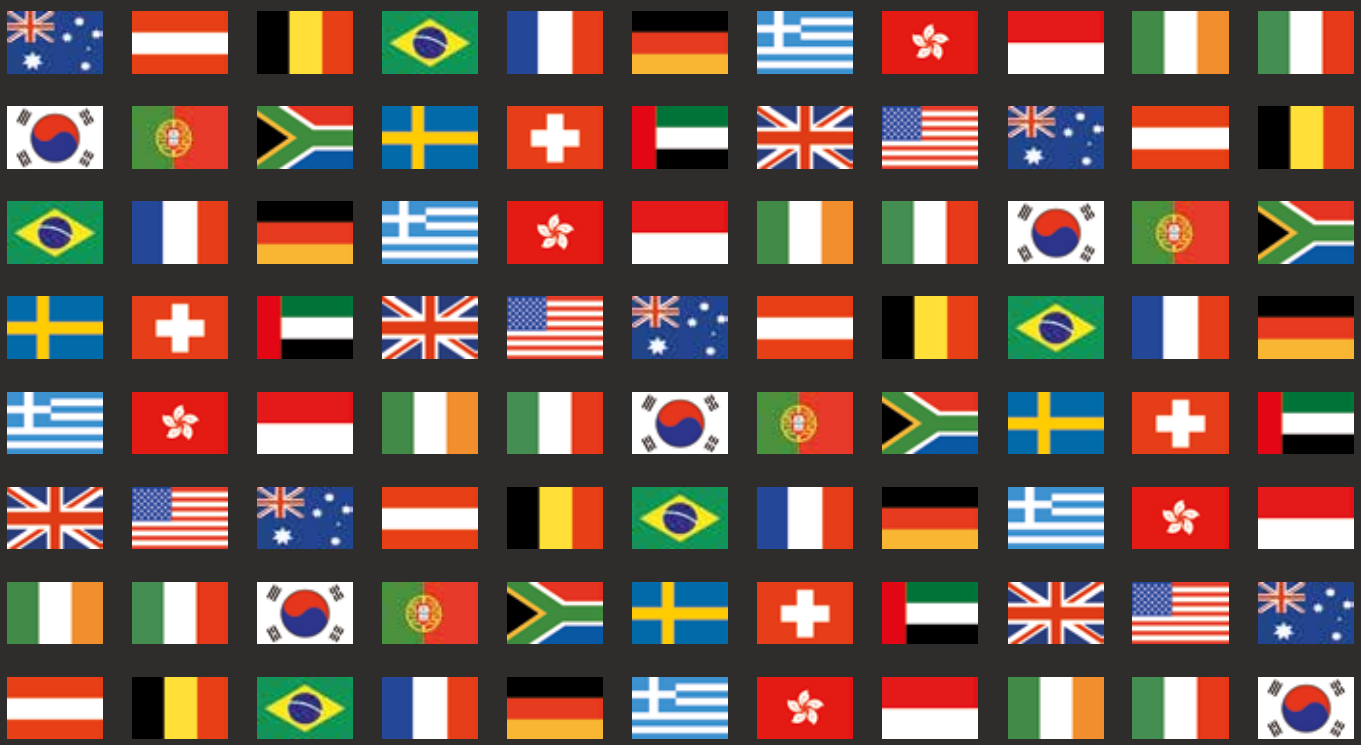
Financial Services Litigation

Contributing editors
Damien Byrne Hill and Ceri Morgan



2018

GETTING THE DEAL THROUGH

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Financial Services Litigation 2018

Contributing editors

Damien Byrne Hill and Ceri Morgan

Herbert Smith Freehills LLP

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Preface

Financial Services Litigation 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Financial Services Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to contributing editors, Damien Byrne Hill and Ceri Morgan of Herbert Smith Freehills LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
July 2018

Austria

Philipp Strasser and Martina Linden

Vavrovsky Heine Marth Rechtsanwälte GmbH

Nature of claims

1 What are the most common causes of action brought against banks and other financial services providers by their customers?

