THE BANKING LITIGATION LAW REVIEW

Sixth Edition

Editor
Jonathan Clark

THE LAWREVIEWS

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This article was first published in December 2022
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.TheLawReviews.co.uk

ISBN 978-1-80449-139-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DREW & NAPIER LLC

GILBERT + TOBIN

KANTENWEIN

PINHEIRO NETO ADVOGADOS

SLAUGHTER AND MAY

WENGER VIELI AG

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Preface

This year's edition of *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 impact of covid-19 continued throughout 2022 with many of the temporary measures enacted becoming permanent features of the litigation landscape. In many jurisdictions, procedural rules have been revised to provide for the use of technology, including in the form of virtual and hybrid hearings. Nevertheless, physical hearings remain an option, especially for complex cases that involve witness evidence and large amounts of oral advocacy.

Financial institutions have also had to adapt to the increasing popularity of crypto-assets. Across the globe, regulators have made efforts to provide clarity on the regulatory framework of digital assets and this will no doubt be an evolving area in the years to come. It remains to be seen how courts will adapt to the unique challenges raised in disputes involving such assets.

Signs of the long-term economic effects of the pandemic, war in Ukraine and inflation are now visible 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. In a number of financial transactions, there will be winners and losers from the current increase in interest rates following a sustained period of historically low rates. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the current global economic environment will feature in future editions of this *Review*.

A continuing trend this year, as in other recent years, has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing fraud, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers, including from their own susceptibility to fraudulent schemes. Claimants, and their funders, are expected to continue testing the limits of these obligations and duties in the courts.

Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector looks set to continue.

Jonathan Clark
Slaughter and May
London
November 2022

Chapter 3

GERMANY

Marcus van Bevern[1]

I OVERVIEW

Sometimes it appears we are living in times of permanent crisis. The Dotcom Bubble, Lehman Crash, great financial crises, refugee crises, Brexit and the covid-19 pandemic mark the 'highlights' of the last two decades. The year 2022 was supposed to be an economic restart after two years of a devastating pandemic – but that was before Russia's invasion of Ukraine put the western world into a state of shock.

Despite all these enormous economic and political challenges, banking litigation in Germany proceeded almost as if nothing had happened – maybe because it takes some time before the disputes reach the courts. As in the years before, most disputes concerned details of consumer protection – for example, the rescission of consumer loans after borrowers had revoked underlying loan agreements or the determination of interest rates in long-term savings contracts. Furthermore, disputes on general terms of business and banking fees remained the centre of interest. It is particularly interesting that, so far, the covid-19 pandemic has not caused an increase of insolvency proceedings or debt restructuring. This kind of normalcy may be due to the financial aid granted by the government or a reassuring sign of Germany's economic stability in times of turmoil. However, it remains to be seen whether the situation will change in the recession predicted for 2023.

II SIGNIFICANT RECENT CASES

i Unwinding of consumer loans – a never-ending story

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

1 Marcus van Bevern is a partner at Kantenwein. The author would like to thank Dr Carolin Sabel for her support in the preparation of this chapter.

2 Federal High Court (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.

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 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 Federal High Court (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. Henceforth, in particular car loan financiers have been confronted with numerous demands to unwind such loans – even in cases where the loan had already been repaid and the bank had released the security. Subsequently, further questions came up between the BGH and the ECJ whether the consumers' claims may be forfeited in such a situation. The ECJ held that, in general, the consumers' revocation right is not time-barred and can still be declared after the parties have completely fulfilled their contractual obligations.[8] However, the BGH argued that the revocation right may be forfeited under national law, if, depending on the circumstance of the individual case, it is abused to gain arbitrary economic advantage. The BGH had already held in previous decisions that an abuse of rights may occur, for example, if a consumer continues to use his or her car despite having declared the revocation or if the bank has released all security after full and final repayment of the loan.[9] The BGH has now submitted these questions to the ECJ in a proceeding for preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union, thereby acknowledging that the ECJ, will have the final word.[10]

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

9 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.

