THE BANKING LITIGATION LAW REVIEW

Fourth Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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FOURTH EDITION

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Deborah Finkler

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CONTENTS

PREFACE v
Deborah Finkler

Chapter 1 AUSTRALIA 1
Richard Harris, Philippa Hofbrucker, Kasia Dziadosz-Findlay, Dominic Eberl and Bradley Edwards

Chapter 2 AUSTRIA 13
Holger Bielesz, Paul Krepil and Florian Horak

Chapter 3 BRAZIL 26
José Luiz Homem de Mello, Pedro Paulo Barradas Barata and Sasha Roéffero

Chapter 4 CANADA 38
Graeme A Hamilton, Mathieu Lévesque and D Ross McGowan

Chapter 5 GERMANY 48
Marcus van Bevern

Chapter 6 HONG KONG 59
Wynne Mok

Chapter 7 INDIA 72
Sonali Mahapatra and Tanay Agarwal

Chapter 8 JAPAN 84
Hironobu Tsukamoto and Hiroyuki Ebisawa

Chapter 9 PORTUGAL 93
Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço

Chapter 10 RUSSIA 104
Dmitriy Bazarov, Anton Pomazan and Alexandra Alfimova

Chapter 11 SPAIN 113
Javier Izquierdo and Marta Robles

Chapter 12 UNITED KINGDOM 123
Deborah Finkler and Liu Hui

Chapter 13 UNITED STATES 134
Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi

Appendix 1 ABOUT THE AUTHORS 153
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 163

PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that litigation involving banks shows little sign of slowing and continues to evolve.

Disputes that have arisen in the past year cover a broad 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. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

One of the major challenges of 2020 has, of course, been covid-19, and this year has demonstrated the resilience and flexibility of court systems around the world, including in the UK, in adapting their procedures in order to minimise disruption to the administration of justice. At the time of writing, the 'new normal' in many jurisdictions now provides for virtual hearings (including remote witness evidence) and electronic trial bundles as a default. This enforced experiment seems likely to have a lasting impact on court procedures around the world. While it is likely that trials involving witness evidence will revert to being largely in person, the need to do so for many procedural applications is less obvious. In any event, it is to be hoped that some of the positive aspects of operating remotely – for example the reduction in the amount of paper used – are here to stay.

A continuing trend is the increase in the use of class or multi-party actions and representative claims. Although often perceived as a predominantly US phenomenon, the past year has seen growth in the use of class actions within non-US jurisdictions, particularly in the UK, Canada and Australia. Whether this rise is the precursor to a worldwide adoption will depend on a number of factors, including any new mechanisms for group actions that are adopted in countries where they did not previously exist and the way courts in different jurisdictions react to such new actions. In the UK, for example, judgment is keenly awaited in a Supreme Court case that is expected to play a key role in clarifying the operation of a new collective proceedings regime and, depending on its outcome, either energise or curtail the growth of competition class actions in the UK. Related to the rise of group actions, one potential area of reform is third party litigation funding (a frequent driver of such actions). Recent regulatory reforms in Australia means that litigation funders are now required to hold a licence and must comply with the same conduct obligations to which banks and other credit providers are subject, including the requirement to provide their licensed 'financial services' efficiently, honestly and fairly. It will be interesting to see whether other jurisdictions follow suit.

The preface to last year's edition highlighted the concern that claimants will seek to use data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, as a tool in litigation, and noted that this concern is only likely to

grow. The rise of UK class action cases for damages resulting from data breaches in the past year reinforces the importance of banks managing such risks, both in a regulatory and in a litigation context. Set against the background of increasingly litigious and well-funded claimants, and considering the extensive volume of personal data that banks hold, the need for adequate systems and controls to protect the data of consumers and employees is ever more vital.

At the time of writing, the Brexit transition period is drawing to an end, and nobody is any closer to being able to say what the political or economic impact of Brexit will be. The prospect of the transition period ending with no deal is a real possibility, and it remains to be seen whether the UK can agree a deal with the European Union in the time available. The UK government has declared its intention to sign up to either or both of the 2007 Lugano Convention and 2005 Hague Convention on Choice of Court Agreements, but unless and until that happens there remains a degree of uncertainty over jurisdiction and the enforcement of judgments.