The most common causes of action brought against banks and other financial services providers by their customers is breach of contract and breach of precontractual duties to inform and safeguard the (potential) customer's interest and precontractual duties of good faith, in particular in connection with the following issues.

First, misselling of financial products or inappropriate investment advice. According to the case law of the Austrian Supreme Court, an implied consultancy agreement is deemed to be entered into between a bank and its customer once the customer contacts the bank with the intention to dispose of his or her assets to make an investment, and the bank provides advice to the customer with the intention to facilitate the execution of such an investment. Under such an implied consultancy agreement, the bank must provide comprehensive and accurate investment advice in a timely manner. Furthermore, section 47 et seq of the Supervision of Investment Services Act (WAG) sets out detailed obligations of financial services providers to act in their customers' best interest, including the obligation to provide fair, clear and non-misleading information, a prohibition to grant or accept inducements in connection with the provision of investment and ancillary services (a few exceptions apply), and to offer only such investment services and financial products that are suitable to the particular customer's situation. To comply with this duty and to assess the suitability of particular investment services and financial products, the bank or financial services institution must obtain the relevant information from the client.

In principle, the obligations stipulated by section 47 et seq of the WAG are regulatory in nature; however, according to settled case law, they are also considered as a specification or manifestation of the general contractual duties of care owed by the financial institution under the implied consultancy agreement that is concluded once the customer seeks advice from the financial institution. Therefore, a breach of these duties stipulated by section 47 et seq of the WAG will also constitute a breach of contract by the bank or financial institution. In principle, execution-only transactions are not subject to the obligations set out by section 47 et seq of the WAG, but misconduct by a formally independent investment adviser may still be attributed to a bank performing an execution-only transaction if there is an ongoing business relationship between the bank and the investment adviser, or if the investment adviser rendered his or her advice based on marketing material provided by the bank.

Other causes of action include validity, enforceability and construction of specific clauses in agreements between the bank or financial services provider and its customer; for example, in connection with floating interest-rate clauses and with clauses granting the bank a right to unilaterally converse foreign currency loan agreements in euros. The question of whether a bank is obliged to pay interest for deposits despite the agreed floating-rate clause amounting to zero and whether a bank may be obliged to pay interest to the borrower for having granted him or her a loan became relevant following the negative Euro Interbank Offered Rate (Euribor) status because Euribor is used as a reference rate in floating interest-rate clauses.

2 In claims for the misselling of financial products, what types of non-contractual duties have been recognised by the court? In particular is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

As mentioned above, although the obligations set out by section 47 et sec of the WAG are regulatory in nature, they are considered a manifestation of general contractual duties of care owed by the financial institution to the customer under an (implied) consultancy agreement. Apart from that, regulatory duties are not generally considered to be owed directly to the financial institution's customer.

A breach of duties set out by statutory laws may establish a basis for tort claims, provided that the respective laws are qualified as 'protective laws' in the sense of section 1311 of the Civil Code, meaning they are particularly designed to protect the rights of individuals. Some financial market-related laws (but not all regulatory statutes in general) are considered as such 'protective laws' (eg, the prohibition of market manipulation or the prohibition of the publication of untrue or misleading ad-hoc statements by listed companies).

Furthermore, harm inflicted by intentional unconscionable acts may also establish a basis for tort claims.

3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

Yes. Section 11 of the Capital Market Act establishes liability of issuers, prospectus auditors, Wiener Boerse AG (Vienna Stock Exchange plc), intermediaries and annual accounts auditors in connection with inaccurate or misleading information provided in prospectuses or any other information material that is subject to a publication requirement set out by the provisions of the Capital Markets Act. The prerequisites for the liability of these persons differ from each other to some extent. The respective provision does not specify jurisdiction.

In principle, the claimant must show reliance on the relevant document, which does not necessarily require that he or she actually read the document (reports by his or her investment adviser based on the document may also be sufficient).

