BÄR & KARRER

Briefing July 2017

Leading Case of the Swiss Federal Supreme Court on the Statute of Limitation applicable to Claims for Restitution of Retrocessions

In its decision of 16 June 2017 the Swiss Federal Supreme Court held that the obligation to account for and pass on retrocessions to the client under the law on mandates (article 400 (1) CO) is subject to a **ten year statute of limitation starting to run as of the receipt of the retrocessions by the agent** (decision of the Swiss Federal Supreme Court 4A_508/2016). Until this decision, the matter was a subject of controversy among Swiss scholars, who debated both the duration of the statute of limitation (five or ten years) and the point in time as of when the statute of limitation starts to run (as of the receipt of the retrocessions or as of the termination of the mandate agreement).

Case Facts

In 1994 and 1995, the claimant, a transport association, mandated the defendant, an insurance brokerage firm, to develop and structure an insurance concept for its members. The insurance brokerage firm concluded contracts with several insurance companies on behalf of the transport association. In 2005, the transport association discovered that the insurance brokerage firm had received a percentage amount of the insurance premiums as retrocessions from the insurance companies. The transport association immediately terminated the contract with the insurance brokerage firm.

In 2007, the transport association filed a suit with the Court of First Instance of the Canton of Geneva to claim, among other items, the restitution of the retrocessions. The Geneva court held that a ten year statute of limitation should apply to such claims, starting to run as of the date of termination of the mandate agreement. The Court of Appeals of the Canton of Geneva confirmed the decision of the lower court in 2016. The insurance broker then appealed to the Swiss Federal Supreme Court.

On appeal from the insurance brokerage firm, the Swiss Federal Supreme Court had to decide on (a) the applicable statute of limitation period for the obligation to account for and pass on retrocessions and (b) the point in time as of when the statute of limitation starts to run.

Clarification on the Statute of Limitation

Controversy on Applicable Time Period and Starting Point in the Past

Since the leading case on retrocessions FSC 132 III 460 et seq. of the Swiss Federal Supreme Court in 2006, Swiss scholars have debated the relevant

time period and starting point of the statute of limitation for the obligation to account for and pass on retrocessions under article 400 (1) of the Swiss Code of Obligations (CO). While some legal scholars held that the obligation was subject to the general rule of a ten year statute of limitation under article 127 CO, others, probably the majority, argued that the restitution of retrocessions was periodically owed and, as a result, subject to a five year statute of limitation under article 128 (1) CO, which applies to recurrent payments. Furthermore, while some legal scholars held that the statute of limitation starts to run as of the date of termination of the mandate agreement between the financial service provider and the client, others took the view that the starting point is the receipt of the relevant retrocessions by the financial service provider.

In 2012, the Court of Appeals of the Canton of Zurich ruled that the obligation to account for and pass on retrocessions was subject to a ten year statute of limitation starting to run as of the termination of the mandate agreement (decision of the Court of Appeals of the Canton of Zurich LB090076 dated 13 January 2012, p. 26). In contrast, in 2014, the Regional Court of Berne-Mittelland ruled that the obligation to account for and pass on retrocessions was subject to a five year statute of limitation starting to run as of the receipt of the retrocession.

In summary, the views ranged between the extremes of a) a statute of limitation of five years as of the receipt of the respective retrocession and b) a statute of limitation of ten years as of the termination of the mandate agreement.

Swiss Federal Supreme Court's Decision
In its decision, the Swiss Federal Supreme Court resolved this controversy. It held that retrocessions do not arise from a contract of duration as they have not been agreed by the principal and the agent in advance. Each obligation to account for and pass on retrocessions is founded on a separate basis. Therefore, retrocessions usually do not qualify as recurrent payments and, consequently, the five year statute of limitation (article 128 (1) CO) does not apply. In contrast, the agent's obligation to account for and pass on the received retrocessions to the principal is subject to the ordinary ten year statute of limitation under article 127 CO. In this respect, the Swiss Federal Supreme Court confirmed the decision of the cantonal courts of Geneva.

However, the Swiss Federal Supreme Court held that the agent's obligation to account for and pass on a retrocession to the principal is due on the date of receipt of each individual retrocession by the agent irrespective of when the principal becomes aware of the claim and of its maturity. Under article 130 (1) CO the limitation period starts to run as soon as an obligation is due. Consequently, the Swiss Federal Supreme Court ruled that the limitation period for the restitution of each retrocession starts to run on the day the agent receives the payment and overruled the decisions of the cantonal courts on this matter.

Outlook

This decision is the latest development in the ongoing legal saga on retrocessions. It comes more than ten years after the initial leading case on retrocessions of the Swiss Federal Supreme Court (FSC 132 III 460 et seq.) referring to an independent asset manager but less than five years after the Swiss Federal Supreme Court's further widely noticed precedent of 2012 (FSC 138 III 755 et seq.) referring to a bank as asset manager, which led to the revision of FINMA-circular 2009/1 Guidelines on Asset Management in 2013.

However, while this decision is an important development on a controversial legal issue, it is not likely to send a shock wave through the industry on the same scale as the previous decisions. Most financial service providers have already adapted their terms and conditions and included disclosure fact sheets governing their client relationships in order to meet the standard set by the Swiss Federal Supreme Court for a valid waiver of the obligation to pass on retrocessions. Many even sought to resolve the legacy issues by obtaining a waiver of the obligation to pass on past payments. Others have even adapted their business model to meet the more exacting standard applicable to pension funds and are no longer compensated through distribution fees.

Moreover, except in particular circumstances, we would expect that clients who were inclined to ask for the disgorgement of retrocessions have already done so. Indeed, the issue was widely publicized then and even if, contrary to the expectation of several pundits at the time, clients did not rush to raise a claim against their bank, it was not because they were unaware of their rights, but, more probably because they did not consider it worthwhile to compromise a business relationship with their financial advisors. The issue will, however, remain important for cases that are pending and perhaps in an M&A or exit context, where clients may feel more inclined to act than usual.

Practically speaking, with the exception of these particular circumstances, this matter should mainly concern legacy issues for claims which were not settled until now. In this respect, the decision of the Swiss Federal Supreme Court cuts both ways: on the one hand, it opted for a ten year statute of limitation. On the other, it limits the exposure in so far as it considered that the statute of limitation starts to run as of the receipt of the retrocession. Overall, following this decision, the risk of possible restitution claims should be limited to known instances and should diminish as time goes by.

Looking to the future, the bill for a Swiss Federal Financial Services Act (FinSA), which is currently pending in parliament, proposes – contrary to MIFID II – to continue to permit retrocessions. It will, however, codify the rules on disclosure and consent developed by the Swiss Federal Supreme Court. The FinSA is currently expected to enter into force in 2019, at the earliest.

Your Key Contacts

Dr. Peter Hsu
Partner
T: +41 58 261 53 94
peter.hsu@baerkarrer.ch

Prof. Dr. Rashid Bahar
Partner
T: +41 58 261 53 92
rashid.bahar@baerkarrer.ch

Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich

Telephone: +41 58 261 50 00
Fax: +41 58 261 50 01
zurich@baerkarrer.ch

baerkarrer.ch
Zurich, Geneva, Lugano, Zug