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NOTE	
date	**August 19, 2020**
to	**Clients**
from	**Philippe Jacquemoud & Roxane Allot**
cc	
re.	**New Decision of the Swiss Supreme Court on Retrocessions: Tightened Conditions**

I. Introduction

On May 13, 2020, the Swiss Supreme Court rendered a new decision addressing the sensitive question of inducements (*i.e.*, retrocessions) related to discretionary mandates (4A_355/2019).

II. Established Case Law on Retrocessions

In its leading decision ATF 137 III 393, the Swiss Supreme Court had the occasion to set strict rules pertaining to the admissibility of retrocessions. A client may validly waive in advance (*e.g.*, in the discretionary mandate agreement) her right to the repayment of retrocessions her wealth manager might receive from third parties (*e.g.*, from the bank) if she received *full information* on the expected retrocessions.

The criteria of *full information* is aimed at putting the client in the position to compare (i) the aggregate amount of the retrocessions, to (ii) the fees charged by his wealth manager. By doing so, the client can understand and assess the final amount of the wealth manager's total compensation. According to the reasoning adopted by Swiss Supreme Court in the case ATF 137 III 393, a client is deemed to be *fully informed* (and may therefore validly waive in advance her right to repayment of retrocessions) if she receives information on:

— the parameters on which the retrocessions are calculated as per the agreement concluded between the wealth manager and the third party; and

— the range of the expected retrocessions which shall be indicated as a percentage of the assets under management.

III. New Decision of the Swiss Supreme Court

In its new decision 4A_355/2019, the Swiss Supreme Court had to rule whether the client's advance waiver to the repayment of retrocessions was valid. The following contractual clauses were under examination:

— Article 7.4. of the discretionary mandate set forth that the asset manager may have received retrocessions, commissions or other benefits from the custodian bank or from third parties which were deemed to form an integral part of its remuneration. The client waived the right to claim back the retrocessions;

— Article 4 of the information notice (signed by the clients) set forth that:

  - the asset manager may have received from third parties a certain percentage of the invoiced revenues (*i.e.*, commissions invoiced by the custodian bank to the client) which will have varied depending on the revenues' categories (management commission, swiss brokerage). This percentage may have ranged from 0% to 62% of the amount invoiced by the bank (the **Retrocession #1**)

  - the asset manager may have received from third parties a retrocession based on the volume invested in funds, structured products or other products. The percentage may have ranged between 0% and 1% of the invested amount (the **Retrocession #2**)

To sum up, the asset manager might have received (i) fees for the wealth management services, (ii) Retrocessions #1 and (iii) Retrocessions #2.

After having requested to be provided with the aggregate amount of retrocessions received by the asset manager over the years, the client terminated the discretionary mandate and asked for the reimbursement of the retrocessions. The asset manager refused and the client filed a claim in repayment of the retrocessions amounting to CHF 30,000.

The client argued that article 4 of the information notice did not put the client in the position to assess the amount of the expected retrocessions since the percentage of the Retrocession 2 was based on the "*invested amount*" which fluctuates as a result of the investments effectuated by the asset manager on behalf of the client. We understand that the client did not challenge the validity of the waiver related to the Retrocession 1.

The Swiss Supreme Court followed the argument raised by the client and held that Article 4 of the information notice did not provide sufficient information to the client. It ruled that the percentage applied to the "*invested amount*" allows only to calculate the retrocessions linked to hedge funds or structured products but does not give, at the time when no investment has yet been effectuated (*i.e.*, at the beginning of the contractual relationship), any information on the amount of the retrocessions, which might be received by the asset manager. To be in such position, the asset manager should have provided the client with the range of percentage that such retrocessions may represent when such percentage is applied to the assets under management.

IV. Recommendations

This court precedent may have a quite significant impact.

As a matter of facts, numerous discretionary mandates contain contractual clauses pursuant to which retrocessions are calculated based on the percentage of the *amounts or volumes invested.*

Although the reasoning of the Swiss Supreme Court in its decision 4A_355/2019 is rather succinct, it seems that the conditions developed in the leading case ATF 137 III 393 to waive in advance the right of the repayment of retrocessions are strictly interpreted and applied by the federal judges.

Based on the risks associated therewith, we advise asset managers to carefully review their contractual clauses to make sure the potential retrocessions are expressed or determined as a percentage of the *assets under management* as opposed to *amounts or volumes invested*.

It is however not always easy since some retrocessions, depending on their source, are typically expressed as proportions of other parameters. This may notably be the case of the following retrocessions:

— Retrocessions paid by the custodian bank calculated as a percentage of the fees invoiced by the bank to the client;

— Retrocessions paid by fund managers (*e.g.*, bond funds, hedge funds, private equity) calculated on (i) amounts invested (*e.g.*, private equity) or (ii) fees invoiced by the fund managers to the client;

— Retrocessions paid by brokers related to structured products calculated on invested amounts.

In the above-mentioned cases, we advise to add (i) the range of each potential retrocessions expressed and (ii) the maximum limit of the aggregate retrocessions, both as a percentage of the *assets under management*.

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We remain at your disposal in case of queries and to review your contractual clauses to make sure they comply with the strict rules set out by the Swiss Supreme Court.