Paragraph 7, section 11 of the Capital Market Act sets out a limitation period of 10 years for respective damage claims.

Note that settled case law also recognises the principle of a 'civil law-prospectus liability' derived from the breach of precontractual obligations to inform. This liability regime has a much broader scope that not only applies to prospectuses but also to marketing materials, fact sheets and other information designed to facilitate the distribution and sales of financial products, provided that such materials are suitable to impact the investor's investment decision.

4 Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

The principle of good faith is a general principle of Austrian civil law and also applies to contracts between financial institutions and its customers. The particular scope of the duty of good faith owed under a contract depends on the circumstances of each individual case. The obligations

set out by section 47 of the WAG are considered a manifestation of the general contractual duties of care (including the duty of good faith).

5 In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

The financial services sector does not automatically stand in a fiduciary relationship to its customers. Fiduciary duties usually arise if some kind of trustee relationship is involved, for example, an asset management agreement or a deposit contract, but to some extent also if the financial services provider is assigned as the customer's agent (in such a case, the agent is obliged to safeguard the principal's interests in the best possible way).

6 How are standard form master agreements for particular financial transactions treated?

Overall, international standard form master agreements do not play a major role in proceedings before the Austrian courts. If they are agreed on by and between the financial services institution and its customer, they will, in principle, govern the respective contractual relationship. Such standard form master agreements will most likely be qualified as 'general terms and conditions' or 'standard form model contracts' within the meaning of sections 864 and 879, clause 3 of the Civil Code and section 6 of the Consumer Protection Act. These provisions set out particular limitations to the enforceability of contractual clauses contained in the general terms and conditions or in standard for model contracts.

Note that some government-related bodies and associations (which are not regulatory authorities) are vested with the right to file representative actions against financial institutions (or other entrepreneurs) to obtain a judgment on the validity and enforceability of particular clauses in the financial institution's general terms and conditions or standard form model agreements. The decision rendered in such representative proceedings is not formally binding for other disputes between the financial institution concerned and a private party, but the courts will most likely comply with the legal position taken in this judgment.

7 Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

A financial institution may exclude or limit its liability by contractual agreement. Statutory limitations to such agreements are stipulated by section 6, clause 1, No. 9 of the Consumer Protection Act. This provision applies to contracts between entrepreneurs and consumers and sets out that a limitation or exclusion of the entrepreneur's liability for personal injury is void, which also applies to a limitation or exclusion of liability for other harm inflicted by gross negligence or intentional acts.

Furthermore, section 879, clause 3 of the Civil Code, which applies irrespective of whether the parties of the contract are entrepreneurs or consumers, sets out that a provision contained in the general terms and conditions or in standard form model agreements, that does not govern the parties' primary obligations, is void if, taking into account any and all circumstances of each individual case, the respective provision imposes an undue burden on one of the parties. Settled case law holds that a limitation or exclusion of liability for harm inflicted by outrageous gross negligence or by intentional acts is void according to this provision.

8 What other restrictions apply to the freedom of financial institutions to contract?

In principle, the limitations as stipulated by the general provisions of Austrian civil law apply. For example, according to section 879 of the Civil Code, a contractual provision is void if it violates statutory laws or accepted principles of good faith and morality. Section 6 of the Consumer Protection Act stipulates further limitations to freedom of contracts between entrepreneurs and consumers; paragraph 3, section 879 of the Civil Code also sets out particular limitations for the validity of contractual clauses that were not negotiated individually between the parties.

Penalty clauses may, in principle, be agreed upon between the parties; however, should penalties arise, they are subject to a statutory right of mitigation to be exercised by the court.

9 What remedies are available in financial services litigation?

Depending on the circumstances of each case, the claimant may, for example, seek damages (which is most common in financial services litigation), raise warranty claims, challenge the validity of a contract or request rescission of the contract for error.

