THE BANKING LITIGATION LAW REVIEW

Third Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that the increase in litigation involving banks shows little sign of slowing.

Although disputes arising from the 2008 financial crises are reaching their end, what might be termed 'normal' banking litigation has resumed, and is in no short supply. This crosses the full spectrum from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. In all these cases, cross-border issues frequently arise, and banking litigation remains an important source of developments in the conflicts of laws in international commercial litigation.

The context for much of the consumer litigation is the growing – and increasingly complex – range of consumer protection regulation in the various jurisdictions under review. However, while the courts appear content to apply that legislation in order to hold banks to account, its existence – together with the more extensive rights it affords to consumers – has meant that in many parts of the world the courts are less willing to expand consumer rights beyond the context of that regulation, instead preferring to enforce the contractual rights between banks and customers strictly.

In those circumstances, we have seen a growth in the use of class actions and representative claims, often where consumers can take advantage of friendly regulation. These mechanisms are being adopted in countries where they did not previously exist, in some cases by changes in legislation, and in others by changes to court procedure. At the same time, courts in different jurisdictions are reacting very differently to this new or growing type of litigation. In some cases this is by seeking to restrict the circumstances in which such claims can be made but in others by promoting their use. It therefore remains to be seen whether the growth of class actions and representative claims against banks is really a worldwide phenomenon.

These novel forms of litigation, and other more conventional claims, are also subject to a global trend towards making both the courts and, importantly, alternative forms of dispute resolution more available to litigants. We continue to see parties encouraged to settle their claims out of court, by way of general mechanisms such as mediation or by way of specialised banking ombudsmen. Further, some jurisdictions are promoting the use of class or group settlements, which can resolve major disputes with limited court involvement.

At the same time, the impact of data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, has opened a further means by which claimants can bring claims against banks, which are inevitably major holders of personal data. The use of the GDPR both as a tool in litigation and as a source of complaint or damages in itself is, therefore, a concern for banks, both in a regulatory and in a litigation context. This concern is only likely to grow.

One bright spot for banks is a general trend in favour of upholding assertions of secrecy, confidentiality and privilege on the part of banks and their advisers against claimants. This is especially important in the context of investigations against banks. In common law jurisdictions in particular, courts now tend to treat such investigations as akin to adversarial litigation and after the concerns raised over the past year or two, now largely accept that many documents created during investigations should be protected by privilege.

Finally, the general political and economic uncertainty around the world remains a probable source of banking litigation, especially where that uncertainty negatively affects investors. Nobody is any closer to being able to say what the political or economic impact of Brexit will be either to the United Kingdom's banking sector or to that of the European Union. It would be dangerous to predict when clarity in this regard will be available.

Deborah Finkler
Slaughter and May
London
November 2019

Chapter 1

AUSTRIA

Holger Bielesz, Paul Krepil and Florian Horak[1]

I OVERVIEW

In terms of sheer numbers of cases, litigation proceedings in Austria have decreased over recent years. Banking litigation was no exception in this regard. While there is no unanimous perception as to what reasons lie behind this development, it is fair to say that the complexity of the pending cases has increased and has made court proceedings more cost- and time-consuming. At the same time, the continued activities of the Austrian legislature impose more extensive and detailed duties on financial institutions in particular. In this chapter, some of the significant recent developments in case law and legislation will be summarised and show that banking disputes will likely remain a key driver of the case law development in Austria, both in the field of civil procedure and substantive law.

II SIGNIFICANT RECENT CASES

The following noteworthy cases have recently been dealt with by the Austrian courts.

i Jurisdiction for prospectus liability claims: decisions by the European Court of Justice of 12 September 2018[2] and the Austrian Supreme Court of 24 October 2018[3]

In September 2018 the European Court of Justice (ECJ) rendered a preliminary ruling on jurisdiction with regard to prospectus liability damage claims.

The defendant, a London-based credit institution, issued index certificates through its branch in Frankfurt in the form of bearer bonds, which were subscribed by institutional investors and subsequently resold to consumers in Austria on the secondary market. The certificates were issued on the basis of a German base prospectus. Ms Löber, a consumer, who is domiciled in Vienna invested in the certificates through two separate Austrian banks, one with its seat in Salzburg and the other with its seat in Graz. Ms Löber subsequently filed a damage claim with the Commercial Court of Vienna, inter alia, based on prospectus liability.

By way of an order dated 18 July 2016, the Commercial Court declined jurisdiction and dismissed that action on the ground, inter alia, that, with regard to the conditions for the application of Article 5(3) of Regulation No. 44/2001, Ms Löber had not submitted that the damage at issue had occurred directly in a bank account that could be associated with her at

1 Holger Bielesz is a partner, Paul Krepil is an associate and Florian Horak is a consultant at Wolf Theiss.

2 ECJ 12 September 2018, C-304/17 (*Löber*).

3 OGH 24 October 2018, 3 Ob 185/18d.

a bank in Vienna. According to that court order, since Ms Löber had acquired the certificates through banks in Graz or Salzburg, the damage had, therefore, arisen in Graz and Salzburg and not in one of the areas for which that court had jurisdiction. Ms Löber brought an appeal against that order before the Higher Regional Court in Vienna. The Austrian Supreme Court then decided to stay the proceedings and to refer to the Court of Justice the following question for a preliminary ruling:

