CENTRE DE DROIT
BANCAIRE ET FINANCIER

Retrocessions and execution only

Scope of information for early waiver

Par Benjamin Vignieu le 11 September 2024

In ruling ACJC/1002/2024 of 19 August 2024, the Geneva Court of Justice considers that the question of the obligation to return retrocessions in an execution-only relationship, which is controversial in the legal literature and the subject of divergent cantonal rulings, may remain undecided due to a valid waiver by the client.

Since 2008, a customer and a Geneva bank have been bound by a simple bank custody agreement (execution only). The bank amended its general terms and conditions several times during the contractual relationship. Since 2009, they have provided that the bank may receive remuneration from third parties and that the customer accepts that this remuneration be retained by the bank. Since 2012, the General Terms and Conditions have been clarified by means of an appendix entitled 'Remuneration factsheet', which states that the remuneration received by the Bank is calculated as a percentage of the investment volume on an annual basis. From 2018, this appendix will be incorporated directly into the General Terms and Conditions, which stipulate that remuneration may be calculated as a percentage of the volume invested :

- between 0 % and 1.4 % for investment funds ;
- between 0 % and 2 % for bond issues ;
- between 0 % and 2.5 % for derivatives ; and
- between 0 % and 3.5 % for structured products.

In 2019, the client is seeking restitution of the retrocessions received by the bank since 2009. The Court of First Instance dismissed the client's claim in its entirety and, basing its decision on some of the legal literature, held that, in the case of an execution-only relationship, the retrocessions received were not subject to a restitution obligation under art. 400 para. 1 of the Swiss Code of Obligations.

First of all, the Court of Justice points out that the Federal Court has expressly left open the question of the obligation to return retrocessions in the context of an execution-only relationship (4A_496/2023, commented on in Fischer, cdbf.ch/1338) and that there are divergent cantonal decisions on this subject. Some cantonal courts, such as Zurich (HG210223-O, commented on in Pittet, cdbf.ch/1305), Bern (HG 22 21) and Ticino (12.2023.140), accept an obligation to make restitution in an execution-only relationship, while the court in St. Gallen (HG.2018.11) does not. In the present case, this question may (still) remain undecided due to a valid waiver by the customer.

On the subject of the validity of the client's waiver of retrocessions specifically received in an execution-only relationship, the cantonal judges consider in the judgment under review that the case-law requirements relating to the duty to provide information on retrocessions developed in connection with asset management cannot be transposed as they stand in the context of a simple bank custody account relationship. Indeed, in the latter relationship, the bank's duty to inform is much weaker and the bank is not required to ensure the general protection of the client's interests. Similarly, the customer takes the investment decisions alone, so that the bank is not likely to be placed in a conflict of interest and is not in a position to know which transactions are going to be carried out. As a result, it could not fully and accurately calculate the indirect remuneration likely to be received.

The Court of Justice held that the information provided by the bank was sufficient insofar as the customer was aware of the method of calculation and the order of magnitude of the retrocessions received in relation to the various financial instruments. With the ranges provided, they can see the cost of each product category and can freely decide to invest. With regard to the order of magnitude of the ranges indicated by the bank, the ruling notes that these are often between 0 % and 2.5 % and are therefore sufficiently precise. Consequently, the early waiver of retrocessions was valid. In the case of retrocessions received between 2009 and 2012 (i.e. prior to the indication in the general terms and conditions of percentages of the investment volume), the Court of Justice considers that ex post information on the value ranges is sufficient, given that the client did not revoke his waiver at the time of the full disclosure in 2012.

This ruling has the merit of clarifying the scope of the information that must be provided to clients in order for them to validly waive retrocessions in an execution-only report, if not clarifying the practice of the Geneva courts in this area. In judgment JTPI/1076/2024 (summary in Thévenoz et al., RSDA 2024 p. 214 ff, 232 f.), the Geneva Court of First Instance accepted an obligation to return retrocessions received in an execution-only relationship, after having denied it in several previous judgments, including judgments JTPI/4669/2023 (summary in Thévenoz [op. cit], p. 232) and JTPI/10949/2023.

It is interesting to note that the Court of Justice considers that the bank is not likely to be placed in a situation of conflict of interest in a relationship of mere bank deposit. This position differs from that adopted by certain cantonal courts (Handelsgericht of Zurich, HG210223-O, commented in Pittet, cdbf.ch/1305 ; Tribunale d'appello of Ticino, 12.2023.140), which consider that the risk of a conflict of interest that may exist in such a relationship justifies, among other things, an obligation to return the retrocessions received in this context.

The requirements laid down in this ruling for a valid waiver in execution only are in line with the recent case law of the Swiss Federal Supreme Court, according to which the scope of the information to be provided is less important in this type of relationship than in the context of asset management or investment advice (4A_496/2023, commented in Fischer, cdbf.ch/1338). It also confirmed that the indication of value ranges according to the value of the client's investment constitutes an appropriate base value in a simple bank deposit relationship (4A_574/2023, 4A_576/2023, commented in Ollivier, cdbf.ch/1358), while giving indications on the admissible ranges, which are rather broad (between 0 % and 3.5 %). It should be noted that an overall assessment seems to have been made by the judges by taking into account the average range calculated on the average of the extreme values indicated. Finally, the solution adopted by the Court of Justice corresponds to the information that must be given from a regulatory point of view for an early waiver (art. 26 al. 2 LSFin).