In a procedural context, remedies may be granted by judgments ordering performance (eg, awarding money damages), constitutive judgments or declaratory judgments. Obtaining injunctive relief is also possible but (with few exceptions) not very common in financial services litigation. In principle, a declaratory action is only admissible if an action for performance cannot be filed yet or is not sufficient to satisfy the claimant's legal demands and interests in full. According to settled case law, an investor raising claims based on misselling of financial products must file an action for performance even if he or she still holds the investment and cannot quantify the amount of his or her losses yet. In such a case, he or she usually has to claim for reimbursement of the invested amount plus interest pari passu against a re-transfer of the financial product to the financial institution.

10 Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

According to section 1489 of the Civil Code, as a general rule (exceptions apply), the limitation period for damage claims amounts to three years and starts when the claimant becomes aware of the damage and the liable party. In connection with misselling of financial products, the Supreme Court holds that if the financial services institution commits several independent breaches of its obligations and, or commits several separate consultancy errors, the limitation period for each particular breach of contract and for each consultancy error starts individually.

Furthermore, note that according to the Supreme Court, damages arising out of the misselling of financial products may materialise irrespective of whether a financial loss has already occurred. The damage occurs upon the mere facts that the customer made an investment he or she would not have made if he or she had been advised properly, and that, as a consequence, the composition of his or her assets do not reflect his or her true investment intention.

Procedure

11 Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

There is no Austrian court that holds exclusive jurisdiction for financial services disputes. However, in Vienna there are commercial courts at the district and regional level. Lying within the scope of their local jurisdiction, they have exclusive subject-matter jurisdiction for lawsuits concerning commercial claims against registered entrepreneurs. Outside of Vienna, particular departments of each court may be assigned with commercial matters. The judges presiding over these court departments do not have to meet specific requirements distinguishing them from other judges. However, certain bodies of appeal at the regional courts and the higher regional courts consist of two professional judges and one lay judge, who must have a professional commercial background or other specific expertise in commercial matters.

12 Do any specific procedural rules apply to financial services litigation?

No. There are no specific rules.

13 May parties agree to submit financial services disputes to arbitration?

In principle, parties may submit financial services disputes to arbitration provided that the respective dispute may (theoretically) be solved by a settlement. Arbitration agreements between entrepreneurs and consumers are only valid if the dispute that shall be submitted to arbitration has already arisen. Furthermore, arbitration agreements between entrepreneurs and consumers have to meet additional requirements with regard to form and content (see section 617 of the Civil Procedure Code).

14 Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

There is no general requirement to negotiate a settlement or to consider alternative dispute mechanisms before commencing litigation. There are some permanent independent conciliation bodies that are assigned with settling disputes between financial institutions and their customers (the competence with regard to business-to-business disputes is limited); but in general, the parties may participate in such conciliation proceedings on a voluntary basis only.

15 Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

There are no pre-action considerations specific to financial services litigation. In cases where a large number of investors suffered losses by investments in the same company or investment fund, usually some organisational measures are taken by lawyers or consumer protection institutions to 'bundle' the investors' claims and to file them jointly in one or several lawsuits. However, this is done on a voluntary basis, for tactical and economic reasons, but is not required by law.

In general, Austrian law does not stipulate any mandatory pre-action procedures. Although common practice, it is not mandatory to request a debtor to fulfil his or her obligations before filing a lawsuit against them. An omission to do so may result in the claimant being barred from recovering the costs of the proceeding, if the defendant acknowledges the claim immediately after service of the lawsuit.

Furthermore, the Civil Procedure Code does not recognise the concept of pre-trial discovery or disclosure. A party should preferably make sure that before commencing litigation, it has appropriate evidence to prove its claims at its disposal, since requests for evidence production during the proceeding are rather limited (especially when compared to discovery proceedings in common-law jurisdictions).