> *Under Article 5(3) of [Regulation No 44/2001], in non-contractual claims based on prospectus liability where the investor took his investment decision caused by the defective prospectus at the place where he is domiciled, and, on the basis of that decision, he transferred the purchase price for the security acquired on the secondary market from his account held with an Austrian bank to a clearing account held with another Austrian bank, from where the purchase price was subsequently transferred to the seller by order of the applicant,*
>
> *a) does jurisdiction lie with the court within whose area of jurisdiction the investor is domiciled,*
>
> *b) does jurisdiction lie with the court within whose area of jurisdiction the seat/the account-keeping branch of the bank with which the applicant has his bank account from which he transferred the amount invested to the clearing account is located,*
>
> *c) does jurisdiction lie with the court within whose area of jurisdiction the seat/the account-keeping branch of the bank which keeps the clearing account is located,*
>
> *d) does jurisdiction lie with one of those courts at the choice of the applicant,*
>
> *e) does jurisdiction lie with none of those courts?*

The ECJ subsequently issued the following ruling:

> *Article 5(3) of Council Regulation (EC) No 44/2001 […] must be interpreted to the effect that in a situation, [...], in which an investor brings, […], a tort action against the bank which issued that certificate, the courts of that investor's domicile, as the courts for the place where the harmful event occurred […], have jurisdiction to hear and determine that action, where the damage the investor claims to have suffered consists in financial loss which occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts and the other specific circumstances of that situation also contribute to attributing jurisdiction to those courts.*

In its ruling the ECJ does not stipulate a general rule determining strict connecting factors to a certain jurisdiction. In contrast to earlier decisions,[4] which merely clarified which courts do not have jurisdiction and which connecting factors are not sufficient, the ECJ affirms jurisdiction in the present case and bases its decision on 'certain circumstances'. The ECJ, however, does not define these circumstances in a strict sense. Rather, the ECJ explicitly justifies jurisdiction on the basis of an overall assessment of the 'specific circumstances of the proceedings'.[5]

Based on the ECJ ruling the Austrian Supreme Court[6] subsequently concluded that the ECJ considers the courts of the claimant's domicile as competent to deal with the tort claims, if certain additional preconditions are met. These preconditions could be summarised as meaning that the acts, which are typical for these kinds of investments, giving rise to

4 ECJ 10 June 2004, C-168/02 (*Kronhofer*), ECJ 28 January 2015 (*Kolassa*).

5 See also *Schacherreiter*, ÖBA 2019/85.

6 OGH 24 October 2018, 3 Ob 185/18d.

the damage, took place within the jurisdiction of the domestic courts and other specific circumstances do not point to the domicile of the defendant. In particular, according to the ECJ, in the present case these facts are the following: the domicile of the claimant lies within Austria, all payments in respect of the investment process were made from Austrian bank accounts, the claimant entered into the obligation which reduced her assets in Austria and the claimant acquired the certificates on the Austrian secondary market on the basis of the prospectus information notified to the Austrian supervisory bank. With its ruling the ECJ basically established another *forum actoris* for claimants' tort claims. It remains to be seen how future cases will be decided when the above acts, which can be considered typical for certain investments, are conducted in different jurisdictions and there is no clear indication for specific circumstances pointing in the direction of one jurisdiction.

ii Internal commissions to be disclosed to investors: decision by the Austrian Supreme Court 26 February 2019[7]

In February 2019 the Supreme Court rendered a decision on the liability of investment advisers due to the violation of duties to disclose internal commissions.[8]

In 2006 the claimant decided to invest €350,000 in an investment fund after two extensive counselling interviews with an investment adviser who was an employee of the defendant, an Austrian-based credit institution. The adviser informed the claimant that a commission had to be paid to the credit institution. However, the adviser did not point out to the claimant that another 3 per cent of the investment sum paid by the claimant would be returned to the defendant by the respective investment funds. The adviser, however, was unaware of this (additional) commission payment as within the organisation of the defendant only a few people were informed about this internal commission.

The Supreme Court based its decision on the following assumptions: (1) if the defendant had not received any further remuneration from the investment funds in addition to the 3 per cent commission, it would not have included these investments in its product portfolio and consequently an investment in the respective investment funds would not have been recommended to the claimant; and (2) if the claimant had been aware of this additional commission payment, he would not have acquired this product but rather would have sought a different investment instead.

In its ruling the Supreme Court pointed out that in terms of undisclosed internal commissions a claim for damages is established, unless the credit institution can prove that there is no conflict of interest and, consequently, in respect of the credit institutions' breach of duty the acquisition of the investment does not lie within the causal nexus between the unlawful act and damage (*Rechtswidrigkeitszusammenhang*). The fact that the acting adviser had no knowledge of internal commissions is, however, irrelevant in cases where the credit institution through special sales-promoting measures had influence on the advisory activities of its employees and, therefore, also on the investment decisions of its customers.[9]

7 OGH 26 February 2019, 8 Ob 166/18x; ÖBA 2019/85.

8 According to the Austrian Securities Supervision Act (WAG) and Supreme Court Jurisprudence (RS0131382) internal commissions are to be disclosed to potential investors irrespective of the fact that the investor can trust that the investment adviser would not receive any commissions from third parties.

