The Banking Litigation Law Review

Fifth Edition

Editor
Deborah Finkler

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THE BANKING LITIGATION LAW REVIEW

Fifth Edition

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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 11
Holger Bielesz and Paul Krepil

Chapter 3 BRAZIL 23
José Luiz Homem de Mello, Pedro Paulo Barradas Barata and Sasha Roéffero

Chapter 4 GERMANY 37
Marcus van Bevern

Chapter 5 HONG KONG 50
Wynne Mok and Kathleen Poon

Chapter 6 PORTUGAL 63
Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço

Chapter 7 RUSSIA 76
Dmitriy Bazarov, Anton Pomazan and Ekaterina Smelkova

Chapter 8 SPAIN 88
Javier Izquierdo and Marta Robles

Chapter 9 SWITZERLAND 98
Nicolas Bracher and Meltem Steudler

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Chapter 10 UNITED KINGDOM 107
Deborah Finkler and Chris Wilkins

Chapter 11 UNITED STATES 118
Rishi N Zutshi, Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi

Appendix 1 ABOUT THE AUTHORS 137
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 147

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PREFACE

This year's edition of the *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The covid-19 pandemic continued to loom large in 2021, with judicial systems taking part in a forced experiment of embracing new technology to minimise the disruption caused by pandemic restrictions; in some jurisdictions we may see the permanent adoption of measures taken up in response to the restrictions imposed by the pandemic, as well as a general shift towards the greater use of new technology in dispute resolution. This extends to the increased use of virtual hearings (as well as electronic trial bundles and filing systems), although we can expect that physical hearings will continue to play a prominent role, particularly in complex cases. While it is too early to predict the future with any certainty, it seems likely that some form of hybrid approach is here to stay.

Outside the court room, the effects of the pandemic continue to be felt throughout the wider economy. As various restrictions and financial interventions by governments are scaled back, the early signs of the long-term, negative economic effects of the pandemic are now beginning to emerge in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the economic fallout of the pandemic will feature in future editions of this Review.

A continuing trend this year has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing bank fraud and other illicit transactions, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers. Claimants will no doubt continue testing the limits of these obligations and duties in the courts.

Last year's preface highlighted the political and economic uncertainty produced by Brexit as the transition period drew to an end. Since then, some welcome clarity has emerged around the foundations of the United Kingdom's new relationship with the European Union, including in the area of jurisdiction and enforcement of judgments. However, the new relationship will take time to bed down, with additional complexities (and potentially disputes) likely to emerge as parties navigate the new reality. That said, there is little evidence that commercial parties, including banks and financial institutions, have been deterred from choosing the United Kingdom as a forum for litigating their disputes.

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While 2021 has been another challenging year for many, there has been some cause for optimism: globally stock markets have continued to perform well as economic recoveries gather pace in many parts of the world, while the roll-out of the covid-19 vaccine has allowed many jurisdictions to emerge from a period of seemingly endless lockdowns and suppressed economic activity. Despite these positive signs, however, the global economy is likely to feel the effects of the covid-19 pandemic for some time and in various (and often unexpected) ways, as highlighted by the recent emergence of a crisis in the global supply chain. At the same time, other global challenges, such as climate change, will increasingly dominate the political and economic agenda. Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector look set to continue.

Deborah Finkler
Slaughter and May
London
November 2021

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Chapter 4

GERMANY

Marcus van Bevern[1]

I OVERVIEW

The covid-19 pandemic hallmarked the years 2020 and 2021, although society got used to a certain pandemic normalcy. In the financial industry, the Wirecard scandal and the collapse of the Greensill Bank marked two of the biggest banking crashes since the financial crisis.

Most civil law cases had nothing to do with these events. Looking at the disputes decided by the Federal High Court (BGH), the pattern of recent years has remained widely unchanged. Many disputes concerned the rescission of consumer loans after borrowers had revoked the underlying loan agreements – only the relevant kinds of financing have changed. Furthermore, the BGH dealt with disputes on general terms of business.

Nevertheless, the turmoil caused by the pandemic will likely hit the financial industry with a delay. Numerous disputes are pending before lower instance courts concerning commercial rent payments during the lockdown. The BGH's final decisions of these disputes could have a tremendous impact on the banks. The collapse of the Greensill Bank could also impact deposit guarantee schemes.

II SIGNIFICANT RECENT CASES

i Unwinding of consumer loans – different results depending on the nature of financing

In recent years, a number of cases dealing with revocation and unwinding of consumer loan agreements have preoccupied the courts. These lawsuits were based on the non-compliance of revocation instructions issued by the banks with consumer protection laws and mostly concerned mortgage loans. If the instruction was flawed, the borrower was entitled to unwind the loan for an unlimited period, even after the loan itself was already repaid.[2] All payments had to be unwound and the borrower only had to pay a loss-of-use indemnification. These claims retroactively subverted the banks' interest calculation.

