

Helmut Schwärzler, Martin Hermann, Lukas-Florian Gilhofer: “Retrocessions: June 1, 2023, as a Turning Point for Liechtenstein’s Financial Center?” (LJZ 4/23)

Vaduz, 11.01.2024

ABSTRACT

This article provides an overview of recent developments on the topic of retrocessions, focusing on the transformative impact of the new § 1489a para. 2 GCC which fundamentally changed the statute of limitations for retrocession-related claims in Liechtenstein.

The amended provision now dictates that claims for disclosure and surrender of retrocessions against FMA-authorized financial intermediaries expire three years after the client becomes aware of retrocessions, or in any case, 10 years after the transaction occurred, reducing the previous 30-year limitation period.

As of June 1, 2023, the new regulation also applies retroactively. It was therefore necessary for clients of banks and asset managers to take measures in order to avoid losing comprehensive claims for disclosure and surrender of retrocessions. Board members of corporations or trusts face heightened risks of liability, amplifying the imperative for preventative actions.

In practice, the new statute of limitation has led to a large number of disclosure and surrender requests against Liechtenstein banks. While many banks have complied with the disclosure requests, they have often resisted surrendering retrocessions, resulting in a substantial number of lawsuits still pending before Liechtenstein courts. In response to various arguments brought by banks opposing retrocession surrender claims, the article refutes these positions by emphasizing established jurisprudence from the Liechtenstein Supreme Court and the Constitutional Court.

The article also raises concerns about potential violations of the new statute of limitations in light of the EFTA Court decision E-14/20 and the European principle of effectiveness.

In the meantime, the EFTA Surveillance Authority (ESA) has actively initiated a critical examination of the statute, informing the Liechtenstein Government of possible violations which depending on the course of subsequent proceedings could potentially lead to a formal request for the repeal of the newly introduced legal provision. Since this development occurred after the article had already been submitted for publication, it could not be included in the manuscript anymore.

The article then analyses how the legal framework in Liechtenstein has changed since the introduction of MiFID II. It is argued that retrocessions are now only permitted in the context of execution-only business relationships, under the condition that these payments are intended to enhance service quality and are transparently disclosed to the client before the financial services were provided. In the context of asset management and investment advice, the authors assert that retrocessions are now prohibited.

The article concludes by offering practical recommendations for the appropriate management of retrocessions. It delves into how financial institutions and asset managers should navigate the receipt of retrocessions, emphasizing best practices. Additionally, the article elucidates essential steps clients must take to safeguard their claims and prevent any loss in connection with retrocessions.