9 OGH 26 February 2019, 8 Ob 166/18x; ÖBA 2019/85.

iii Investment consultancy has no duty to inform about the general risk of insolvency: decision of the Supreme Court of 24 October 2018[10]

In this recent decision the Supreme Court clarified that when providing investment advice, there is no general obligation of advisers to draw attention to the general insolvency risk of an issuer. The decision was triggered by way of an action brought by the Chamber of Labour to which claims arising from alleged incorrect investment advice by the defendant, a financial services provider, had been assigned.

The investors of the bonds in question were willing to acquire investments in the medium risk range. The adviser working for the defendant then presented to the investor's corporate bonds and subsequently, in respect of possible risks, pointed out that 'something can happen' respectively that 'higher interest rates are associated with a little more risk'. Apart from that, the bond was basically described as safe and secure. In July 2013 insolvency proceedings were opened over the issuer's assets. At the time the bonds were acquired, there were no indications of impending insolvency.

The Supreme Court pointed out that while, in general, an investment adviser is obliged to inform his or her clients about the risk potential of the envisaged investment; the obligations of conduct to be followed in this regard can, however, only be assessed on the basis of the specific circumstances of the individual case. According to the Supreme Court, the concrete elaboration of the advisory duties, therefore, depends on a whole series of factors, which refer on the one hand to the person of the customer and on the other hand to the investment project. There is, however, no general obligation to inform an investor about the general risk of insolvency of the issuer of certain investment products. Furthermore, the Supreme Court stated that there is no obligation for advisers to inform about their ignorance of a risk that they did not have to be aware of in the first place. Eventually the Supreme Court confirmed in its decision that in the event of a breach of duties by investment advisers in terms of providing information to potential investors, it is up to the injured party to maintain and prove the causal link between the breach of duty and the occurrence of the damage.

iv Liability due to incorrect brokerage of life insurance policies: decision of the Supreme Court of 21 November 2018[11]

In this decision the Supreme Court pointed out that the principles on liability for incorrect investment consultancy can be applied in cases of incorrect brokerage of life insurance policies due to similar interests.

In the case at hand the claimant acquired a blended unit-linked endowment and life term insurance policy through his adviser, who sold insurance products on a commission basis for the defendant, an insurance brokerage house. In this regard the policies transmitted to the claimant always referred to the defendant as broker. In July 2007 the adviser recommended to the claimant the product 'X certificate', whereby it was clear to both that the claimant wanted to acquire exclusively a product equipped with a capital guarantee. The consultant subsequently assured the claimant that the recommended product was equipped with a capital guarantee at the end of the fixed term of 15 years. In June 2010 the claimant then received a letter by the insurance brokerage house, which informed the claimant that the issuer of the certificate had stated that the published price of the certificate was 'zero' due to the opening of

10 OGH 24 October 2018, 3 Ob 187/18y.

11 OGH 21 November 2018, 7 Ob 196/17z; ÖBA 2019, 451.

insolvency proceedings against the hedge fund. Furthermore, the defendant terminated the insurance contract with the claimant. The claimant then found out that that when setting up the insurance contract the adviser had made a mistake. As a result, the claimant in fact did not acquire a capital-guaranteed product.

In its decision the Supreme Court then pointed out that the principles on liability for incorrect investment consultancy are to be applied to cases of incorrect brokerage of life insurance contracts in respect undesired characteristics of an acquired product (here: unit-linked endowment and life term insurance policy without capital guarantee instead of with capital guarantee) because of the similar state of interests. In the Supreme Court's opinion, as long as claims of the policyholder against the insurer arising from the contract can still exist (such as rights of withdrawal), the situation is comparable to that of the investor who retained the unwanted financial product.

III RECENT LEGISLATIVE DEVELOPMENTS

i Beneficial Owner Register Act

The Beneficial Owner Register Act (BORA) was introduced in Austria by way of implementation of Articles 30 and 31 of Directive (EU) 2015/849[12] into national law and provides for a register of ultimate beneficial owners (UBOs) of all legal entities listed in Section 1 of the BORA.[13] Reportable entities must notify their beneficial owners to a register, observe various due diligence requirements and, in the case of violations, face strict sanctions. The register aims to support those professional groups that are subject to stringent anti-money laundering and terrorist financing rules (i.e., financial institutions).[14] The BORA entered into force on 15 January 2018.

Reportable entities

In general, all relevant company structures with their registered seat in Austria are required to register their UBOs. Reportable entities include unlimited liability partnerships, limited liability partnerships, limited liability companies, public limited companies and Societas Europaea, etc. In addition, trusts managed in Austria and trust-like agreements are also included.

UBOs

UBOs are all natural persons who own or control a registering entity (irrespective of the domicile of such entity). UBOs can be divided into three groups (capital ownership percentage, voting interest and factual control) on the basis of which ownership and control is determined. In general, the Act distinguishes between three types of economic owners:

a direct economic owners: these are natural persons who:
- hold 25 per cent plus one share, or more than a 25 per cent participation of the registering entity or the respective votes; or

12 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

13 Mainly, the entities listed in Section 1 of the BORA are registered with the Austrian Commercial Register.

14 Barbist/Gassner, 'The new register for beneficial owners', Ecolex 2017, p. 1,170.

- exercise control over the management of the registering entity, whereby 'control' is defined as holding – either directly or indirectly – 50 per cent in shares plus one share, or more than a 50 per cent participation of the registering entity or the respective votes. Control is further assumed under the circumstances applicable for drawing up consolidated annual financial statements pursuant to Section 244, Paragraph 2 of the Austrian Enterprise Act;[15]

b indirect economic owners as UBOs: these are natural persons who 'control' (see above) an entity that directly or indirectly holds 25 per cent plus one share, or more than a 25 per cent participation in the registering entity or the respective votes. If more than one registering entity is controlled by the same natural person or the same natural persons, either directly or indirectly, and cumulatively exceed the thresholds of 25 per cent plus one share, or more than a 25 per cent participation in another entity, then such natural person shall be regarded as the economic owner of such entity; and

c *ex lege* economic owner: if no economic owner can be determined according to the above framework (i.e., the top entity is a listed company with widely held stock), the management of the registering entity is determined as the UBO by operation of law.[16]

Special provisions apply for partnerships, cooperatives, (foreign) trusts and foundations.

