

NEWSLETTER

JULY 2017

Authors: Bettina Rudin and Joana Meier



Clarification of the prescription period for the restitution of retrocessions

The Swiss Federal Supreme Court (hereafter the “Supreme Court”) clarified in a recent decision the prescription period for the restitution of retrocessions (decision 4A_508/2016 of 16 June 2017).

The Supreme Court first reminds of the obligation of the agent to give an account of his agent activities at the principal’s request, which may be made at any time, and to return anything received for whatever reason as a result of such activities. This obligation of restitution also applies to indirect benefits, which the agent receives from third parties as a consequence of the mandate, unless the agent and the principal agreed that the agent shall keep such benefits. Such indirect benefits are for instance retrocessions, rebates, trailer fees, etc., which the agent – for instance a bank or asset manager - receives from third parties (e.g. a collective investment scheme) in the frame of the mandate.

However, so far, the Supreme Court has not yet had the occasion to decide on the question whether the obligation of the agent to return the retrocessions to the principal prescribes after the expiry of the ordinary prescription period of 10 years or after the 5 years’ prescription period which applies among

others to periodic payments, interests on capital and rents. In the doctrine, it was disputed whether the 10 years’ or 5 years’ prescription period applies to the restitution of retrocessions. This question has now been clarified. The Supreme Court confirmed that the prescription period expires after 10 years. In doing so, the Supreme Court refuses to qualify the claim for restitution of retrocessions as a periodic payment.

According to Swiss law, the prescription period begins when the debt is due. Regarding retrocessions, the Supreme Court clarified, that the prescription period begins regarding each retrocession payment separately, i.e. on the date of receipt of the respective retrocession payment by the agent.

In practice, the prescription period is of high importance, because the clients of agents such as banks, asset managers, etc. learn often only after many years that their agent received retrocessions. This court decision is also important for the agents having received retrocessions who have not yet clarified the situation with their clients in the context of retrocessions. The amounts to be restituted to the clients may be substantial.

The content of this Newsletter does not constitute legal advice and may not be relied upon as such. For professional and personal advice please contact us at Suter Howald Attorneys at Law.



Bettina Rudin

Partner

Bettina.rudin@suterhowald.ch



Joana M. Meier-Pinheiro

Associate

Joana.meier@suterhowald.ch

Suter Howald Rechtsanwälte – Attorneys at Law

Stampfenbachstrasse 52

Postfach

CH-8021 Zürich

Tel. + 41 44 630 48 11

Fax + 41 44 630 48 15

www.suterhowald.ch