The Banking Litigation Law Review

Fourth Edition

Editor
Deborah Finkler

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THE BANKING LITIGATION LAW REVIEW

FOURTH EDITION

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Editor
Deborah Finkler

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BUSINESS DEVELOPMENT MANAGER
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PREFACE

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

Disputes that have arisen in the past year cover a broad spectrum, from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

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

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

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

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

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

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

Deborah Finkler
Slaughter and May
London
November 2020

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Chapter 5

GERMANY

Marcus van Bevern[1]

I OVERVIEW

The year 2020 was, and still is, the year of the covid-19 pandemic. Curfews and other lockdown measures have reached the courtrooms. Hearings have been delayed or completely cancelled, and digitisation received a boost.

Most civil law cases in 2020, however, have had nothing to do with the pandemic. After a decade of low interest rates, a significant number of disputes decided by the Federal High Court (BGH) concerned the rescission of consumer loans after borrowers had revoked the underlying loan agreements, in order to benefit from lower interest rates.

Nevertheless, the turmoil caused by the pandemic will most likely hit the financial industry, even if it is with some delay. In addition to the immediate impacts of the recession, such as increasing insolvencies, it is likely that interest rates will remain at a low, or even negative, level, one that has remained the same since the financial crisis. The financial industry in Germany will therefore continue to struggle with the same problems that have been witnessed in the last 10 years, yet presently in an even more challenging environment.

In 2019 and 2020, the trend towards increased collective redress continued unabated.

II SIGNIFICANT RECENT CASES

i Unwinding of consumer loans – dispute between the Federal German High Court and the European Court of Justice

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. If the instruction was flawed, the borrower was entitled to unwind the consumer loan for an unlimited period, even after the loan itself was already repaid.[2] Once the loan agreement was revoked, all payments (including interest payments) had to be unwound and the borrower only had to pay a loss-of-use indemnification. The economic rationale was the policy of low interest rates inducing consumers to unwind existing high interest rate loan agreements and secure lower market rates instead. Thus, these claims retroactively subverted the banks' interest calculation.

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.

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The first cases date back as early as the beginning of the 1990s.[3] In 2019 and 2020, these cases still constitute more than 60 per cent of all cases decided by the banking senate of the BGH.

In July 2010, in order to facilitate the banks' attempts to comply with the law, the German lawmaker issued a pre-formulated model instruction,[4] 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 instruction was unclear because it included a cross reference to the German Civil Code regarding the necessary information, instead of expressively listing such information. However, the BGH decided in 2012 that the cross-reference was sufficiently clear and perspicuous for the consumer.[5]

In March 2020, upon a request for a preliminary ruling under Article 267 TFEU submitted by the Regional Court of Saarbrücken, Germany, the European Court of Justice disagreed with the finding of the BGH. The ECJ held that the consumer credit directive requires that loan agreements specify the information and that a mere reference to provisions of national law (known as 'cascading reference') is not sufficient.[6]

In numerous decisions, however, the BGH refused to follow the ECJ. The BGH argued that the ECJ did not have the jurisdiction to answer the questions in dispute because the consumer credit directive did not apply to credit agreements secured by mortgages. Therefore, the case had to be decided on the merits solely in accordance with German law, which was clear and unambiguous that a bank making use of a model instruction pre-formulated by the lawmaker could rely on its legality (known as 'fiction of legality').[7] Because there is no direct appeal to the ECJ, the BGH will likely have the last word.

There are also a number of cases where the BGH held that the consumers forfeited their right of withdrawal. This applied in particular in cases where the revocation was declared after the loan had already been repaid and the bank had released the security to the borrower.[8]

In summary, the BGH has applied an increasingly restrictive approach regarding the unwinding of consumer loans.

ii Arrangement fees and charges

In 2020, the BGH maintained its restrictive approach against standard fees charged by the banks, in particular with respect to the arrangement fees usually charged in the context of loan agreements. Already in 2014, the BGH had decided that such fees provided for in consumer loan agreements are invalid, if the fee arrangement constitutes a pre-formulated

3 BGH, judgment of 8 July 1993, court reference; I ZR 202/91.

4 Art. 247 section 6 annex 6 Introductory Code to the German Civil Code.

5 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.

6 CJEU, judgment of 26 March 2020, court reference: C-66/19.

7 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.

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.

