THE BANKING LITIGATION LAW REVIEW

SECOND EDITION

Editor
Christa Band

THE LAWREVIEWS

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PREFACE

As we noted in the Preface to last year's edition of the *Banking Litigation Law Review*, banks will always be regular litigants – generally as defendants – and this year's contribution of jurisdiction-specific chapters explains how and why.

The themes that emerge from the chapters that follow show that, almost uniformly, the number of cases that might be said to have their origin in the 2008 global financial crisis is reducing. That is partly because of the passage of time – even long-running litigation has to end at some point. It is also because the financial services industry and legal profession have benefited from the guidance given in decided cases. The principles so set reduce uncertainty in providing precedent and less formal indications of how claims will be received. Settlement is promoted – generally for the benefit of all parties and the courts.

There are also some interesting comments on what is being done in particular jurisdictions to provide for alternative means of resolving disputes – to keep them away from the civil courts altogether – or to encourage settlement with the usual savings of costs and court resources. Various countries are thinking about ways in which litigation can be made easier and more efficient – an aim not limited to banking litigation. One topic that is noted in several contributions is the approach of the courts and legislature to class actions. These cover a spectrum from well-established and often-used procedures (eg, the United States) to jurisdictions that have considered class actions and decided against their use (eg, Austria).

Also of interest on a comparative basis is the extent to which different jurisdictions balance contractual freedom and certainty against consumer protection. This is done in various ways through statutory control of contractual clauses (for example, as to interest rates or obligations that are considered unfair) and, importantly, exclusion clauses. Again, the regulatory overlay here is important. Some of the complaints that might otherwise have found their way to the courts are resolved – often more quickly, more cheaply and more effectively – through regulatory enforcement processes. They are strictly outside the scope of this edition, though the regulatory impact on the volume and kind of banking litigation with which the courts are faced cannot be ignored.

A further spectrum of approaches is clear in relation to the difficult issues of confidentiality and privilege. The application of the principles is often fact-sensitive. It has – perhaps as a result – generated significant litigation in more than one jurisdiction. Parties are likely, in the future, to have to weigh up the substantive benefit they hope to secure from the maintenance of privilege and to focus more strategically on how to protect privileged information where it matters most and yield to pragmatism in other respects. This is particularly acute at the interface between litigation and regulation.

If litigation is born in part of uncertainty, a common reflection in what follows is that economic and political change are likely to fuel claims in the future. The reasons for this are various and complex. But any situation in which there is unpredictability means there are likely to be disappointed investors – the quintessential claimant in banking litigation claims. That is the recognised backdrop to much recent litigation. The changing political climate also dictates the regulatory agenda. For many jurisdictions, financial services regulation – which has a major impact on banking litigation – has become bigger and more complex year on year. In the United States, that position is now slowing or even reversing in some respects under the Trump administration, though how this will translate into banking litigation is not yet clear. Last year's edition noted that there will be changes to UK law as a result of its decision to leave the EU – and doubtless knock-on effects on litigation in the remaining EU states. It commented – in a way that now looks to have been over-optimistic – that this year's edition could address the issues. However, the clarity that the industry and profession seeks in this regard has not yet been achieved. By next year, it is hoped that substantive comment on what this is likely to mean for banking litigation will be possible.

Christa Band
Linklaters LLP
London
July 2018

Chapter 12

LIECHTENSTEIN

Hannes Arnold and Sophie Herdina[1]

I OVERVIEW

Despite being ranked the sixth smallest nation in the world, Liechtenstein's financial centre is of great international importance and has gained a respectable reputation over the recent decades. Because of Liechtenstein's membership in the European Economic Area (EEA) since 1995, and its close economic ties with Switzerland, financial intermediaries located in Liechtenstein benefit from privileged access to both the European Union, by way of freedom to provide services, and to the Swiss economic area, owing to the customs and currency treaty that is in place between the two neighbouring states.

The highly regulated banking sector plays an important role in the Liechtenstein financial centre and adheres to the harmonised acquis of financial regulation and consumer protection. Owing to the political continuity and economic stability that Liechtenstein provides as a country of domicile in conjunction with the recent positive market developments, the assets managed by Liechtenstein banks, including their foreign group companies, increased from 234.8 billion Swiss francs by the end of 2016 to 294.3 billion Swiss francs by the end of 2017.[2]

By virtue of the importance of banks to the financial centre and to the economy of Liechtenstein, and the amount of assets managed by Liechtenstein banks, it does not come as a surprise that disputes that need to be resolved through litigation sometimes arise. In the majority of cases in banking matters, litigation is directed against the banks and not initiated by them.