Overall, 2020 has no doubt been a tumultuous year for many. As the year approaches its end, there are some reasons for optimism: global stock markets surged following the results of the US 2020 presidential elections and news of significant strides being made in the development of a covid-19 vaccine. Nevertheless, a substantial amount of political and economic uncertainty remains. Moving forward, the prospect of an unknown future legal landscape in the UK, and to an extent in the remainder of the EU, following Brexit and the continuing effect of covid-19 on the world economy (which may well persist long after the virus itself has been contained) can be expected to generate disputes in the banking sector for a long time to come.

Deborah Finkler
Slaughter and May
London
November 2020

Chapter 2

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 expensive 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 case has recently been dealt with by the Austrian courts.

i No negative interest

In its decision of 26 February 2020[2] the Austrian Supreme Court upheld its opinion on negative interest in credit agreements.

In the past the Supreme Court already decided on several occasions on the question whether a lender may also be obliged to pay interest to the borrower depending on the development of a reference interest rate.[3] In each of these decisions, the court assumed that the parties typically agree that the borrower has to pay interest in return for the provision of the loan value. The Supreme Court held that when concluding the credit agreement, the borrower does not regularly expect to receive payments from the lender at any time during the term of the agreement, so that the lender may receive less in total – or in individual interest periods – than it has provided.

In the present case the Supreme Court was confronted with the interpretation of interest escalation clauses and found that in the absence of special circumstances, an interest escalation clause must be interpreted in such way that it does not lead to 'negative interest'.

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

2 OGH 26 February 2020= ÖBA 2020, 650.

3 OGH 21 March 2017, 10 Ob 13/17k = ÖBA 2017, 338; OGH 29 August 2017, 6 Ob 51/17v = ÖBA 2017, 867; OGH 26 April 2017, 1 Ob 4/17w = ÖBA 2017, 510; OGH 28 June 2017, 9 Ob 35/17p; OGH 30 May 2017, 8 Ob 101/16k = ÖBA 2017, 856 (*Foglar-Deinhardstein*); OGH 30 May 2017, 8 Ob 107/16t.

The Supreme Court also stated that if a borrower had in fact understood the interest rate agreements in the credit agreement to the effect that the lender might be obliged to pay interest to the borrower in certain circumstances, a bona fide contracting party would have been expected to disclose such an understanding, as such understanding would be contrary to a typical loan agreement.

ii Contributory negligence of an investor: change of case law by the Supreme Court

According to the established case law of the Supreme Court, in the case of incorrect investment advice, contributory negligence on the part of the investor can come into consideration, which reduces the investment advisor's liability for damages, if the customer has, among other things, excellent knowledge of the investment sector and should, therefore, have noticed the incorrectness of the investment advice.[4]

In past decisions,[5] the Supreme Court stated that in the case of several errors of advice, a reduction of damages can only be considered if the careless behaviour of the injured party is also correlated to the respective error of clarification.

In its decision of 29 August 2019,[6] the Supreme Court abandoned this view. Now the Supreme Court takes the view that, in case of contributory negligence, the only criterion for the division of damages is whether the injured party acted in breach of care (in his own affairs) and whether this negligence was also the cause of the occurrence of the specific damage. As a result, it must be examined whether the injured party's negligence caused the same damage as the breach of the defendant's advisory duty. It is not required that the injured party's negligence is somehow related to the breach committed by the defendant.

ii No redemption of claims protected by bank secrecy

In its decision of 4 July 2018,[7] the Austrian Supreme Court held that banking secrecy rules preclude a transfer of claims to a payer that is not subject to banking secrecy.

In the present case, a bank's credit insurer sought payment of the outstanding loan amount from the borrower. The insurer and the bank agreed in the insurance contract to transfer the bank's rights against the borrowers under certain circumstances. Subsequently, the insurer claimed to have been vested with the bank's creditor's rights by operation of law pursuant to Section 1422 of the Austrian Civil Code[8] (compulsory assignment – *notwendige Zession*).

