CENTRE DE DROIT
BANCAIRE ET FINANCIER

Retrocessions

Waiver valid for product category ranges

Par Nicolas Ollivier le 10 July 2024

In its judgments 4A_574/2023 and 4A_576/2023 of 24 May 2024, the Swiss Federal Supreme Court has upheld a ruling by the Zurich Handelsgericht (HG210069-O) specifying the conditions under which a waiver of retrocessions is valid outside asset management.

The Handelsgericht had left open the question of whether the relationship between the parties was one of investment advice or a simple account/custody account, since in both cases the bank had to return the retrocessions. In its ruling, the Federal Court did not rule on the bank's obligation to return retrocessions in the context of an execution-only or advisory relationship, as the bank had accepted this obligation in principle.

The retrocession waiver clauses contained in the 2011 General Terms and Conditions (GTC 2011) and a form relating to the advisory agreement provide in particular that the amount of retrocessions depends, as a general rule, on the type of transactions and investments carried out for the client and the frequency with which the assets are reinvested. The Bank will provide details of retrocessions for specific financial instruments at the customer's written request. The retrocessions received by the Bank may amount to between 0 % and 5 % of the average assets under management per year.

The 2014 General Terms and Conditions (2014 GC) specify that the retrocessions periodically received by the bank vary between the following percentages per annum of the relevant investments held by the customer :

- Money market funds : 0 – 0.50 %.
- Bond investment funds : 0 – 0.50 %.
- Equity investment funds : 0 – 0.50
- Alternative investment funds : 0 – 0.75
- Structured products : not applicable
- Stock exchange transactions : not applicable

The Handelsgericht ruled that the clause in the 2011 GT&C did not provide the appropriate reference value for an execution-only advisory or services contract. In addition, it found that the range of 0 % to 5 % was too wide and imprecise to allow the customer to properly assess the total cost and determine whether the bank was in a conflict of interest situation. The Cantonal Court then held that the clause in the 2014 GTC provided sufficient technical reference values for existing retrocession agreements with third parties, while indicating that, in the case of the

investment advice contract or simple account/custody account relationships, the value of the client's investment concerned constituted an appropriate base value. The breakdown into different investment categories and the indication of percentage ranges between 0 and 0.75 % for each category enabled the client to calculate fairly precisely the order of magnitude of the retrocession received by the bank for a transaction that he had ordered.

The Federal Court held, firstly, that the customer had not demonstrated that it was not possible to calculate the retrocessions using the information provided by the bank in the 2014 GTCs. Secondly, the Federal Supreme Court considers that, unlike in the case of asset management, there are no assets under management in the context of investment advice or a simple account/custody account relationship that could be used as a reference value. Insofar as, in such a relationship, the client himself orders the transactions, the principles applicable to asset management cannot be applied without further examination. The other arguments in the appeal are irrelevant, as the appellant merely referred to the case law on asset management contracts.

The recitals of the Federal Court are somewhat summary, due to the gaps in the arguments and the grounds of the appeal in this case with a low value in dispute (CHF 32,490) and the desire of our High Court not to give a more extensive ruling than necessary. However, the following observations can be made about this ruling :

1. The Federal Supreme Court confirms the approach of several cantonal courts which apply distinct rules depending on the type of contractual relationship to judge the validity of the waiver (cf. Obergericht of Zurich NP230015-O/U of 12 July 2023 ; Handelsgerichts of Bern HG 22 21 of 6 September 2023 and the appeal decision TF 4A_496/2023 of 27 February 2024, summary in : Fischer, cdbf.ch/1338 ; Handelsgericht of Zurich HG190234-O of 5 October 2021).
2. The decisive factor is whether or not the principal can estimate how much the agent earns or how much his services cost. This must be examined on a case-by-case basis (see point 6 and also BGE 137 III 393 of 29 August 2011, point 2.5, summary in : Fischer, cdbf.ch/773 ; Zurich Handelsgericht ruling HG190234-O of 5 October 2021, point 3.2). In our view, the ranges by product category are not sufficient if the client has not also received the transaction fee schedule, as the client must be able to grasp the extent of the expected retrocessions and compare them with the agreed fees (cf. ATF 137 III 393, c. 4).
3. In view of the impact of the LSFin on civil law, a distinction must be made between investment advice based on individual transactions and investment advice based on a portfolio. In accordance with Art. 26 FINMASA, FINMA takes the view that for investment advice linked to individual transactions (Art. 11 FINMASA) and execution-only relationships it is sufficient to specify the relevant ranges per product category. In the case of asset management and portfolio-based investment advice (art. 12 LSFin), information must also be provided on the range of remuneration depending on the value of the portfolio (assets under custody) and the agreed investment strategy (cf. Explanatory Report on the draft FINMA circular "Rules of conduct pursuant to the LSFin and OSFin", p. 19).