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Monthly Newsletter November 2026

Dispute Resolution

Schellenberg Wittmer



Three Recent Court Decisions Settling Long-Standing Debates in Swiss Private Law

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Key Take-aways

1.
No duty to pass on retrocessions to the client in execution-only relationships unless there is a concrete conflict of interest.

2.
Compliance with sanctions is a valid reason to refuse performance of contractual obligations if there is a well-founded suspicion (*begründeter Verdacht*) that the customer may be controlled by a sanctioned person.

3.
The violation of an exclusive choice-of-court clause may give rise to a damages claim covering legal costs incurred, and not recoverable, in foreign proceedings.

Swiss courts have recently issued a number of noteworthy decisions on financial services, sanctions and cross-border litigation. This edition highlights three rulings of particular practical significance, addressing **retrocessions** in execution-only relationships, the **impact of sanctions** on private-law obligations, and the liability for commencing proceedings in **breach of an exclusive choice-of-court agreement**.

Retrocessions: no duty of restitution in execution-only relationships

In landmark decision 4A_149/2025 of 12 January 2026, the Swiss Federal Supreme Court resolved a long-standing divergence in cantonal case law concerning retrocessions paid by third parties, such as investment funds, to financial services providers. Cantonal courts had previously reached conflicting conclusions on whether financial services providers are required to pass on retrocessions to clients in **execution-only relationships**, where investment decisions are made exclusively by the client.

The Federal Supreme Court denied a duty of restitution in such relationships, holding that **no conflict of interest** arises when a client makes independent investment decisions. Unlike in discretionary asset management or investment advisory mandates, no obligation to return retrocessions arises under Article 400 of the Swiss Code of Obligations (**CO**) in a pure execution-only mandate, where the financial institution's role is strictly limited to executing client orders without advice or discretion.

Under Article 400 CO, a duty of restitution requires two cumulative conditions:

- The financial benefit must be intrinsically linked to the execution of the mandate, and
- The benefit must be capable of creating a concrete conflict of interest.

In an execution-only relationship, the financial services provider cannot anticipate which transactions or products the client will select, and its remuneration depends exclusively on the client's autonomous investment decisions rather than on discretionary portfolio management – consequently, neither condition is met. The same reasoning applies under Article 26 of the Financial Services Act (**FinSA**): absent a concrete conflict of interest, retrocessions cannot be claimed under statutory financial market provisions either.

The Federal Supreme Court reaffirmed this jurisprudence in two subsequent related decisions, 4A_501/2025 and 4A_503/2025 of 17 June 2026. The court reiterated that the decisive criterion for a duty of restitution is whether third-party remuneration is capable of creating a concrete conflict of interest. The court also rejected arguments based on Articles 97 and 428 CO: no duty of restitution arises even in the absence of a valid waiver, provided there is no conflict of interest. The prevailing financial institution in these proceedings was represented by Schellenberg Wittmer.

No restitution of retrocessions in execution-only relationships absent a concrete conflict of interest

Sanctions compliance and contractual obligations under financial services agreements

The Federal Supreme Court has also clarified the interplay between sanctions regimes and private-law obligations in several recent decisions.

In judgment 4A_455/2025 of 21 May 2026, the court addressed whether a bank's general terms and conditions (**GTCs**) provide a basis for refusing the release of client assets due to a **potential Swiss or foreign sanctions exposure**, and whether such contractual safeguards remain enforceable following the termination of the client relationship. The client itself was not subject to sanctions; however, its former indirect majority shareholder was on the Swiss, EU and UK sanctions lists. When the client issued transfer instructions, the bank refused execution and froze the client's assets. Although the State Secretariat for Economic Affairs (**SECO**) subsequently stated that, based on the information available to it, it did not consider the client to be owned or controlled by a sanctioned person under Swiss sanctions law, the bank nevertheless maintained its refusal to execute the client's instructions, citing foreign sanctions risks and internal compliance obligations.

Specifically, the bank relied on a provision in its GTCs according to which it was authorized to suspend or restrict services in order "*to comply with legal, regulatory or contractual provisions [...]*". Notably, the clause contained no express reference to foreign law or foreign sanctions.

The Federal Supreme Court held that the **GTCs provided a valid basis** for the bank's refusal to follow the client's instructions. It found that a broadly drafted compliance reservation clause in the GTCs of a bank operating internationally can reasonably be understood to encompass compliance with foreign sanctions regimes and not merely with Swiss sanctions. The Court further held that the Swiss governing-law clause did not restrict the scope of the compliance reservation.