16 Does your jurisdiction recognise unilateral jurisdiction clauses?

There is no settled case law on the question whether unilateral jurisdiction clauses are valid under national civil procedure law. The prevailing opinion in the Austrian legal doctrine considers a jurisdiction clause to be a merely procedural act; therefore, the validity and enforceability of a jurisdiction clause must be assessed according to procedural law. The rules for the interpretation of contractual agreements, as stipulated by Austrian substantive law, may be applicable only to a limited extent by means of analogy. According to a 1930 Supreme Court decision, even if the jurisdiction clause sets out that two courts shall be exclusively competent and that the choice of the actual forum lies within the discretion of one of the parties, the other party is also free to commence litigation at each of these courts.

With regard to jurisdiction clauses governed by the provisions of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), the Supreme Court holds that the parties' intent to favour one of the parties must be expressed clearly in the respective provision.

17 What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

The Civil Procedure Code does not set out general disclosure obligations for the parties of a proceeding. Under certain conditions, a party may request the judge order the opponent to produce a particular document that is in the opponent's possession. The opponent must comply with the respective court order if he or she previously relied on the document in their pleading, or if the document is considered a joint document of the parties (eg, a written contract between claimant and defendant), or if the opponent is obliged to deliver the document to the other party according to substantive law. However, an order issued against the opponent party of the proceeding cannot be enforced (in contrast to an order issued against a third party), but the court may draw conclusions from a refusal to comply with the order that may be detrimental to the position of the opponent.

Even if these conditions are not met, the opponent may still be ordered to produce a particular document, but he or she is entitled to raise particular objections as set out by section 305 of the Civil Procedure Code. One of the objections the opponent may raise is that the document production would be considered a violation of an officially recognised confidentiality obligation, including the banking secrecy, or of a business secret. However, the banking secrecy cannot be invoked in civil proceedings between a bank and its client to the extent that this particular client's information is concerned. Therefore, in typical financial services disputes between a bank and its customer, the banking secrecy will not be of major relevance. The question whether the banking secrecy must be observed plays a bigger role in disputes between a bank and former employees or former members of the bank's corporate bodies. In this context, the Supreme Court has held that, as a general rule, the bank may disclose information, which is protected by the banking secrecy, but that the hearing in which such information is disclosed (either during the pleading of a party or the interrogation of witnesses) must be held in camera.

Furthermore, under specific conditions, the court may also order a third party (who is not a party to the proceeding) to produce a particular document. The third party must comply with the order if the document is considered a joint document (eg, a written contract between a party of the proceeding and the third party), or if the third party is obliged to deliver the document to the other party according to substantive law. In contrast to an order issued against the opponent party, such a court order is enforceable if the third party refuses to comply with it.

18 Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

A distinction must be drawn between disputes between the bank and the respective client whose confidential documents are at issue, and disputes between the bank and a third party or the client concerned and a third party.

In the first matter, the bank cannot invoke the banking secrecy to refuse disclosure of the confidential document; rather, the bank must disclose the document under the conditions described under question 17.

In the second and third matters, the bank may, in principle, invoke the banking secrecy to refuse disclosure of the confidential document (unless the client concerned has approved of the disclosure of the document).

19 May private parties request disclosure of personal data held by financial services institutions?

Private parties are entitled to request disclosure of personal data related to themselves according to the provisions of the Data Protection Act and Regulation (EU) No. 2016/679 (General Data Protection Regulation). The request may be rejected inter alia if disclosure would put particular public interests or (eventually, in some cases) the protection of business risks at risk. A rejection of a request is subject to the control of the Data Protection Authority.

20 What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Because the concept of discovery is not implemented in civil procedure law, there are hardly any data governance issues specific to financial disputes. Banking secrecy may be an issue, in particular in proceedings between the bank and former employees or members of corporate bodies where, in such a case, some parts of the hearings may be held in camera to protect the banking secrecy. This was an issue recently in proceedings between a large Austrian bank in financial distress and its former managers, which attracted widespread media attention.