In July 2010, in order to facilitate the banks' attempts to comply with the law, the German lawmaker issued a pre-formulated model instruction,[3] which was used by a number of banks. Subsequently, courts of lower instance expressed doubts as to whether the model instruction complied with the EU consumer credit directive. The argument was that the

1 Marcus van Bevern is a partner at Kantenwein. The author would like to thank associate Lisa Maria Oettig for her support in the preparation of this chapter.

2 BGH, judgment of 12 July 2016, court reference: XI ZR 564/15.

3 Article 247, Section 6, Annex 6 of the Introductory Code to the German Civil Code.

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instruction was unclear because it included a cross-reference to the German Civil Code regarding the necessary information, instead of expressively listing such information. In 2012, the BGH decided that the cross-reference was sufficiently clear for the consumer.[4]

In March 2020, the European Court of Justice (ECJ) disagreed with the finding of the BGH. The ECJ held that loan agreements have to specify the information and that a mere reference to provisions of national law is not sufficient.[5] The BGH refused to follow the ECJ. It argued that the ECJ did not have the jurisdiction to answer the questions in dispute because the consumer credit directive did not apply to mortgage loans.[6]

However, in October 2020, the BGH conceded that the jurisdiction of the ECJ remained applicable to all other consumer credit agreements, in particular car loans.[7] In this case, the BGH followed the ECJ that the pre-formulated model instruction does not comply with the consumer credit directive and is void.

The result is remarkable in that the same instruction is valid, if it concerns a mortgage loan, but is void, if it concerns another consumer credit agreement. Car loan financiers may now be confronted with numerous demands to unwind such loans. Nevertheless, the consumers' claims may be forfeited if the revocation was declared after the loan had been repaid and the bank had released the security.[8]

In September 2021, the ECJ went even further and held that consumers were entitled to unwind these loan agreements in the case of contractual stipulations, such as on default interest, that were not transparent and that consumers could also unwind the purchase financed by the loan if both agreements were linked with each other. The ECJ demanded a high standard of transparency and rejected a forfeiture of the claims.[9] It remains to be seen whether these decisions will ignite a new dispute between ECJ and BGH.

In summary, although the BGH had in recent years applied an increasingly restrictive approach for the unwinding of consumer loans, the wave of claims will still likely proceed.

ii Unilateral change of general terms of business

German law provides that the conclusion or alteration of a contract requires a declaration of intent. Mere silence to another party's offer is, unless between merchants, legally irrelevant. Given the needs of retail banking, most banks' general terms of business provide that changes to such terms become effective, if the bank announces the changes in advance and the customer does not explicitly object to the changes (the omission clause).

4 BGH, judgment of 15 August 2012, court reference: VIII ZR 378/11; confirmed by judgment of 22 November 2016, court reference: XI ZR 343/15.

5 ECJ, judgment of 26 March 2020, court reference: C-66/19.

6 BGH, resolution of 19 March 2019, court reference: XI ZR 44/18; resolutions of 31 March 2020, court references: XI ZR 198/19, XI ZR 299/19 and XI ZR 581/18; resolutions of 26 May 2020, court references XI ZR 103/19, XI ZR 117/19, XI ZR 213/19, XI ZR 252/19, XI ZR 261/19, XI ZR 262/19, XI ZR346/19, XI ZR 359/19, XI ZR 372/19, XI ZR 413/19, XI ZR 424/19, XI ZR 428/19, XI ZR 434/19, XI ZR 444/19, XI ZR 458/19, XI ZR 514/19, XI ZR 541/19, XI ZR 569/19, XI ZR 570/19, XI ZR 64/19, XI ZR 65/19 and XI ZR 98/19.

7 BGH, judgment of 27 October 2020, court reference: IX ZR 498/19.

8 BGH, judgment of 21 January 2020, court reference: XI ZR 465/18; resolution of 23 January 2018, court reference: XI ZR 298/17; resolution of 3 December 2019, court reference: XI ZR 100/19.

9 ECJ, judgements of 9 September 2021, court references: C-33/20, C-155/20 and C-187/20.

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In April 2021, the BGH held that the standard omission clause is invalid.[10] According to the BGH, the clause violates essential principles of German law and, contrary to the requirement of good faith, unreasonably disadvantages the customers. The BGH argued that the clause results in a unilateral right of the bank to change the entire contractual relationship.

Pursuant to the BGH, this also applies to a unilateral increase of fees and charges, despite Section 675g of the German Civil Code, which states that contracts on payment services may include clauses according to which it may be assumed that customers have declared their consent under certain conditions. The BGH held that the scope of this provision is strictly limited to payment services contracts and does not include other contracts.