Exceptions

In certain cases, exceptions from mandatory registration apply. This is the case for partnerships and limited liability companies, for example, if the personally liable direct partners or shareholders consist only of natural persons and, thus, the relevant data for the register can easily be taken from the commercial register. However, these exemptions only apply if no person other than the legally registered person exercises direct or indirect control over the management of the legal entity.

Due diligence

According to Section 3 of the BORA, an entity subject to mandatory registration has to ascertain and verify the identity of its ultimate beneficial owners at least once a year. Therefore, there is the requirement for entities to undertake regular investigations and to store the relevant corresponding documentation. In order to fulfil this due diligence duty, all necessary measures to understand the ownership and control structure need to be taken by the registering entity. As indicated above, the UBO can, in any case, only be a natural person.[17]

15 Section 244 of the Austrian Enterprise Act includes parent companies having in another company (subsidiary): (1) the majority of voting rights of shareholders; (2) the right to appoint or remove the majority of management or supervisory bodies, in the case the parent company is also a shareholder; (3) the right to exercise a controlling influence; or (4) the right to decide, on the basis of an agreement with shareholders of one or more subsidiaries, comparable to voting rights of a shareholder, on the appointment or revocation of the majority of the administrative, management or supervisory body.

16 See Section 2, Paragraph 1(b) BORA.

17 Kühne, 'The determination of the beneficial owner according to the Beneficial Owner Register Act', Ecolex 2018, p. 205.

Right to inspect the register

Unlike the commercial register, the UBO register is not publicly available. Section 9 of the BORA provides for a list of entities that are granted a right to inspection. Besides certain authorities, this list, inter alia, includes the following persons and organisations: financial institutions, attorneys at law and public notaries. However, inspections are only permissible in the context of applying due diligence to prevent money laundering and terrorist financing in relation to customers or to advise clients on the identification, verification and reporting of their UBOs.

Sanctions

Violations of the mandatory registration or incorrect reports are considered financial offences and can lead to a fine of up to €200,000 (for intent) or €100,000 (for gross negligence). For unauthorised inspections of the register, a fine of up to €100,000 may be imposed in the case of deliberate conduct.

Deadline for registration

Initial filings have to be made before 15 August 2018. This deadline, originally proclaimed for 1 June 2018, was extended by decree of the Federal Ministry of Finance owing to the high number of registrations.

ii The Fifth Money Laundering Directive

Although Directive (EU) 2015/849 (Fourth Money Laundering Directive) had only to be implemented into national law by EU Member States by 26 June 2017, which took place in Austria by way of implementing the Financial Market Money Laundering Act,[18] there is already a new requirement for action on part of the national legislature. In June 2018, the Fifth Money Laundering Directive,[19] amending Directive (EU) 2015/849, was enacted, and must be implemented by EU Member States by 10 January 2020.

In Austria the Fifth Money Laundering Directive will be implemented by the EU Financial Adaption Act 2019, which will, inter alia, amend the Financial Market Money Laundering Act (FMMLA) and BORA. The Fifth Money Laundering Directive will implement several innovations, as outlined below.

Enhancement of the scope to obliged entities

In addition to auditors, external accountants and tax advisers, the scope of the Fifth Money Laundering Directive will be extended to any other person who undertakes to provide material aid, assistance or advice on tax matters as principal business or professional activity. Furthermore, activities of estate agents, when acting as intermediaries in the letting of immovable property in relation to transactions with a monthly rent of €10,000 or more are also included within the extended scope of the Fifth Money Laundering Directive. To meet the growing market for cryptocurrencies and online currency platforms, providers engaged in exchange services between virtual currencies and fiat currencies, as well as custodian wallet

18 Bielesz/Krepil/Horak, *The Banking Litigation Law Review* – Edition 2, Chapter II.ii.

19 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

providers, have been included in the extended scope. Finally, the trade of works of art has been included, where the value of the transaction or a series of linked transactions amounts to €10,000 or more, even when the trading is carried out by art galleries or auction houses.

Increased customer due diligence

With respect to electronic money the Fifth Money Laundering Directive will also increase transparency for e-money products. Thus, the maximum monthly payment transaction limit for reloadable payment instruments was reduced to €150, whereas the possibility for Member States to increase the maximum limit to €500 was deleted. Further, the existing thresholds for general purpose anonymous prepaid cards was lowered to €50 and for transactions exceeding this amount customer identification was established, which results in stricter know-your-customer (KYC) rules.

With respect to business relationships involving high-risk third countries, enhanced KYC measures have been implemented to achieve a harmonised treatment of such countries within the EU Member States, for example as follows: (1) obtaining additional information on the customer and on the beneficial owner or owners; (2) obtaining additional information on the intended nature of the business relationship; (3) obtaining information on the source of funds and source of wealth of the customer and of the beneficial owner or owners; (4) obtaining information on the reasons for the intended or performed transactions; (5) obtaining the approval of senior management for establishing or continuing the business relationship; and (6) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination.