10 BGH, resolution of 31 January 2022, court reference: XI ZR 113/21, ECJ, court reference: C–117/22.

In summary, the BGH continues to apply an increasingly restrictive approach for the unwinding of consumer loans. Nevertheless, in light of the jurisdiction of the ECJ the wave of claims will likely still proceed.

ii Unilateral change of general terms of business – claims for reimbursement of fees

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 provided in the past 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).

In April 2021, the BGH held that the standard omission clause is invalid.[11] 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. The decision had a significant impact on Germany's banking practice: first and foremost, banks have reflected the BGH's decision in their general terms and conditions and adapted to the new requirements. To implement the new terms, banks contacted all their customers to give their consent. Taking into account the mere number of accounts in Germany, this resulted in more than 100 million letters in the course of 2021.

Yet the dispute continues. In the aftermath of the BGH's decision, consumer protection agencies initiated several model proceedings against savings banks in Cologne and Berlin to compensate their customers for fees they had collected in the past without the customers' explicit acceptance of such fees. The banks are raising the objection to the statute of limitations, thereby trying to limit the reimbursement to the past three years. The model proceedings are currently pending with the higher regional courts in Hamm and Berlin.[12]

iii Premium savings contracts – interest rate adjustment

To support wealth creation, German savings banks offer long-term savings contracts to their customers, often based on variable interest rates to be determined by the banks. In recent years, these contracts have come under scrutiny by consumer protection agencies demanding better interest rates. The agencies claimed that the banks had no unilateral determination right and that the criteria were not transparent and therefore violated the law on general terms of business. These claims, which were often raised as model cases concerning a multitude of contracts, have been approved by the courts. While some courts originally only wanted to determine the criteria for the adjustment to be observed by the banks, the BGH held that the courts have to determine the interest rate themselves. In doing so, the courts would have to take into account long-term savings rates corresponding to the presumed will of the parties

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

12 OLG Hamm, court reference: I-31 MK 1/21; KG Berlin, court reference: MK 1/21.

in terms of content and time. The benchmark for interpretation would have to be based on an objective, generalised view of the typical ideas of the public involved in transactions of the same kind.[13] Meanwhile, a higher regional court decided that the adjustment has to be made in accordance with interest rates of federal bonds for corresponding terms as published by Deutsche Bundesbank.[14]

iv Rental payments – no general reduction for damages due to the pandemic

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. Contrary to the common law principle of frustration, German law – as other civil law jurisdictions – takes the approach that contracts may be adapted in extraordinary circumstances. This applies where the balance between the parties' performances is seriously disturbed and one of the parties cannot reasonably be expected to uphold the contract without alteration. The concept was developed in times of hyperinflation after World War I. While the general view was that the concept applied to the consequences of the pandemic, questions in detail were in dispute. Some courts favoured a general approach of a 50 per cent reduction in rent;[15] others requested to consider the individual circumstances.[16] In January 2022, the BGH denied a general rent reduction and finally decided that an adaptation may only be demanded taking into account the individual financial situation of the lessee, including the accumulation of profits.[17] This decision makes it harder for lessees to pass the damage on to third parties.

v Cum-ex transactions

The Cum-Ex Scandal in Germany (also known as the German Dividend Tax Scandal) remained a topic of major public interest in 2022, fuelled by ongoing efforts of the German authorities and courts to evaluate cum-ex transactions from the points of view of criminal, civil and tax law.

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 tax authorities once. Estimates suggest that the damage for (European) tax authorities amounts to approximately €55 billion.

Criminal law has been the field of most dynamic development in respect of cum-ex in 2022. In 2021, the BGH had confirmed that reclaiming capital yields tax from the fiscal authorities, despite the tax not being withheld, constitutes tax evasion.[18] Against this background, in 2022, two bankers were sentenced to prison by German courts because of their involvement in cum-ex transactions. The BGH confirmed a first instance judgment

13 BGH, judgment of 6 October 2021, court reference: XI ZR 234/20.

14 OLG Dresden, judgment of 13 April 2022, court reference: 5 U 1973/20.

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

16 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.