As a result, a change of standard business terms requires the explicit acceptance of the customer. Banks will most likely reflect the BGH's decision in their general terms and conditions and adapt to the new requirements.

iii Rental payments

During the first wave of the covid-19 pandemic in spring 2020, most retail shops, bars and restaurants were closed due to the lockdown ordered by the government. Numerous enterprises suffered severe economic damage and refused to pay their rents. This led to a lively discussion on the lessees' payment obligation. Lessees argued that the use of their leased property had become impossible (Section 275 of the German Civil Code), and therefore the lessors were not entitled to the agreed rent. Lessees further argued that the lockdown constituted a defect of the leased property, removing or reducing the suitability for the contractually agreed use, which, in turn, released the lessee from paying rent completely or at least partially (Section 536 of the German Civil Code). Finally, lessees argued that the lockdown constituted a material change of circumstances that had been the basis of the rental agreement, and that the parties would not have entered into the contract, or would have agreed to different content, if they had foreseen this change. Therefore, the lessees could demand the contract to be adapted, pursuant to Section 313 of the German Civil Code.

Several courts of lower instance have held different views. The courts have held that the contractual use of the leased property has not become impossible and does not release the lessees from their payment obligation.[11] They have also held that the lockdown does not constitute a defect of the leased property.[12] However, while all courts have further agreed that the lockdown constituted a material change of circumstances, they disagreed under which conditions the lessees may demand that the agreed rent be adapted. Some courts have held that lessees were entitled to a general rent reduction of 50 per cent.[13] Others have held that a rent reduction is only justified in exceptional cases and that the lessee's entire financial situation, including the accumulation of profits, has to be taken into account.[14]

10 BGH, judgment of 27 April 2021, court reference: XI ZR 26/20.

11 OLG Dresden, judgment of 24 February 2021, court reference: 5 U 1782/20; OLG Karlsruhe, judgment of 24 February 2021, court reference: 7 U 109/20; OLG Munich, indicative court order of 17 February 2021, court reference: 32 U 6358/20.

12 OLG Dresden, judgment of 24 February 2021, court reference: 5 U 1782/20; OLG Karlsruhe, judgment of 24 February 2021, court reference: 7 U 109/20; OLG Munich, indicative court order of 17 February 2021, court reference: 32 U 6358/20.

13 OLG Dresden, judgment of 24 February 2021, court reference: 5 U 1782/20.

14 OLG Karlsruhe, judgment of 24 February 2021, court reference: 7 U 109/20; OLG Munich, indicative court order of 17 February 2021, court reference: 32 U 6358/20.

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Given these different views, the BGH will have to make the final decision. If the BGH were to decide that lessees are generally entitled to a rent reduction, lessors may try to pass the shortfall on to their banks.

iv Cum-ex transactions

The cum-ex scandal in Germany remained a topic of major public interest in 2021. This public interest has been fuelled by ongoing efforts of the German authorities and courts to evaluate cum-ex transactions from a criminal, civil and tax law point of view.

There are multiple variants of cum-ex trades. What all trades have in common is that the parties agree on a share purchase shortly before or on the dividend record date and therefore 'cum' dividend. The settlement of the trade, however, occurs after the dividend declaration, so that the share is delivered 'ex' dividend. This structure makes it possible to obtain multiple returns of capital yields tax that have only been paid to the German tax authorities once. Estimates suggest that the damage for European tax authorities amounts to approximately €55 billion.

Most prominently, in July 2021, the BGH rendered a decision in the trial against two former London bankers, Michael Shields and Nicholas Diable. The BGH confirmed the first instance judgment of the Bonn district court that reclaiming capital yields tax from the fiscal authorities, despite the tax not being withheld, constituted tax evasion in the case at hand. Moreover, the BGH confirmed the Bonn court's decision ordering private bank Warburg, which acted as buyer in the relevant transactions, to repay their profit plus interest (approximately €176 million) to the German tax authorities. Warburg sued Deutsche Bank, which acted as custodian bank on the sell side in the relevant transactions, for damages in the amount of the tax debt Warburg had to repay. Warburg argued that it had assumed that Deutsche Bank had withheld capital yields tax, as this was its responsibility as custodian on the sell side. The Frankfurt district court dismissed Warburg's claim by holding that, as primary tax debtor, Warburg could not claim recourse from Deutsche Bank but had to carry the tax burden exclusively.

Generally, investigations of fiscal and criminal authorities continue to expand, which, in some cases, also affect dividend rights of shareholders. For example, holding company Lang & Schwarz, which focuses on on-exchange and off-exchange trading in securities, had to set aside reserves of €45 million because it faces new tax assessments for 2008 and 2009. These new tax assessments may lead to repayment obligations of up to €61 million.