The insurer inter alia argued that banking secrecy rules would not apply due to Section 38, Paragraph 2, No. 7 of the Austrian Banking Act. According to the latter provision, the obligation to maintain banking secrecy does not apply to the extent that the disclosure of information is required to clarify legal matters arising from the relationship between banks and customers. The Supreme Court, however, held that this exception from the bank secrecy

4 OGH RS0102779.

5 OGH 29 August 2018, 1 Ob 137/18f; OGH 29 November 2017, 1 Ob 112/17b.

6 OGH 29 August 2019, 1 Ob 78/19f.

7 OGH 4 July 2018, 7 Ob 20/18v =ÖBA 2019, 923 (*Liebel*).

8 According to Section 1422 of the Austrian Civil Code (compulsory assignment – *notwendige Zession*) anyone who pays another person's debt for which he is not personally liable or for which he is not liable with specific assets can demand the assignment of the creditor's rights before or during payment (redemption request). This can also be done by implication.

obligation would not apply in the present case. Instead, the assignment in question serves to fulfil the insurance contract between the bank and the insurer but does not serve to clarify legal matters arising from the relationship between the bank and the customer.

iii Statute of limitation of prospectus liability claims

In its decision of 24 September 2019,[9] the Austrian Supreme Court commented on the statute of limitation of prospectus liability claims.

According to former Section 11 Paragraph 7 of the Austrian Capital Market Act (KMG)[10] – now Section 22, Paragraph 7 of the KMG 2019[11] – claims of investors must be filed with the court within ten years of the end of the offer subject to the obligation to publish a prospectus. According to Section 1489 of the Austrian Civil Code, any action for compensation is time-barred after three years from the time when the damage and injuring party became known to the injured party, but at the latest after 30 years. Up to now it was not entirely clear and was subject to an ongoing discussion whether the ten years' period and the three years limitation period apply concurrently. This would mean that despite a maximum ten years' limitation period the claim would get time-barred three years after the damage and injuring party became known to the injured party (effectively shortening the limitation period to three years). In the present case the Austrian Supreme Court held that, at least with regard to negligence behavior, Section 11, Paragraph 7 of the KMG (now Section 22, Paragraph of the 7 KMG 2019) supersedes not only the objective 30-year limitation period but also the subjective three-year period of Section 1489 of the Austrian Civil Code.

III RECENT LEGISLATIVE DEVELOPMENTS

i General

In the spring of 2020 the covid-19 pandemic plunged the global economy into a deep crisis and posed major challenges for the future. Austria was also considerably affected by the covid-19 pandemic, and therefore the Austrian legislator enacted numerous laws and regulations.

ii Laws in connection with the covid-19 pandemic

3rd COVID-19 Act[12]

In the context of the 3rd COVID-19 Act, published on 4 April 2020, inter alia the Beneficial Owner Register Act (BORA) was amended. In general, according to the BORA all legal entities listed in Section 1 of the BORA, that is, stock corporations (*Aktiengesellschaften*), limited liability companies (*GmbHs*), saving banks (*Sparkassen*), insurance companies (*Versicherungsvereine*) trusts and partnerships (*Kommanditgesellschaften*, *Offene Gesellschaften*) are obliged to report their beneficial owners within four weeks after the first registration of the respective entity (Section 5, Paragraph 1 of the BORA). Regarding most of the above mentioned entities, the deadline starts upon the registration in the commercial register, as regards trusts following the establishment of a place of administration in Austria. Any

9 OGH 24. 9. 2019, 8 Ob 14/19w = ÖBA 2020, 264 (*Burtscher*).

10 BGBl. Nr. 625/1991.

11 BGBl. I Nr. 62/2019.

12 BGBl. I Nr. 23/2020.

changes in the information must also be reported within four weeks from the date when the change becomes known. According to Section 3, Paragraph 3 of the BORA, these entities are obliged to check once a year whether the data entered in the register is up-to-date. They are obliged to report a change or to confirm the previously reported data within four weeks after the due date of the annual review.

