

Retrocessions before the Federal Supreme Court

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

Until 2006 it was common for custodian banks to pay independent managers a share of the brokerage commissions and custody fees generated by their clients, and for fund providers to pay distribution fees, without the clients being told the amounts. The Federal Supreme Court ended this practice in a series of decisions based on Article 400 paragraph 1 of the Code of Obligations, under which the agent must account for his conduct of the mandate and hand over everything he has received in connection with it.

In BGE 132 III 460 of 22 March 2006 (4C.432/2005), a foundation sued an independent asset manager for the retrocessions and finder's fees he had received from banks. The Court held that such payments fall under the duty to hand over in Article 400 CO, since they are indirect advantages that the agent receives because of the mandate. The client's silence is not a waiver. A waiver requires an agreement from which the clear intention of the informed principal follows. The fact that, according to a survey cited in the proceedings, 81 per cent of independent managers retained retrocessions did not establish a customary remuneration under Article 394 paragraph 3 CO.¹

In BGE 137 III 393 of 29 August 2011 (4A_266/2010), a pension fund sued an asset management company. The Court specified the requirements for a valid advance waiver. The client must know the parameters for calculating the retrocessions and their expected magnitude, expressed as a range in per cent of the managed assets. A merely general reference to the possibility of retrocessions is not sufficient.² On 30 October 2012, in judgments 4A_127/2012 and 4A_141/2012, the Court held that a bank acting as discretionary asset manager must also hand over the trailer fees it receives from product providers, including fees paid by companies of its own group. The reason was that the conflict of interest exists irrespective of whether the payment comes from an external or an affiliated provider.

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The holding concerns asset management mandates and not mere advisory or execution-only relationships.³ Finally, in BGE 143 III 348 of 16 June 2017 (4A_508/2016), the Court decided that the claim to hand over retrocessions is subject to the ordinary ten-year limitation period of Article 127 CO, which runs separately for each retrocession from the day on which the agent received it.⁴

Decision Date Holding BGE 132 III 460 22 Mar Retrocessions must be handed over unless 2006 informed waiver BGE 137 III 393 29 Aug 2011 Waiver requires parameters and expected range 4A_127/2012 30 Oct 2012 Trailer fees to banks, including intra-group BGE 143 III 348 16 Jun 2017 Ten-year limitation from each receipt

1 Notes

1. BGE 132 III 460 of 22 March 2006 (4C.432/2005), <https://servat.unibe.ch/dfr/bge/c3132460.html>. ↩
2. BGE 137 III 393 of 29 August 2011 (4A_266/2010), <https://servat.unibe.ch/dfr/bge/c3137393.html>. ↩
3. Federal Supreme Court, judgments 4A_127/2012 and 4A_141/2012 of 30 October 2012, as summarized in "Bundesgerichtsurteil zu Retrozessionen (Kickbacks)", law.ch, 13 December 2012, <https://law.ch/lawnews/2012/12/bundesgerichtsurteil-zu-retrozessionen-kickbacks/>; published as BGE 138 III 755, <https://servat.unibe.ch/dfr/bge/c3138755.html>. ↩
4. BGE 143 III 348 of 16 June 2017 (4A_508/2016), <https://servat.unibe.ch/dfr/bge/c3143348.html>. ↩

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