Enhanced transparency for the UBOs

Currently, the UBO register is not publicly available.[20] However, implementing the Fifth Money Laundering Directive will allow any 'member of the general public' to access at least the name, the month and year of birth and the country of residence and nationality of the UBO as well as the nature and extent of the beneficial interest held. In addition, it will become mandatory to access the UBO register, whenever entering into a new business relationship with a corporate or other legal entity, which may be subject to the UBO register.

iii Possible class action provisions

It seems that the Ministry of Justice has abandoned its plans to implement real class action provisions in Austria.[21] In contrast, the European Commission presented a draft proposal for its 'New Deal for Consumers' in April 2018, aiming to strengthen citizens' rights by allowing the filing of class-action suits. The European Commission is working on rules for two categories of lawsuits: one for situations in which a limited group of people suffered comparable harm and would collectively sue the defendant; and the other for low-value cases in which many consumers only suffered a small loss. In the latter case, the benefit would go to a public cause benefiting consumers. Separately, the European Union is proposing harsh fines of up to 4 per cent of a company's annual turnover for firms found guilty of

20 See Section II.i.

21 www.ots.at/presseaussendung/OTS_20171124_OTS0028/liste-pilzkolba-vw-geschaedigte-brauchen-rasch-die-sammelklage (last visited on 26 June 2018).

widespread infringements. The latest initiative of the European Commission is perceived as a consequence of the diesel scandal, which may not – according to some – be adequately addressed within the European Union.[22]

IV INTERIM MEASURES

i General

In Austria, it is possible to request a preliminary injunction to secure a monetary claim in cases of subjective endangerment in the course of pending civil proceedings or before filing a claim. The relevant provisions are regulated within the Austrian Enforcement Act (AEA).[23] The precondition for such a preliminary injunction is the existence of subjective endangerment respective to the recovery of the claim. A case of subjective endangerment may be argued successfully if it is obvious that without a preliminary injunction the opposing (and likely to be liable) party will make it difficult for the other party to pursue its claim, for example, by damaging, destroying, hiding or moving away assets[24] (see Section 379, Paragraph 2, No. 1 of the AEA).

With regard to banking litigation, the abusive demand of bank guarantees is a very common ground to file a request for a preliminary injunction. In such cases, the bank, which issued the guarantee, is prohibited from paying a debt to the opposing party by court order. If a bank violates the court order, it becomes liable for damages.[25] To secure monetary claims, the court is limited to specific measures depending on the respective object. The following measures are regulated in the AEA (Section 379, Paragraph 3):

a A prohibition addressed to third-party debtors not to pay a debt to the opposing party. This is a frequently used method to secure funds. For example, the bank holding an account for the opposing party is prohibited by way of court order to make any payment upon the opposing party's instruction or to make payments owing to an abusive demand of a bank guarantee.

b Movable objects including money: if it is possible to put the object into judicial custody, or administration or management, the court may further render an order to the opposing party to refrain from giving away, selling or pawning the movable object.

c Immovable objects: if it is possible to put the object into judicial custody, or administration or management, the court may further render an order to the opposing party to refrain from giving away, selling, hypothecating or registering any encumbrances in the Land Register.

ii Cross-border interim measures

It is also possible to enforce an external freezing order or an injunction in Austria. The enforceability and recognition of an external freezing order depends on whether the court decision was rendered in an EU Member State or in a non-EU or foreign country.

22 id.

23 RGBl 1896/79, in its applicable version.

24 Kodek in Angst/Oberhammer, EO3, Section 379, AEA, Paragraph 7ff.

25 Kodek in Angst/Oberhammer, EO3, Section 379, AEA, Paragraph 34.

EU Member States

In general, the regime of the Brussels Ia Regulation[26] is also applicable to freezing orders and requests for interim measures, such as injunctive relief. As a result, freezing orders and injunctive relief by another Member State's court are automatically recognised and enforceable in Austria without any further procedure on recognition required.[27] However, since recognition and enforcement can be rejected by other EU Member States if the opponent was not granted a hearing (or the injunction was not at least served on the opponent before) – *ex parte* injunctions are frequently not recognised and enforced – only those freezing orders and injunctions where the defendant has been granted a hearing in the Member State of origin can subsequently be recognised and enforced in another Member State.

With regard to bank accounts within the European Union (except Denmark and the United Kingdom), Regulation (EU) No. 655/2014[28] establishes a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

Foreign/non-EU countries

Freezing orders and interim injunctions that have been rendered in a foreign country outside the European Economic Area (EEA) are enforceable in case bilateral or international treaties are in place, which foresee mutual recognition and enforcement. In principle, freezing orders or interim injunctions must be formally declared enforceable, before enforcement may be sought. The following general requirements for the issuance of a declaration of enforceability are set forth in Section 406 of the AEA:[29] (1) a foreign judgment is enforceable in the state in which it was rendered; and (2) reciprocity with the state of origin is established by way of bilateral treaties or other instruments (actual reciprocity by way of judicial 'practice' does not suffice).

The party seeking to receive the declaration of enforceability needs to file such request to the competent Austrian court. According to the AEA, the district court of the opposing party's domicile has jurisdiction. In addition, the party is required to enclose certified copies of all relevant documents with such request. The application for enforcement may be combined with the request.