17 BGH, judgment of 12 January 2022, court reference: XII ZR 8/21.

18 BGH, judgment of 28 July 2021, court reference: 1 StR 519/20.

sentencing a former employee of Hamburg-based private bank Warburg to five and a half years in prison because of his involvement in Warburg's cum-ex trades,[19] and another decision was rendered by the Bonn district court,[20] sentencing a second Warburg employee to three and a half years in prison. Furthermore, in 2022, Dr Hanno Berger, a German lawyer who had been very active in the cum-ex industry and is known to be the 'cum-ex mastermind' in the public, was extradited to the German authorities by Switzerland, after he had fled there 10 years ago when his offices in Frankfurt were searched. Following the extradition, criminal proceedings were initiated against Dr Berger by the courts of Bonn and Wiesbaden in 2022. In these proceedings, Dr Berger's former law firm partner is a principal witness and is providing the court and the public with insights into the cum-ex industry.

An important civil law judgment was delivered by the Higher Regional Court of Frankfurt in March 2022 in respect of an appeal by Warburg Bank.[21] Warburg had been ordered by the district court of Bonn to repay an amount of approximately €176 million generated from cum-ex transactions to the tax authorities[22] and had sued Deutsche Bank, which had acted as custodian bank on the sell-side in the relevant transactions, for damages in the amount of this tax debt Warburg had to repay. The Frankfurt district court had 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.[23] Though based on a slightly deviating reasoning, the Higher Regional Court of Frankfurt has now confirmed this decision and rejected Warburg's appeal.

With a view to tax law, in February 2022, the Federal Tax Court (BFH) rejected the appeal of a US pension fund that had unsuccessfully sued the Federal Tax Office for the repayment of capital yield tax in connection with a cum-ex transaction.[24] In its decision, the BFH found that the pension fund was not entitled to a tax repayment as it had not acquired beneficial ownership of the shares due to the 'model-like' contractual concept underlying the transaction, pursuant to which the share purchaser was neither able nor intended to exercise essential shareholder rights but rather played a passive role in the transaction.

III RECENT LEGISLATIVE DEVELOPMENTS

i Fair Consumer Contracts Act

Despite the already high standard of consumer protection, German law has further strengthened the position of consumers vis-à-vis the economy. In the Fair Consumer Contracts Act of 10 August 2021, a number of further protective measures have been amended to the existing law. The new law mainly focuses on fighting already well-known phenomena, such as unauthorised telephone advertising, which leads to contracts being imposed or foisted on the consumer against their will, flanked by more efficient sanctioning of unauthorised telephone advertising. Furthermore, lawmakers also wanted to restrict certain contractual clauses in general terms and conditions, which were regarded as causing unreasonable disadvantages to

19 BGH, court order of 31 May 2022, court reference: 1 StR 466/21.

20 LG Bonn, judgment of 9 February 2022, court reference: 62 KLs 3/20.

21 OLG Frankfurt am Main, judgment of 2 March 2022, court reference: 17 U 108/20.

22 LG Bonn, judgment of 18 March 2020, court reference: 62 KLs - 213 Js 41/19-1/19.

23 LG Frankfurt am Main, judgment of 23 September 2020, court reference: 2-18 O 386/18.

24 BFH, judgment of 2 February 2022, court reference: I R 22/20.

customers. In particular, clauses containing restrictions on the assignment of payment claims will be held ineffective in the future. This will also affect banks' general terms of business which regularly contain comparable restrictions.