In addition, the Court ruled that the compliance reservation clause **survives the termination** of the banking relationship: If it were otherwise, the clause would become ineffective at the very moment when it is most needed, that is, when the bank is required to return the client's assets and might otherwise be compelled to do so in violation of applicable sanctions. Finally and importantly, the Court confirmed the finding of the first-instance court that a financial institution invoking sanctions-related restrictions need only demonstrate a **"well-founded suspicion"** (*begründeter Verdacht*) that the client is, or remains, controlled by a sanctioned person; it is not required to establish such control to a standard of full proof.

The judgment complements a ruling rendered by the Federal Supreme Court only a few months earlier. In the related decisions 4A_535/2025 and 4A_537/2025 of 28 April 2026, the Court held that concrete indications of possible indirect control by a sanctioned person are sufficient to trigger the asset-freeze and reporting obligations under the applicable Swiss sanctions regime. The Court further ruled that a financial institution does not breach its contractual duty under Art. 397 CO by refusing to execute a client's instructions where compliance with those instructions would violate mandatory law or otherwise unlawfully prejudice the institution's legal position.

Finally, the Federal Supreme Court recently addressed the interplay between sanctions and private-law obligations in enforcement proceedings. In decision 4A_305/2025 of 13 March 2026, the Court dismissed an appeal brought by the holder of an arbitral award whose controlling shareholder was subject to sanctions. The creditor sought to enforce the award after the debtor had failed to pay, but the lower court dismissed the application holding that payment would violate the Swiss Ukraine Ordinance. The Federal Supreme Court confirmed the decision of the lower court on the basis that the prohibition on making funds available to sanctioned entities, or entities controlled by them (*Bereitstellungsverbot*), results in a statutory deferral (*gesetzliche Stundung*) of the underlying claim, with the consequence that the claim cannot be enforced for as long as the sanctions remain in force.

A key takeaway from these judgments is that the Federal Supreme Court has adopted a permissive stance to a party's refusal to perform contractual obligations where there is a well-founded suspicion that performance would violate sanctions. Nevertheless, banks in particular are well advised to include **clear contractual provisions** in their GTCs expressly entitling them to withhold performance in order to ensure compliance with sanctions requirements. Schellenberg Wittmer successfully represented the financial institutions in the first three cases discussed above.

Sanctions restrictions take precedence over performance of contractual obligations.

Suing in the wrong forum can be costly: damages for breach of an exclusive choice-of-court clause

In a dispute arising in the blockchain and crypto industry, the Zug Cantonal Court, in judgment A2 2025 66 of 13 April 2026, addressed the unresolved question of whether a party that commences proceedings in **breach of an exclusive choice-of-court agreement** may be **liable** for the resulting costs.

The plaintiff, a Zug-based association serving as the legal wrapper of a decentralized autonomous organization (DAO), had engaged a developer domiciled in the United States. The parties' agreements contained clauses conferring exclusive jurisdiction on the ordinary courts of the Canton of Zug for any dispute arising out of or in connection with the contractual relationship. Following the termination of the relationship, the developer sued the association and three of its members before a US court.

The defendants challenged the US court's jurisdiction and ultimately prevailed both at first instance and on appeal. However, under the so-called "American Rule", they were unable to recover their substantial legal fees from the developer. The association, therefore, brought proceedings before the Zug Cantonal Court, **seeking damages for**

breach of the choice-of-court agreement in an amount corresponding to the legal fees incurred in the US proceedings. The developer did not participate in the Zug proceedings, which were therefore decided by default.

The Court granted the association's claims in full. It held that the parties had entered into valid exclusive choice-of-court agreements under Article 23 of the Lugano Convention in favor of the ordinary courts of the Canton of Zug. Choice-of-court agreements, like any other contractual provision, impose **binding obligations** on the parties: each party undertakes to bring proceedings exclusively before the designated forum, and to refrain from commencing proceedings elsewhere. In support of its reasoning, the Court relied on a Federal Supreme Court judgment holding that the principle of contractual fidelity requires a party to a choice-of-court agreement to participate in proceedings before the agreed forum.

The practical significance of the judgment is that a party to an exclusive choice-of-court agreement may recover, as contractual damages, the legal costs it incurred in successfully defending proceedings brought before a court lacking jurisdiction under that agreement. The recoverable loss corresponds to the legal costs that could not be recovered in the foreign proceedings themselves, a remedy that is of particular relevance in jurisdictions that do not shift legal fees to the losing party, such as the United States. Although rendered in default proceedings and thus not tested in a fully adversarial setting, the judgment provides welcome guidance on an issue that had previously remained unsettled. It strengthens the effectiveness of exclusive jurisdiction clauses and may deter tactical litigation in high-cost jurisdictions. The association was represented by Schellenberg Wittmer.

A welcome tool for recovering unrecoverable litigation costs



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