According to Section 408 of the AEA, the declaration of enforceability may be refused if:

a pursuant to Austrian rules on jurisdiction, the foreign court could not, under any circumstances, have jurisdiction over the legal matter;

b the opposing party was not properly served with the document that initiated the foreign proceeding;

c the opposing party could not properly participate in the foreign proceeding owing to irregularities in the proceeding; or

d the judgment violates basic principles of Austrian public policy.

In practice, interim relief is typically sought before the Austrian courts if Austrian assets will be secured. This is because most of the creditors want to make use of the surprise effect of

26 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012.

27 Thomas Garber in Angst/Oberhammer, EO3, Section 79, AEA, Paragraph 11.

28 Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014.

29 Before 1 December 2016, the respective provisions were included in Section 79, AEA.

ex parte injunctions, which can normally be obtained faster in the country where they shall be enforced (and for the limitations of recognition of foreign injunctions). Applications for enforcement of injunctions from non-EEA countries in Austria are extremely rare.

iii Procedure in Austria

With the request for a preliminary injunction, the applicant must provide available evidence, such as documentary evidence and affidavits that can be immediately examined by the court. Foreign-language documents should be presented with German translations. Generally, a decision on a request for a preliminary injunction is rendered within several days or weeks. Regarding appellate proceedings, a time frame of one to three months for the second instance proceeding and a further two to four months in third instance proceedings should be expected.

V PRIVILEGE AND PROFESSIONAL SECRECY

Section 9, Paragraph 2 of the Austrian Lawyers Act (ALA) sets forth the lawyer's duty of confidentiality regarding all matters that were disclosed to him or her in his or her function as counsel whose non-disclosure is in the interest of the client. Therefore, a lawyer has the right to deny testifying in court or before any other authority according to the respective procedural provisions. Section 9, Paragraph 3 of the ALA prohibits circumventing this principle by, for example, interrogation of employees of the lawyer or seizing communications. The procedural implementation of these principles has led to several not entirely identical provisions in the various codes of procedure.[30]

Regarding criminal proceedings, the attorney's right to deny testifying as a witness is stated in Section 157 of the Austrian Code of Criminal Proceedings (ACCP).[31] As mentioned above, owing to the prohibition on circumventing, seizing communications between attorneys and defendants is also prohibited. An amendment of the provision means that this is now also applicable in cases where these communications are located outside the attorney's office (e.g., at the defendant's apartment). However, there is the requirement that all documents and data must have been created either by the attorney or the defendant. Documents that have been created by another person (e.g., a legal expert) and later handed to the defendant or the attorney do not fall within the provision.

In addition to those already mentioned, similar provisions can be found in: Section 321 of the Code of Civil Procedure, Sections 89 and 104 of the Finance Criminal Code, Section 49 of the Code of Administrative Procedure and Sections 171 and 143 of the Austrian Fiscal Code.

30 Prunbauer-Glaser, *'Legal Professional Privilege' v. Schutz der anwaltlichen Verschwiegenheit'*, AnwBl 2013, p. 56.

31 Owing to the implementation of Directive 2013/48/EU, an amendment of Section 157 of the ACCP entered into force on 1 November 2016.

VI JURISDICTION AND CONFLICTS OF LAW

There are, generally speaking, no specific rules on jurisdiction and conflicts of law regarding banking institutions, therefore the general rules set forth below apply.

i Domestic rules on jurisdiction

The Austrian judicial system differentiates between local jurisdiction and competence of the courts. The competence of a court mainly depends on the amount in dispute. District courts are the first instance to decide in civil law cases with a maximum amount in dispute of €15,000. In addition, the district courts have competence irrespective of the amount in dispute on certain types of cases, for example, family and rent law cases. Regional courts as courts of first instance are responsible for rulings in all matters not assigned to district courts.

In the Austrian Court Jurisdiction Act,[32] there are several provisions regulating jurisdiction. As a basic principle, the court at the defendant's place of residence has jurisdiction. For consumer-based claims, the Austrian Consumer Protection Act (ACPA)[33] also stipulates that according to the basic principle on jurisdiction, the court at the defendant's place of residence has jurisdiction. Consumer-based claims are matters relating to a contract concluded by a person for a purpose that can be regarded as being outside his or her trade or profession.

According to Section 104 of the Austrian Court Jurisdiction Act, for non-consumer-based claims, the parties may agree on a forum clause. The forum clause has to be in writing and to be valid it must specify a specific litigation or any legal dispute that may arise from a specific contractual relationship. Choices of forum clauses for consumer-based claims that violate the special jurisdiction for consumer-based claims are null and void.

ii International jurisdiction

International jurisdiction – except where the defendant is not domiciled within the EU (see Article 6 of the Brussels Ia Regulation) – is regulated by the Brussels Ia Regulation. According to the Regulation, in principle, the court of the Member State of the defendant has jurisdiction.