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standard term of business as opposed to being individually negotiated.[9] According to the law on standard business terms, courts may scrutinise the content of pre-formulated standard business terms and declare such terms to be invalid, if they find that the party imposing the terms unreasonably disadvantages the other party by unilaterally deviating from what is provided for in the relevant code. In 2017, the Court applied the same view to B2B-cases.[10]

Following these decisions, the Court clarified a number of follow-up questions. Inter alia, it decided that the mere denomination of the fee, as well as a standard clause containing the borrower's confirmation that the fee had been individually negotiated, is irrelevant for the classification of the clause. The court held that such confirmation also violates the law on standard business terms, which prohibits factual confirmations and shifting the burden of evidence to the customer in standard terms. Rather, the bank would have to provide evidence that the clause was actually negotiated individually. This would require the customer to have an actual alternative for conditions without a fee.[11] Furthermore, the court held that the fact that other clauses in the respective loan agreement had been individually negotiated was irrelevant. Rather, the bank would have to provide evidence that the fee clause in dispute was the result of the negotiation.[12]

Banks' attempts to circumvent the economic effects of these decisions range from concluding separate fee agreements governed by another choice of law or waiver agreements where the borrower waives the right to claim repayment of the fee. However, the banks' attempts seemingly have not been scrutinised by the courts yet. As a result, a significant risk remains that any kind of fee arrangements in the context of loan agreements are invalid.

iii Cum-Ex Transactions

German authorities are continuing their efforts investigating and prosecuting cum-ex transactions. The relevant transactions had been carried out between 2005 and 2011 in Germany as well as other European countries and had essentially led to fiscal authorities repaying or setting-off capital yield tax multiple times despite the tax had only been paid once. According to estimates, German prosecutors now pursue 600–750 suspects. Multiple banks are expected to be ordered to hand over profits they made from participating in cum-ex transactions in one way or another.

The first criminal trial against two former London bankers ended on 18 March 2020. The Bonn district court found the men guilty of tax evasion and aiding and abetting tax evasion respectively.[13] As both of them had been highly co-operating, they received relatively mild suspended jail sentences. The court also ordered one of them to pay back €14 million he had made from the trades. In addition, courts will decide on the criminal liability of tax consultants who provided expert opinions attesting that the transactions complied with German tax law at the time. Moreover, the court ordered a private bank to repay its profit plus interest to the German tax authorities. Four other financial service providers, which had been initially included in the trial, had been later excluded, in order to expedite the

9 BGH, judgment of 13 May 2014, court reference: XI ZR 405/12.
10 BGH, judgment of 4 July 2017, court reference: XI ZR 562/15.
11 BGH, judgment of 19 February 2019, court reference: XI ZR 562/17.
12 BGH, resolution of 19 March 2019, court reference: XI ZR 9/18.
13 LG Bonn, judgment dated 18 March 2020, court reference: 213 Js 41/10 – 1/19.

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proceedings due to the covid-19 outbreak. Owing to an appeal against the verdict, the German Federal Supreme Court will give the final ruling on the matter. More proceedings against the excluded parties and other players are expected to come.

German fiscal authorities also seem to be focusing on custodian banks involved in cum-ex transactions and holding them liable for not complying with their obligations provided for in the German Income Tax Code. At this stage, it is unclear whether custodian banks were actually and actively involved in cum-ex transactions or whether they only fulfilled their statutory obligations without knowing that they played a part in the tax scheme of other players.

The Frankfurt Higher Regional Court overturned a first instance judgment awarding a €22.9 million damage claim to German bank Helaba.[14] The court rejected Helaba's argument that defendant Société Général had a secondary obligation under a sales contract to provide buyer Helaba with the possibility to set-off taxes in the amount of the difference between the net and gross dividend. According to the court, the statutory obligation of the custodian bank of the buyer to withhold and pay capital yield tax is not a contractual obligation vis-à-vis the buyer of the stocks. The coincidence of the seller and the custodian bank on the sell-side being the same legal person does not justify an extension of the seller's obligations vis-à-vis the buyer. The Frankfurt Higher Regional Court allowed a further appeal to the German Federal Supreme Court.

Finally, the Cologne Fiscal Court decided that a buyer purchasing shares over the dividend record date OTC from a short seller does not become the beneficial owner of the shares at the time the parties concluded the sales contract.[15] Thus, the buyer does not have a right to set-off capital yield tax, which has been withheld and paid with regard to the dividend. The tax set-off mechanism provided for in the German Income Tax Act does not allow a multiple reimbursement of capital yield tax that had only been withheld and paid once. The Cologne Fiscal Court allowed the appeal to the German Federal Tax Court. Generally, the tax proceeding before the Cologne Fiscal Court is considered as a model proceeding for multiple other similar cases pending before the Federal Tax Office.