The majority of legal issues in the field of banking litigation arising in the Liechtenstein courts concern the liability of banks and their bodies for the losses of clients, banking secrecy and issues in connection with asset freezing orders. Moreover, the enforcement of pledges that a bank may hold in assets deposited by clients has led to various disputes.[3]

II SIGNIFICANT RECENT CASES

Although Liechtenstein is not a common law country and banking law is thus based on statutory law, Supreme Court decisions and relevant rulings of the lower courts do have substantial influence on Liechtenstein law, without creating binding precedence.

1 Hannes Arnold is a senior partner and Sophie Herdina is an associate at Gasser Partner Attorneys at Law.
2 FMA Liechtenstein Financial Market Report 2018, 12.
3 OGH 7 May 2010, 03 CG.2009.3, GE 2010, 190.

Further, owing to the fact that the Liechtenstein legal system is partly based on Austrian, as well as Swiss, law, the respective Austrian and Swiss Supreme Court decisions need to be taken into account[4] when assessing the legal situation in Liechtenstein.

i Risk-bearing in giro transactions

Recently, the Liechtenstein Supreme Court ruled that, in giro transactions, the bank bears the primary risk of executing forged payment orders. Further, it decided that the bank cannot pass its losses incurred by such execution of forged payment orders to its clients by way of the strict risk liability provided for in Section 1014 of the Liechtenstein Civil Code (ABGB). With this decision, the Supreme Court followed the established jurisprudence of Austria.[5] The Austrian Supreme Court held that, in the cases of the execution of falsified orders, no action induced by the client has been taken and thus the bank does not suffer the damage by fulfilling an order given by said client. In other words, there is no sufficient link to the contractual relationship between the credit institution and its customer, to assume the applicability of the straight risk liability of Section 1014 of the ABGB. With its ruling dated 1 December 2017, the Supreme Court not only followed the Austrian jurisprudence, but was also in line with the respective jurisprudence of Switzerland[6] and Germany.[7]

Further, the Supreme Court held that a clause in the bank's general terms and conditions, according to which the customer bears all risks of the execution of forged payment orders, is grossly disadvantageous and therefore impermissible under Section 879 of the ABGB.[8]

It should be noted at this point, that an exclusion of any liability, thus also liability for intentional damages, is not permissible according to Liechtenstein law.[9] Whether the exclusion of gross negligence is permissible, is disputed. In general, it is stated that an exclusion for gross negligence can be agreed on, but it is immoral and thus void, if the negligence is considered to be of a certain blatancy.[10] Further, it has to be taken into account that Liechtenstein has transposed Directive 2011/83/EU of 25 October 2011 on consumer rights, which is why an exclusion of liability for gross negligence is not permissible with regard to consumers. The exclusion of ordinary negligence is – with certain exceptions – permissible in Liechtenstein.

ii Banking secrecy versus data protection

In a fairly recent decision, the Liechtenstein courts dealt with the banking secrecy provided for by Article 14 of the Liechtenstein Banking Act (BA).

In this specific case,[11] the court had to decide if a Liechenstein-domiciled bank is obliged to provide information regarding the existence, more specifically, the non-existence of a banking relationship with a customer, based on a request for information from a third party, referring to Article 11 of the Data Protection Act (DSG). In this regard, the court held that,

4 OGH 5 July 2013, 10 CG.2010.152, LES 2013, 156; OGH 9 February 2006, 06 CG.2004.23, LES 2006, 468.
5 ÖOGH 4 Ob 179/02f, SZ 2002, 153, ÖBA 2003, 129, RdW 2003, 66.
6 BGE 132 III 449; BGE 122 III 27; BGE 112 II 450.
7 BGH XI ZR 325/00.
8 OGH 1 December 2017, 03 CG.2016.302, LES 2018, 38.
9 *Krejci in Rummel/Lukas*, ABGB4, Section 879 Rz 123.
10 *Krejci in Rummel/Lukas*, ABGB4, Section 879 Rz 124.
11 OGH 5 February 2016, 02 NZ.2014.85, LES 2016, 50.

even though banking secrecy is not absolute,[12] it must be borne in mind that, according to a decision of the Liechtenstein Constitutional Court, banking secrecy has constitutional status despite being implemented as an ordinary law.[13] Banking secrecy is intended to protect the privacy of a legal subject and this protection is guaranteed by the right of personal freedom set out in Article 32 of the Constitution of the Principality of Liechtenstein (LV).