ii Act on the introduction of virtual general meetings of stock corporations

Against the background of positive experience gained during the pandemic and the ongoing digitisation of stock corporation law, virtual general meetings are now generally allowed pursuant to an amendment of the German Stock Corporation Act dated 20 July 2022. The level of rights exercised by the shareholders in a virtual format shall be comparable to that of face-to-face meetings.

iii Implementation of Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment

The Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 contains minimum rules for the definition of criminal offences and penalties to combat fraud and counterfeiting in connection with cashless payments. It came into force on 30 May 2019 and was implemented into German law on 10 March 2021. The legislative adjustments concerned the expansion of the criminal offences of forging payment cards, cheques and bills of exchange, and computer fraud under the German Criminal Code. Further, a new criminal offence of preparing to steal or to embezzle payment cards, cheques, bills of exchange and other physical non-cash payment instruments was introduced in the Criminal Code.

IV CHANGES TO COURT PROCEDURE

On 5 October 2021, the law on the expansion of electronic legal relations with the courts came into force. The law aims to make use of the potential and opportunities of digitisation. Henceforth, the entire file management shall be converted to electronic files and all involved parties shall have access to electronic communication with the courts. The hurdles in the transmission of electronic documents will be dismantled by setting up further secure transmission paths. Access to the law shall be extended to additional digital access options. The law goes along with a number of amendments to the Civil Procedure Code which will come into force subsequently until 2026.

Furthermore, on 1 August 2022, the reformation on the rules of professional practice for the legal industry came into force. The aim of the new regulation is to grant law firms organisational freedom under company law and to set standards that apply irrespective of their legal forms. From now on, law firms will be recognised as the central organisational form for attorneys and tax advisers. Therefore, the entities in which attorneys and tax advisers practise their profession will be the central point of contact and responsibility.

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.

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 would have 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 letter of credit) from drawing the letter of credit 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.[25] However, the BGH held that an injunction issued to restrain the beneficiary from exercising his or her right under the letter of credit does not provide sufficient evidence of obvious misuse, so that neither the issuing nor the nominated bank are obliged to comply with the injunction against the beneficiary.[26]

Therefore, applicants often attempt to apply directly for interim relief against the issuing bank, enjoining the bank to disburse the letter of credit towards the beneficiary. On the merits, it is clear that a refusal to disburse the letter of credit requires that it is evidently clear that the beneficiary breaches the contract in drawing the letter of credit. 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 letter of credit to the beneficiary.[27] Conversely, more recent judgments deny the availability of this measure in general. The courts argue that the issuing bank, when disbursing the letter of credit, would be acting on its own risk and that the question of whether or not it was entitled (and obliged) to honour the letter of credit, only had to be decided subsequently when the bank claims recourse against the applicant.[28]

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

25 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.

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

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

28 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.

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 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. A court may only direct one of the parties or a third party to produce documents, records or any other material in their possession under certain circumstances, 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.[29]

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

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

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 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.[30] 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.[31] Jones Day has filed a complaint against the German government with the European Court of Human Rights (ECHR) which is supported by the German Federal Bar (*Bundesrechtsanwaltskammer*). The ECHR accepted the case for review in June 2021.[32] 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. Apparently, the German government has not yet answered these questions.

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).[33] 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 immediately after Brexit was unclear. The Lugano Convention, which provides for the recognition and enforcement of a wide range of civil and commercial judgments between the EU and

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

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

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

33 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.

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. Following the European Commission's decision, German courts have rejected to apply the Lugano Convention.[34]

However, arguments have been made that the German-British Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters dated 14 July 1960 was automatically reinstated as consequence of Brexit. Notably, the courts have not addressed the German-British Convention in decisions. Rather, they have held that claimants having their seat in the United Kingdom are to be treated as plaintiffs from outside the European Union or the European Economic Area, and can be ordered to provide collateral for the defendant's legal expenses according to the German Code of Civil Procedure, if the defendant demands it.[35]

Recognition could affect another issue: the standing of a party in court. 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 limited company 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, a German court has already held that a limited company founded and registered in the United Kingdom, but having its real (administrative) seat in Germany, may no longer rely on freedom of establishment. However, the court did not generally deny the company's standing in German courts. Rather, the court has held that a 'milder' form of the 'real seat' theory applied and that the company was to be treated as the equivalent under German law instead (e.g., as a general partnership).[36] The discussion does not apply, however, to English law companies that also have their administrative seat in the United Kingdom.