III RECENT LEGISLATIVE DEVELOPMENTS

i Introduction of a European Prosecution Authority

In the near future, an independent, decentralised authority will prosecute crimes against the EU's financial interests. In June 2017, 20 EU member states had already agreed on the establishment of the new authority.[16] The newly appointed European Public Prosecutor, who will focus on corruption, fraud and money laundering issues, will assume office at the end of 2020. The German Federal Parliament approved the law on 28 May 2020.

14 OLG Frankfurt, judgment dated 2 July 2020, court reference: 1 U 111/18.

15 FG Köln, judgment dated 19 July 2019, court reference: 2 K 2672/17.

16 See Council Regulation (EU) 2017/1939 of 12 October 2017.

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ii Insolvency law

As of 1 July 2020, the German Federal Government decided that, in the future, overly indebted companies and consumers will be able to exit bankruptcy after a maximum of three years.[17] The new regulation is part of the Federal Government's economic and crisis management pact. In light of the economic consequences of the covid-19 pandemic, honest debtors shall be given the opportunity to make a fresh start. The new regulation also implements the requirements of the EU directive on restructuring and insolvency in the area of debt relief. The instrument of debt relief allows debtors, subject to certain conditions, to discharge unpaid debts to their creditors. Previously, the period used to be six years. The shortened three-year procedure will apply to all procedures commenced on or after 1 October 2020. The regulation will apply to consumers until 30 June 2025 and will then be reviewed.

iii Amendment to the Foreign Trade and Payments Act

On 18 June 2020, the German Federal Parliament amended the Foreign Trade and Payments Act in order to prevent information leaks or technology transfer that can have serious consequences for public order and security in Germany.[18] The amendment essentially implements the EU screening regulation that came into force in 2019. The new rules will apply to the acquisition of companies or shares by investors from outside the EU.

The amendment tightens the examination of foreign investments. Specifically, the test criterion of an 'expected impairment' of public order or security will apply to future foreign investments. Furthermore, any notifiable acquisition will be 'pending ineffective' as long as the investment review is ongoing.

IV CHANGES TO COURT PROCEDURE

In recent years, the German legislator added some 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 allows consumer protection agencies to initiate model proceedings against private companies, in order to determine certain preliminary questions with binding effect for the claims consumers may have against the company. 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 its own claim (e.g., amount of damages and causation).

The legal industry is still in the process of gaining experience with these actions. One of the first model proceedings concerned Diesel-Gate and was initiated against Volkswagen and was terminated by an out-of-court settlement agreement. Another model proceeding

17 See www.bundesregierung.de/breg-de/service/gesetzesvorhaben/restschuldbefreiungsverfahren-1765118.

18 See www.bundesregierung.de/breg-de/suche/aussenwirtschaftsgesetz-1739866; www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200408-altmaier-investitionen-in-sicherheitssensiblen-bereichen-koennen-umfassender-und-vorausschauender-geprueft-werden.html.

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was brought by a consumer organisation against the savings bank of Leipzig. The consumer organisation accused the bank of paying too low interest rates and sought declaratory relief on whether contractual interest rate fixing clauses were invalid. The Dresden Higher Regional Court granted the declaratory relief; an appeal is currently pending with the BGH.[19]

Given the limitations of the aforementioned instruments, it is noteworthy that a new instrument for class action 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.[20] A political agreement was reached in June 2020 but still needs to be ratified by the European Parliament and the European Council. Once the directive is in effect, Member States will have two years to implement it in their national laws. 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.[21] 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.[22]

The aforementioned decision concerned a claim for repayment due to excessive rent payments under the Rent Limitation Act of the City of Berlin. However, it is also groundbreaking for numerous companies in the digital industry, offering online services for assessing and collecting any kind of uniform claims, including claims against the financial industry. Though the decision does technically not 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.

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. In cases that 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

19 OLG Dresden, judgment of 22 April 2020, court reference: 5 MK 1/19.

20 COM/2018/184.

21 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.

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

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granted *ex parte* or after hearing both parties. If the 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 LoC) from drawing the LoC issued in favour of him, 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.[23] 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 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.[24]

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.[25] 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, 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.[26]

As an alternative to the aforementioned interim measures under German national law, the Regulation (EU) No. 655/2014 provides for a European Account Preservation Order (EAPO), in order 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 are 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 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.

23 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.