Interaction with regulatory regime

21 What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

As a general rule, Austrian regulatory authorities, in particular the Financial Market Authority, do not have standing to bring claims against financial institutions in civil proceedings. The Financial

Update and trends

The large numbers of claims filed by harmed investors with Austrian courts after major insolvencies and investment scandals still pose a considerable challenge for the Austrian court system. This concerns organisational issues as well as procedural questions. The Austrian legislator and the courts are still looking for a reasonable way to answer the issues that have arisen in this context in an economically efficient and feasible manner, while simultaneously sufficiently preserving the individuals' fundamental rights; in particular, the right to be heard and the freedom of ownership. There are ongoing discussions regarding the implementation of class actions, but a satisfactory resolution has not yet been found.

Market Authority implements regulatory measures addressed to specific financial institutions by decisions rendered in administrative proceedings. The financial institution that is the addressee of such a decision (or is at least affected by the decision in its rights) may challenge the decision in the administrative proceedings.

Inter alia, the Financial Market Authority is entitled to impose the following measures (see section 70 of the Banking Act):

- request additional information and production of documents from the financial institution, or request access to the books of the financial institution;
- prohibit withdrawals and distributions of capitals and earnings;
- appoint a government commissioner, who shall act as expert supervisor;
- prohibit the directors of a bank from managing the bank or even prohibit the bank from continuing its business operations;
- request credit institutions to hold additional own funds to cover particular risks;
- request credit institutions to abstain from particular activities posing excessive risk; and
- impose additional reporting requirements and specific liquidity requirements.

The Financial Market Authority may also impose financial penalties on financial institutions (which may be challenged in administrative proceedings).

22 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

Unless the conditions described in question 17 apply, a financial institution is not obliged to disclose communication with regulatory authorities in a civil proceeding. There is no general rule that such communication is privileged in civil proceedings. However, the respective documents may contain information protected by professional secrecy (in this case, the rules set out in questions 17 and 18 apply).

However, the Supreme Court has held that in case the other party presents such (written) communication or related information (eg, audit reports by the Austrian National Bank or decisions rendered by the administrative authority against the financial institution) in the proceedings, such material will, in general, be considered as admissible documentary evidence and assessed by the court. However, the financial institution may challenge the veracity of the information contained therein (see Supreme Court, 1 Ob 39/15h; 9 Ob 27/15h).

The employees and board members of the Financial Market Authority have a general obligation to maintain confidentiality with regard to professional secrecy, and may, under particular circumstances, refuse to give testimony in a civil proceeding with regard to facts protected by the professional secrecy.

Note that the above primarily applies to civil proceedings. The Criminal Procedure Code stipulates further disclosure obligations in criminal proceedings.

23 May private parties bring court proceedings against financial institutions directly for breaches of regulations?

In general, private parties do not have standing to enforce breaches of regulatory provisions against financial institutions. Rather, breaches of regulatory provisions are sanctioned by the Financial Market Authority or other authorities.

However, under certain conditions, a breach of regulatory provisions committed by the financial institution may constitute an act of unfair competition. In such a case, competitors of the respective financial institution as well as particular associations established for the promotion of economic interests of enterprises may be entitled to file claims for injunctive relief, cease-and-desist orders and damages.

Furthermore, in case a private party suffered losses as a consequence of a breach of a regulatory provision, it may be entitled to claim damages from the financial institution under the condition that the respective regulatory provision qualifies as protective law according to section 1311 of the Civil Code (ie, that the respective regulation was particularly designed to protect the rights of individuals).

24 In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

In general, a financial institution is not obliged to disclose complaints made against it by other private parties.

The opponent may nevertheless present copies of complaints made by other private parties as documentary evidence in the proceeding, and the court has to assess the respective documents according to the principle of free consideration of evidence.

Although it cannot be ruled out entirely, it is rather unlikely that the complaints brought by other private parties are, per se, considered relevant to the proceeding.

However, evidence obtained in parallel proceedings between the financial institution and other private parties; in particular, the minutes of witness testimonies (eg, employees of the financial institution) or expert opinions may well be considered relevant. The admission of such evidence obtained in other proceedings in the current proceeding is subject to particular limitations set out by section 281a of the Civil Procedure Code. Such evidence (or the minutes of its taking) will not be admitted in the current proceeding if a party who was also a party to the other proceeding (therefore, in the matter at issue, the financial institution) raises an objection, provided that the respective means of evidence is still available, or if a party who was not a party to the other proceeding (in the matter at hand, the private party) does not explicitly consent to the introduction of the respective evidence in the current proceeding.