Article 7 of the Brussels Ia Regulation constitutes a supplement to the general principle of jurisdiction. In matters relating to a contract, a person domiciled in a Member State can be sued in the courts of the place of performance of the obligation in question (Article 7, Paragraph 1a). In matters relating to tort, delict or quasi-delict, a person domiciled in a Member State can be sued in the courts for the place where the harmful event occurred or may occur (Article 7, Paragraph 3). This is deemed to also include the place where the damage occurred. In other words, a forum can be established both in the place where the event triggering the damage took place and the place where the damage actually occurred. The provision plays a crucial role with regard to cross-border banking disputes as it enables claimants to sue a bank in their home jurisdiction, provided that the place of performance or the place of the damaging event is there. However, the provision regularly gives rise to interpretation issues, which lead to disputes on jurisdiction and may prolong the dispute.

32 RGBl, No. 111/1895, in its applicable version.

33 BGBl, No. 140/1979, in its applicable version.

According to Article 25 of the Brussels Ia Regulation, the parties of a contract may agree on the jurisdiction of a court of a Member State. There does not have to be a connection between the parties and the forum. Unless agreed otherwise, the chosen forum has exclusive jurisdiction. A choice of forum clause must fulfil one of the following conditions to be valid:

a the forum clause must be in writing or evidenced in writing;

b the choice of forum is according to practices that the parties have established between themselves; or

c the choice of forum is according to international commercial customs.

Last but not least, the rules on consumer jurisdiction pursuant to Articles 17 and 18 of the Brussels Ia Regulation must be borne in mind in particular with respect to banking disputes. Generally, the provisions allow for consumers to sue their counterparty at the place of their domicile or at the defendant's domicile. However, lawsuits filed by the consumer's counterparty may only be filed at the consumer's domicile.

iii Conflicts of law

In Austria, conflicts of law are generally regulated by the International Private Law Act.[34] Further, in relation to contractual obligations, the Rome I Regulation[35] is relevant and regards non-contractual obligations in the Rome II Regulation[36] (including obligations derived from *culpa in contrahendo*).

In principle, the parties, both in business-to-business and business-to-consumer contracts, are free to choose the applicable law. Failing a choice of law, the Rome I Regulation provides that depending on the circumstances, either the law of the place where the service provider is resident applies or the law of the party that performs the characteristic obligation applies (Article 4 of the Rome I Regulation). More complex rules apply to international consumer contracts. Pursuant to Section 13a of the ACPA, certain sets of rules cannot be altered by way of a choice of law, if the choice of law leads to the application of the law of a non-EEA Member State (Paragraph 1). In addition, the Austrian law provisions governing the application and validity of general terms and conditions of a consumer contract are mandatory in all cases where the consumer contract was concluded because the counterparty expanded its commercial activity to Austria, and the consumer contract was concluded as a result of such activity (Paragraph 2). This means that the general terms and conditions of any foreign bank directing its retail business to Austria must comply with the mandatory Austrian rules governing application and validity of such general terms and conditions.

The Rome I Regulation also allows the courts of the Member States to apply 'its overriding mandatory' rules, irrespective of which law applies to the contract (Article 9 of the Rome I Regulation).

The application of foreign law has to be established *ex officio*. In such cases, the court that has to apply foreign law will consult with the Austrian Ministry of Justice and has to rely on expert opinions. If foreign law cannot be established within a stipulated time frame despite considerable efforts, Austrian law will be applied.

34 BGBl No. 304/1978, in its applicable version.

35 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L 177, p. 6.

36 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007, L 199, p. 40.

VII SOURCES OF LITIGATION

Banking litigation in recent years has revealed that banks are more likely to be defendants in lawsuits than plaintiffs. Nevertheless, a few cases with high amounts in dispute were initiated by banks, for example, a case filed by a well-established Austrian bank against an Austrian community seeking redress for the closing costs of derivative instruments with negative market value, which had been purchased by the public administration in order to improve its debt management.

With regard to banks as defendants, numerous cases were triggered following the start of the financial crisis in 2008, which concerned alleged breaches of advisory duties in the context of the marketing and sale of certificates. These included claims based on prospectus liability if the bank was involved in the issuance or control of prospectus information. These cases reached four-digit sums at various Austrian courts and were responsible for a significant statistical increase in lawyers' caseloads.

Such cases are now in decline as they are being resolved by way of final judgment or settlement. However, nowadays banks seem to be increasingly exposed to representative actions filed by consumer protection associations, primarily the Austrian Consumer Association (VKI), seeking the removal of terms and conditions used by banks for alleged non-compliance with transparency and contra bonos mores rules, as provided for in Austrian consumer law. The most recent example is the issue of negative interest loan agreements (including FX loans), which focuses on the extent to which banks are obliged to pass on the economic benefit of negative interest in loan arrangements to the customer.

VIII EXCLUSION OF LIABILITY

According to Austrian law, a total exclusion of liability is prohibited. Provisions to that effect are therefore null and void. Consequently, exclusion of liability for intentional or conscious violations is not possible. Whether this also applies for certain cases of gross negligence is often discussed by scholars. Generally, exclusion of liability for gross negligence is – even though there are some exceptions – not permissible. Exclusion of liability for slight negligence is largely permissible,[37] but not for personal injury.[38]

The Austrian Consumer Protection Act (ACPA) provides for certain provisions limiting the entrepreneurs' right to exclude or limit their liability for damages. For other damages (e.g., financial loss) exclusion of liability is not possible for gross negligence and intentional damages according to the ACPA.[39] Moreover, any contractual provision included in the general terms and conditions or contractual form shall be ineffective if it is unclear or unintelligible.