Already, the mere fact that a business relationship exists between the customer and the bank is subject to banking secrecy, which is why banking secrecy may also be violated if negative information is provided. This is owing to the fact that negative information may allow the existence of such a customer relationship to be concluded (e.g., by inversion).

In this case, the Supreme Court had to assess whether, in light of the above, such negative information, meaning a confirmation of the non-existence of a relationship between a certain customer and the bank, may be provided to non-customers on the basis of the DSG. In this regard, it has to be noted that in its rulings, the Supreme Court has repeatedly emphasised that a bank is only obliged to provide information to the account holder.[14] In a recent decision, the Supreme Court held, under consideration of a Constitutional Court ruling,[15] that banking secrecy is to be considered a special statutory provision that takes precedence over the right to information, pursuant to Article 11 of the DSG. Information that could violate banking secrecy is under no circumstances covered by the DSG. Since this principle is also applicable to negative information, non-customers are not entitled to receive such negative information.

iii Liechtenstein banking secrecy in legal assistance

In another recent decision, the Supreme Court dealt with the persistence of banking secrecy in connection with the provision of legal assistance in criminal matters.

The Liechtenstein Code of Criminal Procedure (StPO) provides for the obligation of banks to surrender all documents and other material concerning the type and scope of the business relationship as well as business transactions and other business events related to such business relationship from a certain period of time upon court ruling to such effect, if it is necessary in the investigation of a case of money laundering, a predicate offence to money laundering or an offence in connection with organised crime.[16]

Where the district court ruled that a bank should surrender account statements in a mutual legal assistance case regarding the violation of the obligation to provide maintenance,[17] the Supreme Court held that the bank was not obliged to surrender the account statements, since it was not ordered in connection with the investigation of a case of money laundering, a predicate offence to money laundering or an offence in connection with organised crime.

Further, the court held that where acts of investigation interfere with personal rights, legal assistance may only be granted if the conditions provided for such a measure in the StPO are met.[18] Thus, there is no reason why, even in times of increasing transparency, banking

12 OGH 4 June 2009, RZ.2007.274, LES 2009, 322.
13 StGH 6 February 2006, StGH 2005/50, LES 2007, 396.
14 OGH 12 January 2006, 10 CG.2003.297, LES 2006, 388.
15 StGH 29 August 2011, StGH 2011/11, GE 2013, 66.
16 Section 98a StPO.
17 Section 197 Liechtenstein Criminal Code.
18 BuA 2000/55, 49.

secrecy in Liechtenstein should be penetrated any further in cases of mutual legal assistance in criminal matters than in domestic criminal proceedings. This decision proves that banking secrecy is of great importance to the Liechtenstein legal system.[19]

iv Prolongation of asset freezing orders

As asset freezing orders often concern banks, especially as third-party debtors,[20] the recent decision of the Supreme Court dealing with the prolongation of such an asset freezing order is also of interest here. In general, asset freezing orders, which are based on criminal law, may only be ordered for a period of a maximum of two years and may only be extended for a year each upon application after that.[21]

The Constitutional Court holds, in settled case law, that asset freezing orders interfere with the property guarantee that is provided for by Article 34 of the LV and thus, only permissible if the necessary intervention criteria, including the principle of proportionality, are complied with. According to the case law developed in this regard, a freezing of assets beyond three years is already unreasonable, unless expedient investigations are conducted or results of such are available, which confirm the initial suspicion, or special circumstances worthy of special consideration, which justify an extension beyond three years, are given.[22] Thus, freezing of assets for several years does not automatically result in a breach of the property guarantee.[23]

In light of the above, the Supreme Court has recently decided that, under special circumstances, an extension of an asset freezing order that has already been in place for 13 years is not an unreasonable impairment of the property guarantee protected under Article 34 of the LV or under the first supplementary protocol to the European Convention on Human Rights and does not violate the principle of proportionality.[24] In this particular case, the Supreme Court reasoned that the scope and complexity of the facts, the strong foreign connection and the need to await the results of foreign criminal proceedings to clarify the facts of the case, constitute such special circumstances mentioned above.

