SWISS FEDERAL SUPREME COURT ENDS THE RETROCESSION SAGA: NO RESTITUTION DUTY IN EXECUTION-ONLY RELATIONSHIPS

In a landmark decision (4A_149/2025, 12 January 2026), published on 13 February 2026, the Swiss Federal Supreme Court has now clarified a two-decade uncertainty and confirmed that retrocessions received by the bank in execution-only mandates are not subject to restitution either under Art. 400 para. 1 of the Swiss Code of Obligations ("SCO") or Art. 26 of the Financial Services Act ("FinSA").

The Federal Supreme Court determined that, within an execution-only relationship, the bank's responsibilities are confined exclusively to carrying out the client's instructions. Consequently, any retrocessions received are solely attributable to the client's orders and do not present a conflict-of-interest risk. Since both Art. 400 SCO and Art. 26 FinSA require the presence of such a risk—which is absent in an execution-only context—there is no obligation to provide restitution under this framework.

FACTUAL BACKGROUND

In 2001 and 2008, a private client (the "**Client**") opened two accounts (one joint account and one individual account) with a private bank (the "**Bank**"). In connection with the individual account, the Client notably signed: (i) an account opening form governing the contractual relationship, which expressly referred to the Bank's general terms and conditions, (ii) a risk profile questionnaire confirming knowledge, experience and risk appetite for hedge-fund investments and (iii) written confirmations defining the relationship as non-discretionary and excluding any asset management or advisory mandate.

The applicable general terms and conditions included provisions – highlighted in bold – informing the Client that the Bank was authorised to receive commissions, retrocessions or other forms of indirect remuneration from third parties in connection with transactions executed for the Client's account and specified the scale of magnitude of such third-party benefits. They further stated that the Client waived any right to their restitution.

Between 2010 and 2017, the Bank received a total of CHF 31,477 in retrocessions linked to transactions executed for the Client's account. After the account was closed, the Client assigned her claims to a company specialising in financial claim acquisition and enforcement, which then sought restitution of the retrocessions against the bank. The latter refused, arguing that the relationship was execution-only and that any restitution claims had been validly waived.

THE LONG ROAD ON RETROCESSIONS – TWO DECADES OF SWISS CASE LAW

Over the past two decades, the Federal Supreme Court has developed a substantial body of case law on retrocessions, settling most major controversies – except one until the decision addressed in this briefing: whether restitution duties apply in execution-only relationships.

Below is an overview of this long journey and the sequential findings made by the Federal Supreme Court in successive rulings, that are summarized hereafter:

- **2006**: Retrocessions received by an external asset manager in connection with an asset management relationship must be returned to the client (art. 400 CO). The client can waive the right to the return of the retrocessions, but only if the client is informed of the existence of such retrocessions and expressly agrees to the manager retaining them (ATF 132 III 460).

- **2011**: Waivers given in advance require disclosure of: i) the key parameters of the retrocession agreements concluded with third parties and ii) the approximate scale of the expected retrocessions at least in amount ranges (ATF 137 III 393).

- **2012**: Distribution fees and asset management fees must be treated like classical retrocessions in the context of portfolio management mandates (ATF 138 III 755).

- **2017**: Restitution claims on retrocessions are subject to a ten-year limitation period, commencing upon the bank's receipt of the respective retrocessions (ATF 143 III 438).

- **2020**: Clarification of jurisprudence on waivers: the latter are invalid if disclosure is incomplete; clients must be informed on the total level of the expected retrocessions expressed in proportion to the client's assets entrusted to the financial adviser (4A_355/2019 of 13 May 2020).

- **2022**: In this long-awaited decision, the Federal Supreme Court dashed hopes for a clear answer on restitution duties in execution-only relationships, as it ultimately left the question unresolved (TF 4A_601/2021 of 8 September 2022).

- **2024**: Three years later, the Federal Supreme Court declined, once more, to provide a definitive answer on restitution duties in execution-only relationships but clarified waiver rules in this context (TF 4A_496/2023 of 27 February 2024).

FEDERAL SUPREME COURT'S ANALYSIS

THE DOCTRINAL CONTROVERSY

In its decision rendered this month, the Federal Supreme Court opened its reasoning with a structured review of the scholarly position on the restitution of retrocessions. As seen above, because it had repeatedly refrained from deciding whether a restitution obligation applies to execution-only mandates, this unresolved question sparked extensive doctrinal debate.

Some authors **oppose a restitution obligation** in execution-only mandates, arguing that because the client independently chooses investments and the bank merely executes orders, no conflicts-of-interest risk arises and, consequently, no restitution duty is triggered. They stress the economic rationale for retrocessions, viewing them as remuneration for the bank's trading infrastructure, distribution efforts and access to products, rather than as benefits improperly enriching the bank. A few scholars also advocate a holistic causal analysis, considering the client's order as only one of the factors underpinning the retrocession, so that it is not intrinsically linked to the execution of the mandate.

By contrast, some authors **support a restitution obligation** in execution-only mandates, noting that the rules of mandate law, including the duty to return benefits (Art. 425(2) SCO cum Art. 400 SCO) apply. On that basis, they argue that Art. 400 SCO is not solely about preventing conflicts of interest, but that it also serves an attribution function, ensuring the principle of non-enrichment of the bank. According to this view, a direct link exists between the retrocessions and the mandate: the investor's transactions trigger the payments, evidencing an intrinsic connection to the acts performed by the bank for the client.

