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Enforcement of Retrocessions in Switzerland

Financial service providers are obliged to reimburse wrongfully retained benefits to their clients.



A. Introduction

The term retrocession refers to all types of benefits (commissions, portfolio maintenance commissions, kickbacks, finder's fees, sales compensation, inducements, discounts, disagios, benefits in kind, etc.) received by an asset manager in the course of their services. Banks and asset managers in Switzerland have retained retrocessions instead of delivering them to clients for decades. That means billions of Swiss francs have been wrongly retained at the expense of clients. On average, clients have lost up to 1% of their assets under management per year.

It is obvious that retrocession leads to conflicts of interest for banks and asset managers. The conflict of interest consists in the fact that maintaining the kickbacks for the asset manager takes precedence over the client's interests.

It is precisely for this reason that the Swiss courts have declared the retention of retrocessions inadmissible, which leads to today's well established case law in this matter.

B. Legal Basis in Switzerland

Key decisions of the Swiss Federal Supreme Court

In 2006, the Swiss Federal Supreme Court ruled in a landmark decision that retrocession granted to asset managers belong to the client and therefore need to be reimbursed.

In October 2012 the Swiss Federal Supreme Court subsequently ruled a Swiss bank to reimburse retrocessions to its client with retroactive effect. This judgement made clear that clients with an asset management agreement are entitled to all retrocessions that financial service providers receive from third parties.

The same court ruled, on a later occasion, that claims arising from retrocessions are subject to a 10-year limitation period. Consequently, retrocession can also be claimed for the past and are subject to an interest rate of 5%. This means that all benefits received by the bank or the asset manager during this period must be returned to the client, together with a 5% interest rate from the date of accrual.

Obligation to report and hand over kickbacks

The Supreme Court's decisions are based on the Swiss Code of Obligations itself, according to which the contractor is obliged to fully report their services provided to the client at all times and to deliver everything received from third parties in the course of this activity.

In this context, it is important to note that the obligation of accountability exists irrespective of whether or not the bank has withheld retrocession, meaning that the client is in any case entitled to receive accounts about retrocessions from any bank they did or are doing business with.

It is important to point out that the corresponding provisions of the Swiss Code of Obligations have existed for a long time and that Swiss banks have been aware of the legal situation for many years, which leads directly to the matter of the handling of this issue by Swiss banks.

One might assume that the Swiss banks would react in the best interest of their clients in the light of these Supreme Court rulings and the clear legal situation and release the unduly withheld benefits.



In fact, even in this situation, the Swiss banks have tried to find ways to withhold these benefits from clients by asking for waivers. For a waiver to be valid, however, certain conditions must be met. A general waiver is not valid in every case. Whether a waiver exists and whether such waiver is valid has to be examined on a case-by-case basis.

At this point, the lawyers of Schwärzler Attorneys at Law assume responsibility for the client's interests by conducting countless proceedings against Swiss banks and recovering millions of client funds.

C. Our Approach

In a first step, we contact the bank or the asset manager in order to obtain an overview of the kickbacks received by the bank or the asset manager during the last 10 years. In a second step, we evaluate the amount of the claim and in a third step we assert the kickback claims against the bank or the asset manager.

Due to the clear case-law and the clear legal situation as well as the formalistic proceeding, the costs for such proceedings can be kept comparatively low. In doing so, we always endeavour to proceed with the greatest care for our customers and to achieve the best result possible.

D. Conclusion

In summary, one can state that the banks' practice of having hidden commissions guaranteed by financial product providers for the investment of client assets, is not lawful in Switzerland.

For decades, Swiss banks and asset managers have been profiting from this circumstance, depriving their clients of benefits which should actually have been paid out to them. Consequently, there is an immediate need for action to prevent these claims against banks and asset managers from lapsing.

In general, kickbacks can be enforced simply and cost-effectively. Schwärzler Attorneys at Law offers high quality support by experienced lawyers in this field.



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