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NEWSLETTER

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Retrocessions

Federal Supreme Court judgment 4A_496/2023 of 27 February 2024: requirements for valid retrocession waivers in execution only relationships.

The Federal Supreme Court (FSC) had to rule on the appeal of a bank client (or rather its assignee) who had brought a largely unsuccessful claim for the surrender of retrocessions before the Commercial Court of the Canton of Berne (HG 22 21 of 6 September 2023). This gave the FSC the opportunity to rule, for the first time, on the conditions under which clients can waive their rights to retrocessions in execution-only banking relationships.

Assessment of the waiver by the Commercial Court of Berne

The Commercial Court had denied the bank's obligation to hand over the retrocessions it had received since 2013. The Court held that the client had accepted the bank's General Terms and Conditions of 2013, which, according to the Commercial Court, contained a valid waiver (consid. 15.4.2):

The Commercial Court considered that the waiver clause (printed in consid. 14.3.2 et seq.) described the calculation method of the retrocessions. For investment funds, the supplementary information sheet provided for percentage bandwidths for each product category. The Court further considered that percentages paid to the bank's group companies and to third-party companies were addressed separately and that the retrocessions were expressed as a percentage of the investment volume on an annual basis. For structured products, the distribution fee was separately provided as a percentage (consid. 15.4.2).

The Commercial Court held that this level of information fulfilled the requirements defined by the FSC, as the client knew *«for which transactions (reason for the remuneration) which remuneration (type of remuneration) was due, and in what amount»*. In addition, by comparing the different product categories, the client could see where the bank's conflict of interest was particularly pronounced (consid. 15.3). Furthermore, the client was entitled to request further information on the retrocessions at any time (consid. 15.4.2).

Reasoning of the Federal Supreme Court

Before the FSC it was disputed whether the lower instance was right to decide that the client had validly waived his entitlement to the retrocessions.

The FSC first repeated the detailed reasoning of the Commercial Court (consid. 4.1) and then concluded that the client had failed to show that the decision of the lower instance violated federal law (consid. 4.2).

It thus supported the opinion of the lower court that the disclosure of percentage bandwidths per product category is sufficient. The FSC also criticized the client for not responding to the lower court's finding that he had the right to request more detailed information at any time (consid. 4.2).

FSC leaves open question regarding hand over duty in execution-only relationships

Since it confirmed the existence of a valid waiver, the FSC did not have to decide whether there actually is an obligation to surrender retrocessions in an execution only relationship pursuant to art. 400 para. 1 CO (consid. 4.2 in fine).

Remarks

To date, the FSC only had to deal with waiver requirements in the context of discretionary asset management mandates (FSC judgement 138 III 755 consid. 6; 137 III 393, consid. 2; 4A_355/2019 of 13 May 2020, consid. 3.2). In each of these cases, it denied the existence of a valid waiver.

Therefore, the judgment of 27 February 2024 is significant in two respects: Firstly, the FSC, for the first time

ever, accepted the wording of a waiver clause as sufficient. Secondly, for execution only relationships, it held that it is sufficient if the amounts paid are disclosed as a bandwidth of percentages *per product class*, provided that the customer has the right to request further information at any time.

The detailed clause cited by the Commercial Court of Bern in its judgement can therefore – with due caution – serve as a model for a waiver clause that meets the requirements of the FSC. Whether a less detailed clause would also have sufficed is not clear though.

It equally remains unclear whether there is, pursuant to art. 400 para. 1 CO, in principle an obligation to surrender retrocessions in execution only relationships. Legal doctrine disagrees on the issue, and cantonal courts have taken different positions. The Commercial Court of Berne in the present case held that an obligation to surrender retrocessions exists in execution only relationships, as the Commercial Court of Zurich has decided in several decisions (see, e.g., HG190234 of 5 October 2021, consid. 2.3 et seq.; HG210223 of 21 June 2023, consid. 6). However, other cantonal courts denied such an obligation (e.g. Commercial Court of St. Gallen, HG.2018.11 of 12 September 2019, consid. 3.3, and Geneva Court of First Instance, JTPI/4669/2023 of 19 April 2023). One would hope that this question will in due course be clarified by the FSC, which would enhance legal certainty in a highly controversial area.

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