III LEGISLATION AND SUPERVISION

By virtue of its EEA membership, Liechtenstein implements EU directives with EEA relevance. In the financial services sector in particular, Liechtenstein is obliged to transpose EU directives and regulations. Thus, financial institutions in Liechtenstein are subject to the same regulatory framework as financial institutions located in EU Member States and EU law has great impact on legislation in Liechtenstein's financial centre.

Recent legislative developments in the banking sector have been the implementation of Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II) and the transposition of Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use

19 OG 19 January 2016, 12 RS.2015.166, LES 2016, 76.

20 *Drittschuldner*.

21 Section 97a, Paragraph 4 StPO.

22 StGH 30 November 2009, StGH 2009/149, GE 2010, 373; OGH 2 November 2006, 12 RS 2003.202-55, LES 2007, 462; OGH 3 October 2007, 13 UR.2001.151-131, LES 2008, 191, *inter alia*.

23 OGH 6 August 2009, 12 UR.2001.39-1718, LES 2010, 63; StGH 29 October 2013, StGH 2013/93 GE 2014, 99.

24 OGH 21 July 2017, 11 UR.2003.365, GE 2018, 32.

of the financial system for the purpose of money laundering and terrorist financing, better known as the Fourth Anti-Money Laundering Directive (4th AMLD). The transposition of Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD II) is scheduled to take place in the near future, presumably at the beginning of 2019.

In Liechtenstein, the relevant supervisory authority is the Liechtenstein Financial Market Authority (FMA), which is part of the European system of financial supervision. Even though Liechtenstein is not a member of the European Union, it is a full member of the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority; however, the FMA has no voting rights in the committees of these financial supervisory authorities.

i MiFID II and the Regulation on markets in financial instruments

Certainly one of the major legislative developments of the recent past has been the implementation of MiFID II, which required comprehensive amendments to the BA, the Asset Management Act and the respective ordinances, as well as adjustments to the Law on specific undertakings for collective investment in transferable securities. The legislative process has been completed, and the respective amendments entered into force on 3 January 2018.

Through the implementation of MiFID II and the Regulation on markets in financial instruments (MiFIR), investor protection has been enhanced by requiring the provision of improved information to customers with regard to the services provided to them. Further, in accordance with EU law, independent investment advice and portfolio management have been introduced in conjunction with a new legal framework for fees, commissions or other monetary or non-monetary benefits received from or granted to third parties, in particular product providers.

With regard to the scope of the term 'financial instruments', an expansion to commodities and other derivatives, which are comparable with traditional financial instruments from a regulatory perspective, was conducted. In addition, markets for financial instruments, including over-the-counter trading, are now subject to stricter regulation, aiming for transparency and investor confidence.

In addition to the above-mentioned amendments, *inter alia*, the powers of the supervisory authorities have been enhanced and certain trading techniques, in particular the algorithmic high-frequency trading, are now subject to regulation.

However, with respect to the applicability of MiFIR, it has to be taken into account that Liechtenstein is a member of the EEA but not the European Union itself, which is why MiFIR will only be directly applicable without the need of national transposition after its incorporation into the EEA *acquis*. The transposition process has already been initiated, but at this time it is difficult to predict when the transposition will be finalised. While MiFIR has been applicable in EU Member States since 3 January 2018, it is not yet applicable in Liechtenstein.

ii PSD II

Further, the national implementation of PSD II is in progress. The main contents of this are, in particular, the extension of the scope of application to transactions with EU third countries and payments in foreign currencies, as well as increased transparency and information obligations. In addition, consumer protection and safety requirements will also be enhanced.

In the course of the implementation of PSD II, a law on payment services will be enacted and several other laws will be amended, including, *inter alia*, the BA. At this point, it is difficult to predict when the respective national implementation laws will enter into force in Liechtenstein, but the beginning of 2019 seems likely.

iii Anti-money laundering

In addition to the above-mentioned regulations, the 4th AMLD was transposed into Liechtenstein law quite recently, with the exception of the provisions regarding the requirement to establish beneficial ownership registers. In the course of the transposition, the Liechtenstein Due Diligence Act (DDA) and its respective ordinance were amended accordingly. Further, alongside the transposition of the 4th AMLD, Liechtenstein decided to address the most recent assessment regarding Liechtenstein's compliance with the Financial Action Task Force Recommendations.[25] The respective national implementation law entered into force on 1 September 2017.

The scope of the DDA was extended with regard to asset management companies and undertakings for collective investment and thus, aligned with the scope defined by the 4th AMLD. Further, in anticipation of the 5th AMLD, virtual currency exchanges now also fall within the scope of the DDA.

