



Page 1

1. Who can be subject to criminal liability due to retrocessions?
2. What are the factors influencing the amount of reimbursement?

Page 2

3. When and how do claims become time-barred?
4. Who is entitled for reimbursement of expenses?
5. What obligations arise due to retrocessions?

## ***Retrocessions: Trap for criminal liability in Switzerland***

### ***Answers to the 5 most frequently asked questions***

As you have taken from the press - banks, pension funds as well as independent portfolio managers in Switzerland may not only be subject to civil liability but also be subject to criminal liability due to the ever-changing jurisdictional rules by the Swiss Supreme Court concerning the question of retrocessions for investment funds and structured products.<sup>1</sup> Experience has shown that disputes can be resolved pragmatically in ways that both sides find acceptable. We can help you to effectively negotiate the conflict and to reach mutually acceptable agreements. Legal action should only be taken where a mutually acceptable solution to the problem cannot be reached. Please find answers to the 5 most frequently asked questions here:

#### **1. Who can be subject to criminal liability due to retrocessions?**

Retrocessions could lead not only to civil claims, but also to criminal liability claims. Under mismanagement of agency (Art. 158 StGB) any person who by law, by an official order or by contract has been entrusted with the management of assets of another person or has been entrusted with the supervision of such management may be criminally liable if he or her in breach of his duties causes or permits that this other person suffers damages to his assets. The range of punishment is a custodial sentence of up to three years and, if someone acts with the purpose of enrichment, of up to five years. In addition, the person may also fulfil the elements of fraud (Art. 146 StGB) or private sector bribery (article 4a UWG). Generally, asset managers and bank employees may incur criminal liability due to their contractual fiduciary duties, provided that retrocessions sourced from client money are not rendered account of as well as reimbursed to the client. Due to their fiduciary duties by law (Art. 51b Abs. 2 BVG) pension funds may also face criminal liability claims if they miss to file for reimbursement of retrocessions.

#### **2. What are the factors influencing the amount of reimbursement?**

The ban on unjust enrichment (Art. 400 OR) under agency rules derives from Roman law. Its scope is wide and encompasses anything received as a result of agency activities. Various different factors have an influence on the amount of reimbursement: the duration of an asset management agreement, the conditions for a waiver as well as its validity (because a waiver may be prohibited), the applicable statute of limitation and the question when that period starts, interest payable on reimbursement as well whether banks or asset managers are entitled for reimbursement of expenses.

<sup>1</sup> Illustrative Prof. Dr. Monika Roth, with Chair for Compliance and Financial Market Law at the Lucerne University in a Luzerner Anzeiger dated 18. January 2014 or Prof. Dr. Martin Schubarth, former federal judge und former president of the Federal Supreme Court in: Jusletter dated 12. December 2012

April 2014 Page 2/2

## Newsletter

Page 1

1. Who can be subject to criminal liability due to retrocessions?
2. What are the factors influencing the amount of reimbursement?

Page 2

3. When and how do claims become time-barred?
4. Who is entitled for reimbursement of expenses?
5. What obligations arise due to retrocessions?

### 3. When and how do the claims become time-barred?

The question when the statute of limitation is to start is to be debated. This means that it is still to be determined whether the period starts with the reception of the retrocession or the termination of the agency contract. In general, claims become time-barred after ten years (Art. 128 OR), only in exceptional cases the limitation period of 5 years (Art. 128 OR) may apply.

### 4. Who is entitled for reimbursement of expenses?

Under the court cases of the Swiss Supreme Court banks and asset managers are entitled to reimbursement of their expenses. (Art. 402 OR; see BGE 138 II 755). Such expenses may include a share of costs of core bank services, costs for workspaces, the implementation of fund specific processes, the subscription and safekeeping of investments, the processing of subscription and take-back agreements, duties related to the prevention of money laundering and other duties resulting from regulatory requirements. The claim for the expenses may compensate wholly or partially the claim for reimbursement.

### 5. Which obligations must be considered?

The possible repayment of retrocessions poses some complex questions and creates legal uncertainty for both sides. Accordingly, transparency ex nunc or activities of a purely formal or administrative nature such as a claim of reimbursement by registered letter or a written denial of reimbursement have proven insufficient in most cases. It might be quite helpful to engage experienced lawyers in order to take reasonable steps towards the legal protection or legal defence of claims. As well, the confirmation that all necessary measures were taken and duties fulfilled may be of help.

***Do you have any questions? – Please feel free to contact us!***

---

## LINDEMANN RECHTSANWÄLTE

LAW, TAX & AUDIT in ASSET MANAGEMENT

Dr. iur. Alexander Lindemann  
Dr. iur. Jürg Wissmann  
Prof. Dr. iur. habil. Michael Elicker  
Alexandra Takhtarova

+41 44 256 7351  
+41 44 256 7340  
+352 264 834 03  
+41 44 256 7350

[alexander.lindemann@lindemannlaw.ch](mailto:alexander.lindemann@lindemannlaw.ch)  
[juerg.wissmann@lindemannlaw.ch](mailto:juerg.wissmann@lindemannlaw.ch)  
[michael.elicker@lindemannlaw.ch](mailto:michael.elicker@lindemannlaw.ch)  
[alexandra.takhtarova@lindemannlaw.ch](mailto:alexandra.takhtarova@lindemannlaw.ch)

[www.lindemannlaw.ch](http://www.lindemannlaw.ch)

Office SWITZERLAND  
Dufourstrasse 22  
CH-8008 Zurich

Office LUXEMBOURG  
16 Avenue de la Liberté  
LU-1930 Luxembourg