No Duty to Return Retrocessions in Execution-Only Banking Relationships

Published today, the Swiss Federal Supreme Court's decision of 12 January 2026 provides for a much-awaited clarification on the treatment of retrocessions in execution-only banking relationships. The Swiss Federal Court ruled that banks are not required to return retrocessions received in pure execution-only relationships, distinguishing them from asset management mandates where restitution is mandatory, unless validly waived by the client.

Facts

A private bank maintained an execution-only relationship with a client from 2010-2017, receiving CHF 31,477 in retrocessions from fund promoters and product issuers. The bank's general conditions disclosed that it could receive third-party payments as supplementary remuneration and that the client had no entitlement to such payments. Restitution of the retrocessions was subsequently claimed under Article 400 (1) of the Swiss Code of Obligations (CO).

The Court's Analysis

The Central Criterion: Conflicts of Interest

The Court reaffirmed that the duty to return third-party benefits hinges on whether they create a risk of conflict of interest. Mere enrichment of the mandatary is insufficient, as there must be a risk that the mandatary will prioritise its own interests over the client's.

In discretionary asset management, banks make autonomous investment decisions and may be tempted to favour higher-retrocession products, creating a clear conflict of interest requiring restitution. By contrast, in execution-only relationships, banks merely execute client instructions without discretion or advice. The client independently selects all investments, and the bank cannot influence which products are chosen or predict which retrocessions it will receive.

In the case at hand, the Court found no conflict of interest risk because: (i) the client made all investment decisions autonomously, with requisite knowledge and experience; (ii) the bank had no discretion or advisory role; (iii) retrocession receipt and amount depended solely on client decisions, not bank conduct; and (iv) no evidence showed the bank chose between platforms or brokers based on retrocession levels.

The Nature of Distribution Commissions

The Court further noted that the retrocessions at issue were distribution commissions paid by product providers pursuant to pre-existing distribution agreements. Such commissions (i) are typically calculated on assets under management at fund level; (ii) compensate distributors for infrastructure and distribution efforts; and (iii) are not negotiated individually per client.

While they may fall within the scope of Art. 400 CO in asset management contexts, their nature does not automatically trigger restitution in execution-only settings. Absent discretionary power or advisory influence, the intrinsic link required for restitution is missing.

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Commentary

This ruling significantly narrows the scope of retrocession litigation by confirming that the conflict-of-interest principle, not mere enrichment, determines retrocession treatment. Key considerations:

- **Operational reality matters:** Execution-only relationships must be genuinely passive. Any element of advice, recommendation, or discretion could shift the analysis toward advisory mandates where conflicts arise.
- **Client sophistication appears to be irrelevant:** The Court's reasoning is structural – in execution-only mandates, there is no conflict of interest because the bank has no discretion, regardless of whether the client is sophisticated or not.
- **Financial Services Act (FinSA) Compliance:** The Court confirmed that FinSA Article 26 is a purely prudential (public law) obligation with no direct effect on private law relationships. While Article 26 applies to all financial services including execution-only, it also uses the conflict-of-interest criterion. Absent such conflict, Article 26 obligations do not arise according to the Court.

Takeaway: The decision turns on operational reality, not contractual labels. Banks must ensure execution-only relationships remain genuinely passive – any advisory element or discretionary decision-making exposes them to potential restitution claims.

Should you require any further information on this subject, please do not hesitate to contact the authors or your usual contact person at Borel & Barbey. Our specialists will be pleased to assist you.



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