Finally, a decision of the Higher Regional Court Frankfurt in March 2021 made waves in cum-ex and legal circles. The case concerned a business model known as 'cum-ex shortselling', which has been developed by the accused Hanno Berger. The Frankfurt court found that the business model qualifies not only as tax evasion but also as professional and gang fraud. The reason for the qualification of the business model as fraud was to allow the extradition of Mr Berger from Switzerland to Germany, where he is charged. Mr Berger fled Germany to Switzerland in 2012 after investigators had raided his house and law firm. Switzerland generally does not extradite tax evaders. Owing to the decision of the Frankfurt court, Mr Berger is currently under arrest for extradition purposes.

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III RECENT LEGISLATIVE DEVELOPMENTS

i Introduction of electronic securities

On 10 June 2021, the Electronic Securities Act (eWpG) came into force. The new law is part of the government's blockchain strategy. It aims to modernise German securities law and the associated supervisory law. A central part of the law is the introduction of digital securities. Previously, securities had to be certified in a physical deed. The deed represented all rights and claims in connection with the security and was the medium of transfer. This allowed a good faith acquisition from non-entitled persons. Under the new law, the deed may be replaced by a digital security entered into (inter alia) a blockchain register. The law provides for a central electronic securities register or, alternatively, registers by distributed ledger technologies. The Federal Financial Supervisory Authority (BaFin) will monitor the issuance and maintenance of these registers as financial services.

ii Financial Market Integrity Strengthening Act

Also on 10 June 2021, the Financial Market Integrity Strengthening Act (FISG) came into force. The law was mainly driven by the Wirecard scandal, which had seriously damaged the German financial market and investors' trust. The government saw the need to further regulate the auditing of financial statements to ensure the accuracy of corporate accounting records. BaFin is now entitled to audit all capital market companies. This includes the right to request information from third parties as well as to conduct forensic examinations and to inform the public. Previously, BaFin had often withheld this kind of information due to liability concerns. Furthermore, it is now mandatory for capital market companies to replace their auditors after 10 years. To strengthen the independence of the auditors, auditing and advisory services have to be separated. Finally, civil law liability of auditing companies has been extended.

iii Act to Improve Criminal Law Combating Money Laundering

On 17 March 2021, the Act to Improve Criminal Law Combating Money Laundering came into force. The law serves to implement the Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on the same issue.

Originally, the provisions on money laundering in the German Criminal Code only aimed to combat organised crime. Money laundering only applied where monetary funds originated from certain predicate offences, such as drug trading. This scope was subsequently extended to any serious crime, even if not qualifying as organised crime. Henceforth, money laundering applies to all criminal offences as a predicate offence. The extension goes beyond the requirements of the Directive (EU) 2018/1673, which only required the inclusion of certain other predicate offences. To avoid unlimited expansion, the law was accompanied by further restricting requirements.

IV CHANGES TO COURT PROCEDURE

In recent years, the German legislator added elements of collective redress to the civil procedure, which traditionally had been strictly bipartisan. In 2005, the legislator adopted the Act on Model Case Proceedings in Disputes under Capital Markets Law aiming at providing declaratory relief to a specific number of claimants regarding preliminary questions in capital markets disputes. In 2018, the Act on Model Declaratory Actions came into effect, which

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allows consumer protection agencies to initiate model proceedings against private companies. Both instruments are limited, either with respect to the parties who may use the instrument or with respect to the matter in dispute. Both of them have in common the fact that they only allow the determination of preliminary questions, that determination being the basis only for each subsequent individual claim; in other words, each claimant still has to establish the individual prerequisites of their own claim (e.g., amount of damages and causation).

A new instrument will be introduced within the next two years. Already in 2018, the European Commission proposed a new directive on representative actions for the protection of collective interests of consumers.[15] On 4 December 2020, the directive came into force after ratification by the European Parliament. Member States now have to implement the directive in their national laws until the end of 2022. In Germany, the implementation is still pending. The new instrument will allow consumer protection agencies to file cross-border claims directly for payment of damages.

In addition, the BGH opened the door for registered debt collection agencies to enforce uniform claims assigned to them on a trust basis. Previously, such fiduciary assignments were often held to be invalid due to a breach of the Legal Services Act; this is because the main subject of the agencies' activities was considered as rendering legal advice, which was reserved for attorneys-at-law.[16] The BGH now favoured a more liberal approach towards debt collection, allowing all measures in connection with the collection and enforcement of the claim. This includes claims being initiated in the name of the collection agency.[17] Though the decision does not technically concern a class action, it paves the way for enforcing small uniform consumer claims in a more or less automated way. Thus, it leads in the same direction as class actions.

