Limitation period for entitlement to refund of retrocession fees

Topic: **Asset management** Case number: **2017/05**

The client requested the Ombudsman's advice on the matter of retrocession fees. In 2012, she claimed a refund of retrocession fees from her bank. Believing that the limitation period for this entitlement was ten years, she did not agree with the bank's decision to apply a limitation period of five years to her claim. While it is true that the issue of the limitation period for entitlement to a refund of retrocession fees has long since been a controversial issue, the client learned, through the media, that the Federal Supreme Court has now settled this matter and found the limitation period of ten years to be applicable in such cases. She therefore contacted the bank again and then the Ombudsman to determine whether or not the bank's new proposal was reasonable. The Ombudsman provided the client with some general information about the legal issues raised in her case.

The client explained that she had already requested a refund of retrocession fees from the bank back in 2012. At the time she was not satisfied with the bank's offer and preferred to reject it because the bank maintained that a limitation period of five years applied to this type of claim and that it would therefore only agree to refund the retrocession fees or commissions collected after 2008. The client had concluded an asset management agreement with the bank in 2005 however. As she believed that the limitation period of ten years applied, she felt she was entitled to receive the retrocession fees collected by the bank in 2005, 2006 and 2007 as well.

Having read in the news that the Federal Supreme Court delivered a judgement on 16 June 2017 in which it settled the disputed matter of the limitation period and set it at ten years, the client contacted the bank again in autumn 2017. The bank then declared its willingness to also refund the retrocession fees for 2007 with interest. Not knowing whether or not to accept this offer, the client asked the Ombudsman for advice.

The client was not satisfied with the offer since it did not include the retrocession fees paid to the bank in 2005 and 2006. Indeed, in her letter, the client stated that if, in 2012, when she first made her claim, the bank had applied the "correct" limitation period of 10 years (from the point at which the right to a refund arose), the client would have been entitled to a refund of the retrocession fees for 2005 and 2006 as well. In her opinion, it was therefore unacceptable for her claim to have become time-barred in the meantime, given that it has since been confirmed that the limitation period was indeed ten years.

The Ombudsman understood the issues raised by the client. It is both annoying and regrettable to find that such rights are barred due to the passing of time when they would not have been at the time of the initial claim had the controversial matter of the limitation period already been resolved at that time. In its ruling of 16 June 2017, the Federal Supreme Court found the entitlement to a refund of retrocession fees to be subject to a limitation period of ten years and that said period would commence, for each retrocession fee, upon the day the respective fee was received by the bank. It is clear therefore that any entitlements that arose prior to 2007 are now time-barred unless the limitation period was interrupted in the meantime.

Before the Federal Supreme Court issued its judgement, the issue of the five or ten year limitation period for refunds of retrocession fees was an extremely controversial one with valid legal arguments

for both points of view. In the Ombudsman’s opinion, when the client submitted her first claim in 2012, the bank was therefore able to argue in good faith that the claims arising over five years before were time-barred. In fact, at this time, there was no “right” or “wrong” stance on this issue. According to the Ombudsman, the fact that the bank had to review its 2012 position following the Federal Supreme Court ruling does not alter the fact that the claims which arose over ten years ago (from today) are now subject to the ten-year limitation period in the absence of any action undertaken which might interrupt the limitation period (such as the initiation of debt collection proceedings, the filing of a legal actions or even obtaining a declaration from the bank that it would waive the limitation period). This principle applies even if, at the time they were first claimed by the client, the entitlements were not yet barred under a ten-year limitation period.

Finally, the Ombudsman also told the client that part of the scholarly literature discussed the issue of whether or not invoking the limitation period constituted an abuse of rights in certain cases. In the aforementioned judgement, the Federal Supreme Court denied the existence of an abuse of right in the case in question on the grounds that the debtor had not actively prevented the creditor from initiating actions to interrupt the limitation period. Thus, according to the Federal Supreme Court, the limitation period is to be applied strictly even where the creditor was unaware of the existence of their right to a refund.