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

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

26 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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VI PRIVILEGE AND PROFESSIONAL SECRECY

Under the German code of civil procedure, there is no general pre-trial discovery or disclosure obligation. Each party of a proceeding has to submit the facts and documents supporting their claim. Only under restricted circumstances, a court may direct one of the parties or a third party to produce documents, records or any other material in their possession, namely that (1) 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 (2) 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).

Because of these restricted rules, document production is scarcely used in civil proceedings, the question of privilege and professional secrecy is rarely raised and, therefore, often is of no importance in civil proceedings. The BGH recently upheld the very restricted approach to pre-trial 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.[27]

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. In order 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 criminal procedure code 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 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.[28] Unfortunately, the question has not yet been scrutinised by higher courts and thus remains

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

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

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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.[29]

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. Only in rare cases is the standing of a party under discussion. These cases concern parties, which are founded and have their seat in a jurisdiction outside the European Union, but are in fact administered in another jurisdiction.

The number of cases dealing with jurisdiction and conflicts of law issues could increase in case of a hard Brexit, in particular with respect to private limited companies under English law being administered in Germany. 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 the context, courts tended to generally admit these forms of corporations in accordance with EU-law and the freedom of establishment. However, if the UK and the EU do not reach a trade agreement after the current interim period, which expires by the end of 2020, then such companies will no longer be able to rely on the EU freedom of establishment. Instead, German national conflict of law rules would 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 UK, but having their real (administrative) seat in Germany, could face serious problems in court as they could be denied standing in German courts. This would not apply, however, to English law companies, which also have their administrative seat in the UK.

Further, in the case of a hard Brexit, 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 were to demand one. Exceptions apply, if, due to international treaties, no such security deposit may be demanded. Germany and the United Kingdom 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 convention excluded the provision of security deposits from parties domiciled in either state and was applicable until the Brussels I Regulation came into effect. It is unclear whether the German-British Convention will be automatically reinstated in case of a hard Brexit.

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

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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.[30] 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. Further, 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.[31] It appears that further cases are still pending in lower courts. As the dispute between the BGH and the ECJ described above shows, the BGH is currently trying to suppress these lawsuits and mostly rejects new claims, either by arguing that the banks could rely on the model instruction pre-formulated by the legislator,[32] or that the consumer's right of withdrawal was forfeited.[33] It remains to be seen whether this line of decisions will finally stop the wave of lawsuits.

Given the current economic environment, a number of cases concerning fee and interest issues are pending. The questions in dispute are whether fees requested by the banks are invalid due to a breach of the law on standard business terms[34] or how long, if any, banks are bound to long-term high-yield interest rates.

IX EXCLUSION OF LIABILITY

Clauses excluding a bank's liability or narrowing the scope of contractual duties in order to reduce the risk of liability are frequently used in contracts. Still, 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.

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

31 Cf. Section II.1.

32 See footnote 8.

33 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.

34 See above Section II.2.

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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 in cases the law explicitly orders so.[35] 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).[36]

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.[37] 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.[38] Thus, a tort action may only 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 act for the protection of small investors 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.[39] According to the German Civil Code, contracts violating these decrees will be held void.[40] So far, BaFin has not issued further decrees in 2020.

XI OUTLOOK AND CONCLUSIONS

The overall economic situation will remain challenging in the upcoming months. ECB's low interest rate policy will continue, particularly in light of the economic problems following the covid-19 pandemic. The banks will keep struggling with the economic environment.

Collective action will likely continue to rise in the future. This is not only because of a general trend for more collective action. In addition, new business models have emerged offering the enforcement of consumer claims. Consumer protection agencies are supporting this trend and increasingly try to use instruments for collective relief. It remains to be seen whether the instruments currently available under the German civil procedure will be further eased.

35 BGH, judgment dated 29 April 2014, court reference: II ZR 395/12.

36 BGH, judgment dated 29 April 2014, court reference: II ZR 395/12.

37 Section 823 par. 2 German Civil Code.

38 BGH, judgment dated 7 July 2015, court reference VI ZR 372/14; judgment dated 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.

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

40 Section 136 German Civil Code.

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Appendix 1

ABOUT THE AUTHORS

MARCUS VAN BEVERN

Kantenwein

Marcus van Bevern is an attorney-at-law specialising in banking and capital markets. He advises in banking- and capital market-related litigation and arbitration as well as in financing transactions. He is also regularly appointed as arbitrator in arbitration proceedings. Until 2006 he 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.

KANTENWEIN

Theatinerstraße 8
80333 Munich
Germany
Tel: +49 89 8996 86 0
Fax: +49 89 8996 8686
marcus.vanbevern@kantenwein.de
www.kantenwein.de

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