The support by the jurisdiction in favour of a digitisation of the legal industry continued in 2021. On 9 September 2021, the BGH allowed a digital contract generator operated by a legal specialist publisher with which contractual documents can be generated based on pre-formulated text modules.[18]

V INTERIM MEASURES

In general, there are two instruments of interim relief under German law: seizure and injunction. A seizure can be *in rem* in order to secure subsequent enforcement of a monetary claim against movable or immovable property, if such enforcement is considered to be in jeopardy. Furthermore, a seizure in person may be available by arresting a debtor to ensure compulsory enforcement against the debtor's property, when such enforcement is at risk. If it is necessary to protect a party's rights or otherwise to avert significant disadvantages, an injunction may be available to either maintain the status quo or provide a temporary status in a legal relationship that is in dispute.

15 COM/2018/184.

16 BGH, judgment of 30 October, court reference: XI ZR 324/11; judgment of 11 December 2013, court reference: IV ZR 46/13; judgment of 21 October 014, court reference: VI ZR 507/13; judgment of 11 January 2017, court reference: IV ZR 340/13; judgment of 21 March 2018, court reference: VIII ZR 17/17.

17 BGH, judgment of 27 November 2019, court reference: VIII ZR 285/18.

18 BGH, judgment of 9 September 2021, court reference: I ZR 113/20.

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In all cases, seizure and injunction must not result in a final decision on the merits of a case. At the discretion of the courts, orders containing seizures or injunctions can be granted *ex parte* or after hearing both parties. If the main proceedings are not already pending, the rendering court is legally obliged to order, upon application by the debtor, court proceedings to be commenced within a certain period determined by the court.

In banking law disputes, interim relief is frequently an issue in cases concerning standby letters of credit and similar forms of bank guarantees. This is particularly the case in disputes regarding cross-border transactions, where the applicant suspects that the money, once disbursed to the beneficiary, cannot be successfully reclaimed because a repayment had to be claimed for and enforced in another jurisdiction. In these situations, it is undisputed that the applicant (i.e., the debtor in the underlying transaction) may apply for an injunction to enjoin the beneficiary (i.e., the creditor in both the underlying transaction and the line of credit (LoC)) from drawing the LoC issued in favour of them, provided that the prerequisites for an injunction are met, in particular when there is prima facie evidence that the drawdown would be a misuse of the creditor's rights in the underlying transaction.[19] However, neither the issuing nor the nominated banks are obliged to respect an injunction that was issued against the beneficiary. The BGH held that an injunction issued to restrain the beneficiary from exercising his or her right under the LoC does not provide sufficient evidence of obvious misuse, so that the issuing and the nominated bank are not obliged to comply with the injunction against the beneficiary.[20]

Therefore, applicants often attempt to apply directly for interim relief against the issuing bank, enjoining the bank to disburse the LoC towards the beneficiary. On the merits, it is clear that the bank may only refuse to disburse the LoC, in case it is evidently clear that the beneficiary breaches the contract in drawing the LoC. However, it is disputed whether, even in the case of an abuse by the beneficiary, an injunction against the bank is available at all. In the past, courts held that the applicant might prevent its bank from disbursing the LoC to the beneficiary.[21] Conversely, more recent judgments deny the availability of this measure in general. The courts argue that the issuing bank, when disbursing the LoC, would be acting on its own risk and that the question of whether or not it was entitled (and obliged) to honour the LoC, only had to be decided subsequently when the bank claims recourse against the applicant.[22]

As an alternative to the aforementioned interim measures under German national law, Regulation (EU) No. 655/2014 provides for a European Account Preservation Order (EAPO), to ensure the subsequent enforcement of a creditor's pecuniary claim by freezing the debtor's bank accounts in cross-border cases. With the exception of certain claims (family, inheritance, insolvency and social security law as well as arbitration), the EAPO applies to pecuniary claims in civil and commercial matters, provided either the competent court or the creditor is located or domiciled in another Member State than the one where the bank account is maintained. The preservation order is available in all cases where a judgment has already been rendered or proceedings are pending or about to be initiated. It requires a real

19 OLG Stuttgart, judgment of 20 January 2015, court reference: 10 U 102/14; *Vollkommer in: Zöller* Commentary on the Civil Procedure Code, 33rd edition 202018, Section 940, margin No. 8.4.

20 BGH, judgment of 10 October 2000, court reference: XI ZR 344/99.

21 OLG Frankfurt, judgment of 3 March 1983, court reference: 10 U 244/82.

22 OLG Stuttgart, judgment dated 14 November 2012, court reference: 9 U 134/12; *Vollkommer in: Zöller*, Commentary on the Civil Procedure Code, 33rd edition 2020, Section 940, margin No. 8.4.

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risk that the subsequent enforcement of the creditor's claim might be in jeopardy and – unless a judgment has already been rendered – sufficient evidence of a likelihood that the creditor will succeed on the merits.