Regarding gross negligence, the Supreme Court distinguishes between gross negligence and extreme gross negligence, which implies conduct that cannot be expected on the basis of usual daily life experience. According to the Supreme Court, exclusion of liability for extreme gross negligence contradicts good manners and is, therefore, considered equal to intentional damaging conduct. Thus, exclusion of liability for extreme gross negligence is prohibited

37 Krejci in Rummel/Lukas, ABGB4 Section 879, Civil Code, Paragraphs 122 to 130.

38 Reischauer in Rummel, ABGB3 Section 1298, Civil Code, Paragraph 10a.

39 Reischauer, 'Contractual exclusion of liability for culpable conduct, in particular gross negligence', ÖJZ 2009/114.

in any case. Agreements that exclude liability for extreme gross negligence are, therefore, null and void. The circumstances in which conduct can be considered grossly negligent or extremely grossly negligent constitutes a difficult normative question that, to a great extent, depends on the facts of each case.[40]

i Credit reports

Regarding credit reports, the Supreme Court ruled (7 Ob 666/84)[41] that exclusion of liability for gross negligence – but not for extreme gross negligence – was justified and valid owing to the fact that companies could largely pass on their general business risks (i.e., their relevant credit risk (owing to the insolvency of their customers) onto the financial or credit institutions.[42] In the Supreme Court's view, providing credit reports is a big business that has high risks as the conditions subject to the assessment are, in some cases, very complex. The Supreme Court argued that credit and financial institutions generally have little self-interest in this regard as they do not usually receive any compensation for providing such credit reports. Therefore, financial institutions have a legitimate interest in restricting their liability. For this reason, it seems possible to restrict liability to extremely grossly negligent and intentional conduct.

ii Consulting on funding opportunities

The Supreme Court's jurisprudence on exclusion of liability concerning credit reports is, however, not applicable with regard to consulting on funding opportunities in connection with the financing of a company. The specific issues in one underlying decision (6 Ob 541/92)[43] were whether exclusion of liability was permissible for miscounselling in connection with funding opportunities. In this respect, the Supreme Court argued that credit and financial institutions generally have self-interest in the conclusion of the business transaction especially when the consulting services are closely linked to credit accommodations.[44] Therefore, a legitimate interest to restrict one's liability is not predominant. For this reason, an exclusion of liability for grossly negligent conduct would be null and void.

IX REGULATORY IMPACT

Generally, the increasing pressure applied to banks by the regulator makes financial institutions cautious as to whether they are ready to introduce new products of higher complexity. This conduct reduces the risk of getting exposed to litigation. Currently, financial institutions are still prioritising getting in line with constantly evolving regulatory requirements, regarding, for example, the updated anti-money laundering rules (see Section II.ii) and the changes incurred through the future implementation of the Markets in Financial Instrument Directive (MiFID) II.

40 Krejci in Rummel/Lukas, ABGB4, Civil Code, Section 879, Paragraphs 122–130.

41 OGH 22 November 1984, 7 Ob 666/84; SZ 57/184; EvBl 1985/98 p. 495; RdW 1985, p. 73; JBl 1986, p. 168.

42 Reischauer, 'Contractual exclusion of liability for culpable conduct, in particular gross negligence', ÖJZ 2009/114.

43 OGH 11 June 1992, 6 Ob 541/92; ÖBA 1993, p. 325 (Jabornegg); JBl 1993, p. 397; RdW 1992, p. 399.

44 Reischauer, 'Contractual exclusion of liability for culpable conduct, in particular gross negligence', ÖJZ 2009/114.

At the same time, we expect the latest regulatory developments, such as MiFID II, to continue influencing the case law of the civil law courts. More so than before, breaches of the regulatory rules will be construed as breaches of contractual or pre-contractual duties enabling the customer to adapt or rescind a contract or seek damage compensation. Banks are therefore likely to continue focusing primarily on their internal processes, implementing the increased regulatory duties of care not only to avoid administrative sanctions, but also to reduce the risk of exposure in civil litigation.

X OUTLOOK AND CONCLUSIONS

In the years following the 2008 financial crisis, banking litigation played a significant role before the Austrian courts, especially in Vienna. In particular, damage claims filed by retail investors for wrongful advice or wrongful prospectus information were responsible for capacity restraints before the courts. The sheer number of these lawsuits and their complex nature contributed to the significance of these banking litigation cases in Austria after 2008. Nowadays, such claims are in decline as many cases not yet filed with the court are under increased risk of being rejected as time-barred. This decline does not seem to have been compensated by new cases.

However, representative lawsuits filed by consumer associations (dealing with the application and validity of general terms and conditions towards banks' customers) will continue as the banks are under competitive pressure and cannot afford to relent, especially in cases where the dispute with the consumer organisation will have an impact on the income of the bank. The latest disputes regarding the 'negative interest' cases serve as an example. Further, we anticipate an increase in litigation cases against former management board members of financial institutions based on breaches of professional duties of care.

Appendix 1

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Holger Bielesz has been a partner at Wolf Theiss since 2010 and specialises in civil and commercial dispute resolution, claims enforcement, asset tracing and white-collar crime. He has successfully represented banks, investment funds, industrial clients, European foundations and private clients in civil law litigation, and has acted against a large number of opponents in relation to white-collar crime matters. Holger has also acted as counsel before the European Court of Justice. He is a postgraduate of the College of Europe, a highly regarded academic institution in the domain of European Union law. Before joining Wolf Theiss, Holger gained in-depth professional expertise in EU law at a high-profile international law firm in Brussels.

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