VIII SOURCES OF LITIGATION

Typical scenarios in banking disputes concern misselling 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

34 OLG Frankfurt, judgment of 9 September 2021, court reference: 11 U 84/18; BGH, resolution of 1 March 2021, court reference: X ZR 54/19 (BPatG).

35 OLG Frankfurt, judgment of 9 September 2021, court reference: 11 U 84/18; BGH, resolution of 1 March 2021, court reference: X ZR 54/19 (BPatG).

36 OLG Munich, judgment dated 5 August 2021, court reference: 29 U 2411/21 Kart.

agreement.[37] Under this contract, the advice rendered by the bank has to be investment- and investor-friendly; that is, the bank has to enquire 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 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.[38] Since the dispute between the BGH and the ECJ regarding the unwinding of mortgage loans has finally been decided, these lawsuits 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 how the new dispute between BGH and ECJ on forfeiture of the consumer's right of withdrawal will finally be decided and whether the German courts' tendency to reject the majority of these claims, holding that the right of withdrawal was forfeited, will be supported by the ECJ.[39]

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.[40] In this respect, the banks' chances of success have further decreased because of the judgment of 27 April 2021, in which the BGH held that the standard omission clause is invalid.[41] As mentioned above, 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. It remains to be seen whether the courts will approve the objection to the statute of limitations raised by the banks or whether banks will be held liable to compensate their customers for fees collected more than three years ago.[42]

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

38 cf. Section II.1.

39 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; BGH, resolution of 31 January 2022, court reference: XI ZR 113/21, ECJ, court reference: C–117/22; cf. Section II.1.

40 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.

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

42 OLG Hamm, court reference: I-31 MK 1/21; KG Berlin, court reference: MK 1/21; cf. Section II.2.

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 orders so.[43] 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).[44]

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.[45] 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 to be laws designed to protect individuals.[46] The same applies to know-your-customer obligations under anti-money laundering laws, which are also not considered to be individual protections.[47] Thus, a tort action may rarely be based on regulatory law.

However, the legislator only recently expanded the scope of action for the Federal Financial Supervisory Authority (BaFin). In 2015, the 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.[48] According to the German Civil Code, contracts violating these decrees will be held void.[49] In July 2021, BaFin banned Terraoil Swiss AG

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

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

45 Section 823, Paragraphs 2 of the German Civil Code.

46 BGH, judgment of 7 July 2015, court reference: VI ZR 372/14; judgment of 13 December 2011, court reference: XI ZR 51/10;

47 BGH, judgment of 6 May 2008, court reference: XI ZR 56/07.

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

49 Section 136 of the German Civil Code.

from marketing, distributing and selling its shares to investors in Germany.[50] Also 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.[51] 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.[52] 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

German and European consumer protection law remains the focal point in banking litigation law. It is not to expect that this will change in the future. It is more likely that the legislator will further increase the requirements. The financial industry must therefore be prepared to continue to operate in a legally highly regulated environment that is rather restrictive against their business. This is particularly true for retail banking with consumers. Despite some courts' attempts to close Pandora's box and to reject consumers' claims for a reversal of loan agreements, such claims will likely continue. Furthermore, the courts are particularly critical of any kind of banking fees. The profitability of the banking business will therefore continue to be under scrutiny by the courts. Whether that makes macroeconomic sense is another question.

50 See www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Verbrauchermitteilung/weitere/2021/meldung_210713_Terraoil_Produktintervention.html.

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

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

Appendix 1

About The Authors

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ISBN 978-1-80449-139-3