VI PRIVILEGE AND PROFESSIONAL SECRECY

Under the German Code of Civil Procedure, there is no general pretrial discovery or disclosure obligation. Each party of a proceeding has to submit the facts and documents supporting their claim. Only under restricted circumstances may a court direct one of the parties or a third party to produce documents, records or any other material in their possession, namely that:

a one of the parties made specific reference to the details of such documents in the course of the proceedings and its relevance for the case; and

b the applicant sets forth the reasons why the party itself cannot produce the document but believes that the other party has the document in their possession.

In general, the third party could also be an attorney. However, an attorney must not be directed to produce documents if he or she is entitled to refuse to testify (which is usually the case).

Owing to these restricted rules, document production is scarcely used in civil proceedings. The question of privilege and professional secrecy is rarely raised, and therefore is often of no importance in civil proceedings. The BGH recently upheld the very restricted approach to pretrial discovery and document production. The case concerned a consumer loan agreement in which the borrower had exercised its right of withdrawal. Although the law generally provides that, in case of revocation, the contractual performances received by each party as well as the emoluments taken are to be returned, the court rejected a claim by the borrower for disclosure of the bank's specific emoluments taken from the loan amount in dispute. The court argued that there is no specific obligation by the bank to disclose its business secrets because the consumer could rely on the general assumption that the bank had taken emoluments in the amount of the statutory interest rate.[23]

However, there might be an exception to the application of privilege and professional secrecy rules in case a civil claim may also be based on criminal offences. In general, attorneys are bound to secrecy and a breach of such duty may constitute a criminal offence. To enforce and protect such duty to secrecy, attorneys also have the right (and obligation) to refuse testimony on matters covered by their duty to secrecy in both civil and criminal proceedings. Despite this duty to secrecy, criminal investigators have recently confiscated documents and reports held by external lawyers in a number of high-profile cases. For example, Jones Day has been raided in relation to the VW emission scandal and Freshfields has been raided in relation to the near bankruptcy of (former) HSH Nordbank AG. In these cases, the external law firms had been hired to conduct internal investigations and have submitted internal investigation reports to their clients. Generally, the Code of Criminal Procedure provides that, in cases where criminal charges have been brought against a defendant, certain documents – including documents in the possession of an attorney as well as all documents relating to attorney–client communications – are exempted from confiscation by the investigating authorities. However, in the aforementioned cases, the investigators argued that there is no general prohibition to seize such reports and any related documents, but rather the

23 BGH, judgment of 17 April 2018, court reference: XI ZR 446/16.

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question of seizure would depend on the individual content of the documents. In particular, the interviews of employees would not be subject to the legally protected 'bond of trust' between the attorney and the client. Lower courts upheld these decisions.[24] Unfortunately, the question has not yet been scrutinised by higher courts and thus remains unclear. Though Jones Day filed a constitutional complaint, the constitutional court refused to decide on the merits, arguing that Jones Day – as a US-based law firm – could not claim a violation of the basic rights under the German Constitution.[25] Jones Day has filed a complaint against the German government with the European Court of Human Rights (ECHR). The ECHR accepted the case for review in June 2021.[26] Thus far, the ECHR has invited the German government to answer a number of questions in connection with Article 8 of the European Convention on Human Rights.

Once the investigation authorities have seized documents, any person having a legitimate interest may demand access to the records and could then also make use of them in civil proceedings. This is also a frequent strategy of claimants in banking litigation cases.

VII JURISDICTION AND CONFLICTS OF LAW

Banking disputes are typically based on contract law. Contracts usually contain choice of law clauses as well as forum clauses usually complying with the Brussels Ia-Regulation Jurisdiction and conflicts of law issues therefore rarely play a role in banking law disputes.

As a result of Brexit, the number of cases dealing with jurisdiction and conflicts of law issues could increase in cross-border disputes involving parties from the United Kingdom. The transitional provisions in Articles 66–69 of the Brexit Agreement provide that a number of regulations under European law concerning applicable law as well as jurisdiction, recognition and enforcement of judicial decisions remain applicable if the relevant event (e.g., the institution of legal proceedings) occurred before the end of the transition period (i.e., 31 December 2020).[27] This applies, in particular, in respect of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation). However, all legal proceedings instituted on or after 1 January 2021 will no longer be subject to European law. Instead, these proceedings will be governed either by agreements under international law (if available) or by autonomous national law, including conflict of law rules.

In respect of agreements under international law, the legal situation is currently unclear. The Lugano Convention, which provides for the recognition and enforcement of a wide range of civil and commercial judgments between the EU and European Free Trade Association states, does not apply in respect of the United Kingdom, after the European Commission rejected the United Kingdom's application for joining on 4 May 2021. However, there might

24 LG Hamburg, resolution of 15 October 2010, court reference: 608 Qs 18/10.

25 BVerfG, resolution dated 27 June 2018, court reference: 1287/17, 2 BvR 1583/17.

26 ECHR, court reference: 1022/19 und 1125/19.

27 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community dated 31 January 2020 (OJ L 029 31.1.2020, p. 7), amended by Decision No. 1/2020 of the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 12 June 2020 (OJ L 225 14.7.2020, p. 53) cf. https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A02020W%2FTXT-20200613.