25 Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

In general, private parties cannot directly enforce the terms of a business review or redress exercise against the respective financial institution. Administrative orders are considered binding upon civil courts only to a limited extent (namely, upon the parties of the civil proceeding or if the respective administrative order has constitutive effect).

The private party may, nevertheless, present reports of such business reviews and the respective findings as well as corresponding documents as documentary evidence in the civil proceeding; they are, in principle, subject to the principle of free consideration of evidence by the court. The financial institution may still challenge the veracity of the facts contained in such documentary evidence.

26 Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

In light of the experiences from the global financial crisis, Austrian regulatory authorities tend to enforce the regulatory framework more vigorously.

In recent years, to support their damage claims, private parties have increasingly relied on orders issued by regulatory authorities and on audit reports by regulatory authorities or the Austrian National Bank obtained in business reviews to establish misconduct by the financial institution (eg, to establish that information contained in investment prospectuses is inaccurate or misleading) and a breach of the financial institution's obligations towards the private party.

Private parties also benefit from the fact that since the beginning of the financial crisis, there has been a significant increase of criminal proceedings against board members and employees of financial institutions and sometimes even against financial institutions themselves. Frequently, administrative orders issued by regulatory authorities and reports of business reviews conducted by regulatory authorities are

submitted to the public prosecutor and become part of the criminal files. In principle, private parties, who claim to have been harmed by the suspects against whom the criminal proceedings are conducted, have a right to access the criminal files and to obtain copies from the respective decisions and orders. The right to access the files may be excluded or postponed by the prosecutor to preserve prevailing interests by the suspect, other parties or the prosecution office. Therefore, private parties are likely to take this opportunity to obtain information and documentary evidence to support their claims against the financial institution.

27 Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

Several independent conciliation bodies have been established for the settlement of disputes between particular entrepreneurs and consumers.

Inter alia, there is an independent conciliation body that is competent for the settlement of certain disputes between banks and its customers. Its scope is not generally limited to consumers, but its competence with regard to disputes on a business-to-business level is very limited. In principle, the participation in the proceedings before the conciliation body is entirely voluntary for both the bank and the customer. Both parties may revoke their consent to participate in the conciliation proceedings at any time. As a result of such revocation, the conciliation proceedings are declared to be closed.

Irrespective of the amount of the claims raised by the customer, the conciliation body has no power to render a binding decision on the claims. It can only make a proposal for a settlement that may be accepted by the parties or not. Such a proposal has no binding effect in a subsequent court proceeding.

Several banks have also instituted ombudsmen who may be approached by customers with their complaints on a voluntary basis. There are no general procedural rules with regard to such ombudsmen and they are usually not considered independent.

28 Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

There are several funds or protection schemes that compensate customers for specifically protected assets lost as a result of the insolvency of a financial institution. Any credit institution that is domiciled in Austria and intends to take deposits or to render investment services in Austria that are subject to mandatory insurance, must be a member of one of five deposit protection schemes.

With regard to banks, the compensation for specific lost deposits is, in principle, limited to €100,000 per customer and credit institution. Under specific circumstances, a compensation up to €500,000 per customer and credit institution, may be awarded.

In addition to this statutory protection scheme, some Austrian banks are members of voluntary compensation funds that may provide compensation to the customers for lost assets exceeding the statutory amounts.

With regard to security trading companies, a customer is entitled to compensation for particular claims against the security trading company arising out of particular security transactions. This compensation is provided by the Austrian investor compensation scheme and limited to an amount of €20,000 per customer. The compensation provided to customers not being individual persons are further limited to an amount of 90 per cent of their respective claims.

These limitations apply regardless of whether court claims are brought or not.

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