the Federal Court regarding the duty to make restitution, based on art. 400 para. 1 CO, apply to asset management and investment advice (for a reminder of these principles : Fischer, cdbf.ch/1415). However, the question has not yet been definitively settled in execution-only (or predominantly execution-only) relationships.
- This ruling may indicate a desire on the part of the Federal Court to accept a lower standard for the disclosure of retrocessions in execution-only relationships. As

mentioned, in the context of asset management, the Federal Court requires disclosure of the amount of retrocessions in relation to the assets under management, which in any case is not possible in practice in an execution-only relationship in which the client alone makes the investment decisions.

- In connection with the decision of the Zurich Handelsgericht (HG210223-O of 23 June 2023, summarised in : Pittet, cdbf.ch/1305), which refused to apply the “rule of the unusual” to nullify a waiver of retrocessions, the case law presented here arrives at the same result, based on the sophisticated nature of the client. For reasons that appear to be procedural in nature, however, the case law presented here does not analyse the scope of application of art. 8 of the Swiss Federal Unfair Competition Act, the provision that led to the nullity of the waiver clause in the above-mentioned judgment of the Zurich Handelsgericht.

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