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be a bilateral treaty in force between Germany and the United Kingdom. Both states entered into the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters on 14 July 1960 (the German–British Convention). The German–British Convention was applicable until the Brussels I Regulation came into effect. It is unclear whether it has been automatically reinstated as a consequence of Brexit.

These uncertainties could particularly affect two issues: the standing of a party in court and the necessity to provide collateral. Under German procedural law, the standing of a party may be under discussion, if a party was founded and has its seat in a jurisdiction outside the European Union but is, in fact, administered in another jurisdiction. In the past, due to lower founding requirements and advantages regarding liability, a significant number of companies having their administrative seat in Germany made use of English company law. These companies were either limited companies under English law or a combination of a German private limited company with an English Ltd as its general partner (Ltd & Co KG). Despite a number of legal questions and disputes arising in this context, courts tended to generally admit these forms of corporations in accordance with EU law and the freedom of establishment. However, after Brexit these companies can no longer rely on the EU freedom of establishment. Instead, German national conflict of law rules apply, providing for the 'real seat' theory, instead of the incorporation theory recognised under Anglo-Saxon law. As a result, companies founded and registered in the United Kingdom, but having their real (administrative) seat in Germany, could face serious problems in court as they could be denied standing in German courts. This does not apply, however, to English law companies that also have their administrative seat in the United Kingdom.

Henceforth, UK companies filing a lawsuit in Germany could be ordered to provide collateral for the defendant's legal expenses according to the German Code of Civil Procedure. In general, only plaintiffs from outside the European Union or the European Economic Area have to provide a security deposit covering the costs of the proceedings, if the defendant demands it. Exceptions apply if, due to international treaties, defendants do not demand a security deposit. Such an exception exists under the German–British Convention. However, as mentioned above, it is unclear whether the German–British Convention has been reinstated.

VIII SOURCES OF LITIGATION

Typical scenarios in banking disputes concern mis-selling cases and prospectus liability when the customer relied on incorrect information or flawed advice, or both, by the bank. German law provides for an informed investor concept: the mere commencement of a conversation between a bank and its customer concerning an envisaged investment by the customer and his or her request for a recommendation by the bank constitutes an implied advisory agreement.[28] Under this contract, the advice rendered by the bank has to be investment- and investor-friendly; that is, the bank has to inquire about the customer's experience and knowledge as well as his or her risk awareness and personal financial circumstances, including the income and wealth position, and the purpose and duration of the envisaged investment. Furthermore, the bank has to evaluate all publicly available information with regard to the recommended investment and must inform the customer about the main risks. A negligent false statement is considered a breach of contract, resulting in a damage claim for unwinding the sale. In this regard, the courts argue that there is an actual presumption that the customer

28 BGH, judgment dated 6 July 1993, court reference: XI ZR 12/93.

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would have refrained from making the investment if properly advised. Similarly, prospectus liability requires a prospectus to disclose all risks and circumstances relevant for the investment decision fully, completely and correctly.

As mentioned above, a significant number of cases in recent years concerned disputes for revocation and unwinding of consumer loan agreements.[29] As the dispute between the BGH and the ECJ described above is now finally decided, lawsuits for the unwinding of mortgage loans should run out. However, lawsuits for the unwinding of other consumer loans – eventually including the unwinding of the financed purchase agreement – can still be expected and might be encouraged and supported by digital collection agencies. It remains to be seen whether there will be a new dispute between BGH and ECJ on the unwinding of the purchase agreements and whether the German courts will tend to reject the majority of these claims, holding that the consumer's right of withdrawal was forfeited.[30]

Another frequent source of litigation concerns the repayment of fees. Over the past years, the BGH maintained a rather restrictive approach against standard fees charged by the banks and frequently held them invalid due to a breach of the law on standard business terms.[31] In this respect, the banks' chances of success will have decreased because of the judgement of 27 April 2021, in which the BGH held that the standard omission clause is invalid.[32] In view of this decision, further claims for repayment of increased fees can be expected, if the increase was made unilaterally by the banks based on the omission clause without the customers' explicit acceptance.

IX EXCLUSION OF LIABILITY

Clauses excluding a bank's liability or narrowing the scope of contractual duties to reduce the risk of liability are frequently used in contracts. Nevertheless, they rarely prevent customers from filing a lawsuit because courts frequently consider such clauses as general terms of business, and hold them invalid according to the law on standard business terms. Notably, German courts frequently hold that a restriction of liability for a party's main contractual obligation is void.