Some scholars additionally highlight latent conflicts-of-interest risks, for example if the bank is incentivised to select platforms or brokers offering higher retrocessions. Others also point to operational risks, such as front-running or parallel running, which may be elevated even in execution-only relationships.

Cantonal case law reflected a similar divergence. Some courts (e.g. Zurich Handelsgericht) extended the restitution duty to execution-only relationships, while others approached the issue more cautiously (e.g. Geneva courts).

THE COURT'S HOLDING: NO CONFLICT OF INTEREST, NO RESTITUTION DUTY

The Federal Supreme Court has now settled this important controversy: no restitution obligation arises in execution-only relationships due to the absence of conflicts-of-interest risks. The reasoning of the Court can be summarised as follows.

In an execution-only relationship, the bank simply follows client instructions without offering advice or exercising discretion. Retrocessions result directly from client orders, but restitution depends on whether conflicts of interest exist — not just enrichment. The main issue is whether third-party benefits influence the bank against the client's interests, which must be evaluated within the client-bank contract and relevant context. Agreements with product providers only matter if they threaten the bank's duty to act in the client's best interest.

In the present case, the retrocessions under consideration comprised distribution fees paid by product providers such as fund managers or issuers of structured products. The Federal Supreme Court determined that, within this context, distribution fees received by the Bank were generally not subject to restitution, as they were not inherently associated with the execution of the mandate and did not generate conflicts of interest. These fees—which are calculated based on the total volume of products—are intended to compensate the Bank and offset infrastructure and distribution expenses, rather than posing any conflicts-of-interest concerns. In an execution-only relationship, the Bank's involvement is limited to carrying out the client's instructions; consequently, it has no influence over the quantity of products purchased nor the ability to impact its own compensation. Therefore, the fees obtained are not fundamentally related to the mandate.

Furthermore, the Court stressed that in an execution-only relationship, the bank has no general duty to safeguard the client's interests or to provide broad information. In this case, the Client had the necessary knowledge and experience, as confirmed by the risk profile, and chose investments independently. Before receiving the Client's orders, the Bank could not know which transactions it would execute or what retrocessions might result therefrom. As a result, the retrocessions depended solely on the Client's decision to place an order, not on any conduct of the Bank. As the Bank had no discretion over investment decisions, it could not be influenced by its own financial interests, unlike an asset manager who independently decides on transactions. Accordingly, no conflicts of interest existed.

Finally, the Court rejected arguments suggesting conflicts could arise from the choice of trading platforms or brokers offering higher retrocessions. The Bank had no discretion in platform selection, and the Client was aware of platforms, brokers and fees. According to the Federal Supreme Court, operational risks such as front-running or parallel trading are inherent in financial markets, but do not affect restitution obligations in execution-only relationships.

ART. 26 FINSA MIRRORS ART. 400 SCO: RESTITUTION ONLY IF CONFLICT RISK EXISTS

The Federal Supreme Court also clarified that Art. 26 FinSA follows the same logic as Art. 400 SCO. FinSA's rules on third-party remuneration are supervisory in nature and do not expand the civil-law restitution duty. Like under Art. 400 SCO, the decisive criterion under Art. 26 FinSA is the existence of a conflicts-of-interest risk. Since no such risk arises in an execution-only relationship, Art. 26 FinSA does not require the bank to return retrocessions.

CONCLUSION AND PRACTICAL TAKEAWAYS

The decision of the Federal Supreme Court brings welcome clarity to an area that had remained unsettled for far too long. By delineating the limits of restitution duties in execution-only relationships, the Court draws a clearer line between advisory or discretionary mandates and mere order execution.

In the Court's view, the very nature of an execution-only mandate, where the bank merely carries out the client's instructions without any advisory or discretionary role excludes the possibility that the bank could influence its own remuneration or act contrary to the client's interests. Against that backdrop, the Court appears to have considered a restitution waiver in general terms and conditions unnecessary for execution-only clients, given that it declined to engage with the appellant's argument on this issue.

That said, from a practical and compliance perspective, incorporating an explicit waiver remains both prudent and strongly advisable. A clear contractual clause enhances transparency, reduces legal uncertainty and ensures that clients fully understand the nature of the fees involved. It also provides the bank with an additional layer of protection should the legal landscape evolve or should a client later challenge the characterisation of the relationship. In short, while the Court's reasoning suggests that a waiver is not strictly required, maintaining one in the documentation continues to be best practice.

AUTHORS

Aurélie Conrad Hari
Partner – Co-head Litigation
aurelie.conradhari@baerkarrer.ch
T: +41 58 261 57 07

Julien Renaud
Associate
julien.renaud@baerkarrer.ch
T: +41 58 261 57 31

Kalia Tsimaratos
Junior Associate
kalia.tsimaratos@baerkarrer.ch
T: +41 58 261 57 92

FURTHER CONTACT

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

Frédéric Bétrisey
Partner
frederic.betrisey@baerkarrer.ch
T: +41 58 261 57 05