According to Section 16, Paragraph 1 of the BORA, the Austrian tax office can impose a penalty if the report according to Section 5 is not submitted. In this case, a warning period of six weeks must be set before a compulsory penalty may be imposed.

By way of Article 3 of the 3rd COVID-19 Act a transitional provision was inserted in Section 18 of the BORA. According to this provision, the periods for reporting data by the legal entity and the warning period and imposition of a penalty are interrupted if the periods had not yet expired by the end of 16 March 2020 or if the start of the period falls within the period between 16 March 2020 and 30 April 2020. These deadlines according to Section 5 of the BORA have started to run anew on 1 May 2020.

4th COVID-19 Act[13]

On 4 April 2020, the '2nd Federal Law On Accompanying Measures To COVID-19 In The Judiciary' (2nd COVID-19 JUBG) was issued. The first chapter of the 2nd COVID-19 JUBG provides for measures for civil law cases. According to Section 2 of the 2nd COVID-19 JUBG, the due date of payments for loan agreements was postponed.

For consumer loan agreements concluded before 15 March 2020, claims of the creditor for repayment, interest or redemption payments due between 1 April 2020 and 30 June 2020 were deferred for a period of three months from the due date, if the consumer, due to the exceptional circumstances caused by the spread of the covid-19 pandemic, suffers a loss of income that makes it unreasonable to expect him to provide the service owed. In particular, the borrower cannot reasonably be expected to provide the service if his reasonable livelihood or the reasonable livelihood of his dependants is at risk.

For the duration of the deferral, the borrower is not in default with the payment of these services; during this period, therefore, no interest on arrears will accrue. If a period is set for the realisation of collateral for the credit, after the expiry of which the collateral can no longer be realised, this period shall be extended in accordance with the duration of the deferral. However, the borrower has the right to continue to make his contractual payments on the originally agreed due dates. In this case the deferral does not apply. However, the parties to the contract may agree to defer payments in deviation from the legally prescribed deferral. However, termination by the lender due to default in payment or a significant deterioration in the financial circumstances of the consumer is excluded until the deferral expires. This rule is mandatory for the lender.

According to Section 3 of the 2nd COVID-19 JUBG in the case of a contractual relationship entered into before 1 April 2020, if the debtor did not make a payment due between 1 April 2020 and 30 June 2020 or did not make it in full because his economic capacity has been considerably impaired as a result of the covid-19 pandemic, he or she must pay the statutory interest of no more than 4 per cent for the arrears of payment. This applies irrespective of any deviating contractual agreements. In addition, the debtor is not obliged to reimburse the costs of extrajudicial debt collection or recovery measures.

13 BGBl. I. Nr. 24/2020.

According to Section 9 of the 2nd COVID-19 JUBG, over-indebtedness is suspended as ground to file for insolvency until 31 January 2021. Further, creditors may not file for insolvency based on over-indebtedness (i.e., the debtor company has still cash to pay due debt, but will fail doing so in the future) during that period. However, directors are under the obligation to file for insolvency (1) within 60 days from 31 January 2021 if the company is (still) over-indebted by the end of 31 October 2021, or (2) within 120 days from the date of the occurrence of over-indebtedness, whichever period ends later. Note that illiquidity (i.e., inability to pay the due debt) remains a ground to file for insolvency both for creditors and debtors.

According to Section 10 of the 2nd COVID-19 JUBG bridge loans granted in order to pre-finance short-time work measures in connection with covid-19 are not subject to claw back claims according to Section 31 of the Austrian Insolvency Act, if such bridge loans are repaid to the lender immediately after receipt of short-time work payments by the Public Employment Service Austria (AMS). The latter does not apply (1) with regard to secured loans and (2) in cases where the lender was aware of the borrower's illiquidity.