X REGULATORY IMPACT

Despite increasing regulation, regulatory law has almost no impact on civil law banking disputes. Most disputes are based on contractual or statutory provisions under German civil law. German courts frequently hold that regulatory law has no general direct effect in civil law contracts because it serves a different purpose. There is a direct effect only if the law explicitly

29 Cf. Section II.1.

30 BGH, judgment of 21 January 2020, court reference: XI ZR 465/18; resolution of 23 January 2018, court reference: XI ZR 298/17; resolution of 3 December 2019, court reference: XI ZR 100/19.

31 BGH, judgment of 13 May 2014, court reference: XI ZR 405/12; judgment of 4 July 2017, court reference: XI ZR 562/15; judgment of 19 February 2019, court reference: XI ZR 562/17; resolution of 19 March 2019, court reference: XI ZR 9/18.

32 BGH, judgment of 27 April 2021, court reference: XI ZR 26/20 (cf. Section II.2).

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orders so.[33] Without such explicit order, the BGH refuses to even consider regulatory law when interpreting a civil law contract (unless such contract directly refers to provisions under regulatory law).[34]

Exceptions may apply under the law of torts, which provides for a damage claim in case of a breach of statutory law, provided that such statutory law is intended to individually protect another person.[35] Whether or not a tort damage claim may be based on a breach of regulatory law depends on the individual statutory provision in dispute. In this respect, German courts are also rather reluctant to grant individual claims, again arguing that regulatory law serves different purposes, in particular to protect the banking system or the public in general and not individuals. For example, whereas the offering of banking services without licence was considered a violation of individual protection, the prohibitions on insider trading as well as ad hoc publicity and market manipulation were not considered laws designed to protect individuals.[36] Thus, a tort action may only rarely be based on regulatory law.

However, the legislator only recently expanded the scope of action for BaFin. In 2015, Small Investor Protection Act came into effect. Inter alia, it allows BaFin to intervene against the sale and distribution of individual financial products causing concerns regarding the protection of investors or considered dangerous for the normal course or integrity of the financial markets. On the basis of this law, BaFin issued two decrees in 2019, aiming at the prohibition of binary options and contracts for difference.[37] According to the German Civil Code, contracts violating these decrees will be held void.[38] In 2021, BaFin issued another decree concerning long-term premium savings contracts containing an unlimited unilateral right of the bank to determine the contractual interest rate. According to the decree, BaFin forced the banks to inform all affected consumers about the fact that such unilateral rights are void according to a judgment of the BGH, which had already been rendered in 2004.[39] BaFin further requested the banks to offer consumers a recalculation of interest and a new interest clause in line with the requirements laid out by the BGH.[40] This decree is one of the rare examples where a public authority enforced the jurisdiction of the BGH in favour of all affected consumers. It remains to be seen whether BaFin will intensify the use of this instrument in the future.

XI OUTLOOK AND CONCLUSIONS

Both German and European law set a high standard of consumer protection. As a result, the case law in banking law disputes is rather restrictive against the banks. This is true in particular for cases concerning the unwinding of consumer loans (eventually including the underlying transaction) as well as standard terms of business and fees and commissions.

33 BGH, judgment of 29 April 2014, court reference: II ZR 395/12.

34 BGH, judgment of 29 April 2014, court reference: II ZR 395/12.

35 Section 823, Paragraph 2 of the German Civil Code.

36 BGH, judgment of 7 July 2015, court reference VI ZR 372/14; judgment of 13 December 2011, court reference: XI ZR 51/10; Wagner in Munich Commentary on the German Civil Code, 7th edition 2017, margin No. 505 et seq.

37 See www.bafin.de; references: VBS 7-Wp 5427-2018/0046 and VBS 7-Wp 5427-2018/0057.

38 Section 136 of the German Civil Code.

39 BGH, judgment of 17 February 2004, court reference: XI ZR 140/03.

40 See www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Aufsichtsrecht/Verfuegung/vf_210621_allgvfg_Zinsanpassungsklauseln_Praemiensparvertraege.html.

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Though it can be expected that the previous years' wave of litigation for the unwinding of mortgage loans will stop, litigation for the unwinding of other consumer loans and car purchases will likely proceed.

Certain economic problems following the covid-19 pandemic have yet to be finally decided by the BGH. Depending on the outcome, these decisions may also affect the banks.

The general trends for more collective action and more digitisation in the legal industry will continue to rise in the future. These trends are supported by German courts and European law, in particular the directive on collective consumer claims, which is yet to be implemented in Germany.

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Appendix 1

ABOUT THE AUTHORS

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Until 2006, Marcus worked in the litigation and arbitration department of an international law firm, where he represented, among others, national and international financial institutions in complex litigation and arbitration matters. Later, he became in-house counsel and head of transaction management in an internationally active German finance group. At the end of 2009, he joined Kantenwein.

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