According to Section 13 of the 2nd COVID-19 JUBG unsecured shareholder loans do not fall under the prohibition of repayment under Austrian capital maintenance rules if granted with a maximum maturity of 120 days until 31 January 2021. Both foregoing provisions shall induce shareholders to inject their own money to help protecting the company without having to fear that their claim be subordinated to claims of other creditors.

iii The New 'Capital Market Act 2019'

As the 'Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market'[14] (the Prospectus-Regulation) had to be applied directly as of 21 July 2019 in all Member States, in Austria the Austrian Capital Market Act was renewed entirely in July 2019. As part of the EU-Finance-Adjustment Act 2019[15] the Capital Market Act 2019[16] (KMG 2019) entered into force on 21 July 2019.

The most important change was that the regulations for the offer of securities are now regulated in the Prospectus Regulation. For this reason, these provisions have now been removed from the KMG 2019 and the Austrian legislator has taken this as an opportunity to completely renew the KMG. However, the KMG 2019 has not brought any major changes. This was justified with regards to the existing case law in Austria.[17]

The following innovations are worth mentioning:

a The exemptions from the obligation to publish a prospectus for investments have now been reduced, which is why a prospectus obligation pursuant to Section 3, Paragraph 1 of the KMG 2019 applies in the following cases, among others:

- an offer of investments aimed at investors who acquire investments with a minimum amount of €100,000 per investor in each separate offer, as well as an offer of investments with a minimum denomination of €100,000;

14 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

15 BGBl I 2019/62.

16 BGBl. I Nr. 62/2019.

17 *Thomas Zivny*, ZFR 2019/548.

- an offer of investments with a total equivalent value in the European Economic Area (EEA) of less than two million euros; this upper limit shall include any income from offers of investments of the last twelve months that are exempt from the prospectus pursuant to this section;
- an offer of investments which is directed exclusively at qualified investors; and
- offers of investments addressed to less than 150 natural or legal persons per EEA member state who are not qualified investors.

b Article 8, Paragraph 3 of the KMG 2019 now stipulates that prospectuses must remain available for ten years after publication on (1) an Internet site of the issuer or on an Internet site of the financial intermediaries placing or selling the investments, including any paying agents existing in Austria, or (2) on an Internet site of the Financial Market Authority (FMA) or on the Internet site of a body commissioned by the FMA for this purpose against appropriate remuneration.

c Pursuant to Article 21 of the Austrian Capital Market Act, the right for consumers to cancel the purchase of securities or investments only comes into play in the event of failure to publish a prospectus in the case of an offer of securities or investments subject to the obligation to publish a prospectus at all. There is no more a cancellation right for failure to publish supplements to the prospectus.

d Penalties for violations of the provisions of the Prospectus Regulation for public offerings of securities were regulated in Section 15, Paragraph 1 of the KMG 2019. A fine of up to twice the amount of the profits or losses avoided as a result of the infringements may be imposed, if such profits or losses can be quantified, or, if such quantification is not possible, a fine of up to €700,000 may be imposed. In addition, the penalties for the imposition of fines on legal persons in connection with violations of the provisions of the Prospectus Regulation have now been increased. Therefore, pursuant to Section 15, Paragraph 2 of the KMG 2019, the maximum fine to be imposed is €5 million or 3 per cent of the total annual turnover of the legal person concerned.

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).[18] 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[19] (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.

18 RGBl 1896/79, in its applicable version.

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

If a bank violates the court order, it becomes liable for damages.[20] 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.

EU Member States

In general, the regime of the Brussels Ia Regulation[21] 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.[22] 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[23] 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

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

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

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

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

sought. The following general requirements for the issuance of a declaration of enforceability are set forth in Section 406 of the AEA: (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).[24]

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 *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.[25]

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

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

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).[26] 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.

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 have jurisdiction in all matters not explicitly assigned to district courts.

In the Austrian Court Jurisdiction Act,[27] 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)[28] 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.

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

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

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

ii International jurisdiction

International jurisdiction in civil and commercial matters – except where the defendant is not domiciled within the EU (see Article 6 of the Brussels Ia Regulation) – is governed 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 2). 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.

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 governed by the International Private Law Act.[29] Further, in relation to contractual obligations, the Rome I Regulation[30] is relevant as regards non-contractual obligations in the Rome II Regulation[31] (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

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

30 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.

31 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.

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.

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,[32] but not for personal injury.[33]

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.[34] 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 gross negligence is impermissible in consumer contracts (see foregoing paragraph) and exclusion of liability for extreme gross negligence is prohibited in any event. 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 constitute a difficult normative question that, to a great extent, depends on the facts of each case.[35]

i Credit reports

Regarding credit reports, the Supreme Court ruled (7 Ob 666/84)[36] that exclusion of liability for gross negligence – but not for blatantly gross negligence – was justified and valid owing to the fact that companies could largely pass on their general business risks, that is,, their relevant credit risk (owing to the insolvency of their customers) onto the financial or credit institutions.[37] 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. In the underlying decision ultimately decided by the

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

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

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

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

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

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

Supreme Court (6 Ob 541/92),[38] the plaintiff – the customer of the defending bank – filed a lawsuit against the bank for wrongful advice. The plaintiff had negotiated a loan agreement with the bank. The bank furnished wrong information on available subsidies to the plaintiff, and therefore lured the plaintiff from applying for these subsidies, thus reducing his financial burden. The courts had to decide whether the case was comparable to the case law on credit reports (mentioned above). The Supreme Court ruled that this case is different because the bank had a genuine interest in procuring the loan agreement to the plaintiff.[39] Therefore, a legitimate interest to restrict one's liability was not predominant in this case. For this reason, the exclusion of liability for grossly negligent conduct was 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[40] (see Section II.ii) and the changes incurred through the future implementation of the Markets in Financial Instrument Directive (MiFID) II.

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

Currently, it is not predictable what further impacts the economy will have to deal with due to the covid-19 pandemic and how long these exceptional circumstances will continue. However, it has to be expected that also in the near future measures must be taken to support the economy, so that numerous insolvencies of companies or individuals can be avoided or at least limited to a minimum. Even if the current measures in Austria are limited to the end of 2020, they might be extended accordingly. Likewise, it cannot be ruled out that new laws will be enacted to regulate further payment deferrals to support consumers. Despite such possible measures, banks will likely need to get prepared to absorb a greater number of insolvencies of companies, which currently survive due to the current covid-19 measures but will run into unsurmountable financing problems thereafter. Consequently, it is likely that banks will have to concentrate on the restructuring of financing arrangements with their customers in the near future.

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

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

40 *Bielesz/Krepil/Horak*, The Banking Litigation Law Review – Edition 3, Chapter III.ii.

Appendix 1

ABOUT THE AUTHORS

HOLGER BIELESZ

Cerha Hempel

Holger Bielesz has been a partner at Cerha Hempel since 2020 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 Cerha Hempel, Holger gained in-depth professional expertise in EU law at a high-profile international law firm in Brussels and was a partner at Wolf Theiss from 2010 to 2019.

PAUL KREPIL

Wolf Theiss

Paul Krepil has been an associate since 2016 and is a member of the dispute resolution department at the Wolf Theiss Vienna office. Paul focuses on commercial litigation, white collar crime and insolvency law. He received a master's degree from the University of Vienna and completed part of his studies at the University of Edinburgh. Before joining Wolf Theiss, Paul gained experience at international law firms and as a judicial law clerk in Vienna.

FLORIAN HORAK

Wolf Theiss

Florian Horak is a consultant at Wolf Theiss's Vienna office and a member of the dispute resolution practice group. He joined the firm in 2015 and has been a part of the litigation team since. His main practice areas are civil and commercial dispute resolution, as well as criminal law, where he focuses on tort and white-collar crime disputes, including corruption, fraud and compliance. Florian has a law degree from the University of Vienna and several years of practical experience.

CERHA HEMPEL

Parkring 2
1010 Vienna
Austria
Tel: +43 1 514 35 0
Fax: +43 1 514 35 35
holger.bielesz@cerhahempel.com
www.cerhahempel.com

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