The major amendments in the national law that were made in order to comply with the provisions set out in the 4th AMLD include the adjustment of the definition of beneficial ownership regarding legal entities and arrangements, as well as the extension of the definition of a politically exposed person. Further, *inter alia*, the responsibility for the submission of suspicious transaction reports to the Liechtenstein Financial Intelligence Unit has been laid out more clearly; the threshold with respect to the obligation to conduct customer due diligence was reduced to 10,000 Swiss francs, and the DDA now stipulates the obligation to appoint a member at the executive level as responsible for the compliance with the DDA and its respective ordinances.

Regarding the supervisory framework, a stronger risk-based supervision is provided for by the revised DDA, according to which the FMA has to prepare a risk profile for subjects to due diligence. In addition, the range of supervisory measures has been extended to align with the requirements set out in the 4th AMLD, and the maximum for fines for qualified infringements has been significantly increased. Moreover, the introduction of liability of legal entities in administrative criminal proceedings and the transfer of certain offences away from the courts to the jurisdiction of the FMA has been effected.

IV PROCEDURAL ISSUES

As banks often play a key role in interim measures, especially as third-party debtors, this section focuses on interim measures in Liechtenstein.

25 Conducted by the IMF and MONEYVAL in 2013 and 2014, Report on Fourth Assessment Visit, MONEYVAL (2014).

i Civil law interim measures

General remarks

The Liechtenstein Enforcement Act (EO) provides for the possibility to request a preliminary injunction to secure either a monetary claim or any other claim before or pending a civil case or execution proceedings.[26] The relevant provisions concerning interim injunctions are contained in Articles 270 et seq. of the EO and have been implemented on the basis of the Austrian provisions with regard to interim measures. Consequently, the courts and legal representatives must consider Austrian legal doctrine and jurisprudence when dealing with interim injunctions.

As banks will most commonly only be affected by preliminary injunctions to secure a monetary claim, this section focuses on such. According to Article 274, Paragraph 2 of the EO, interim injunctions to secure monetary claims may be issued, if it is likely that without an interim measure, the debtor could prevent or impede the recovery of a monetary claim through acts such as damaging, destroying, concealing or side-lining assets or through the sale or other disposal of assets. Thus, an application for an interim injunction must be based on an element of subjective endangerment as set out above. Such endangerment shall in particular also be assumed, if the debtor (1) has no fixed address; (2) is making arrangements to flee or is fleeing with the intention of avoiding his or her obligations; or (3) does not reside in Liechtenstein or if the execution title would have to be enforced abroad.[27] The practical significance of the enforcement of the execution title abroad as a reason for endangerment represents a peculiarity of Liechtenstein law and a distinction from the Austrian legal situation. This is owing to the fact that Liechtenstein is not a member of the European Union and thus, Liechtenstein execution titles will not automatically be enforced in EU Member States.

Since banks will more commonly be third-party debtors than claimants, or even less commonly, debtors, the third-party prohibition as a security measure is of special interest. The court may issue a third-party prohibition if the debtor has a monetary claim or any other claim for performance or delivery of any item.

Such a third-party prohibition is enforced by prohibiting the debtor from disposing of the claim and ordering the third party not to pay the debt owed to the debtor and not to undertake anything in relation to the debtor that could impede or prevent the recovery of the respective claim.[28] In contrast to the legal situation in Austria, in Liechtenstein, the creditor will acquire a lien on the secured claims.[29] Thus, the bank will be prohibited from disposing of the claim for repayment that the debtor has acquired against it and the creditor will have a lien in said claim.

Procedure

Regarding the filing of an application of an interim injunction, which may be done separately or in conjunction with a claim, application for a payment order or any other application, certain details must be provided, *inter alia*, the type of order the applicant wishes to apply for and its proposed duration. Further, the creditor's claim must be specified precisely and the facts on which the request is based must be stated truthfully and in detail.

26 Article 270, Paragraph 1 EO.

27 Article 274, Paragraph 3 EO.

28 Article 275, Paragraph 2 EO.

29 OGH 4 April 2002, 09 CG.165/2000-38, LES 2003, 29.

Against the issuing of an interim injunction, the debtor has the right to appeal within 14 days upon receipt of the interim injunction.[30]

Since the procedure regarding interim injunctions, the purpose of which is to prevent the enforcement of a securable claim from being frustrated, is an urgent and summary one, numerous procedural peculiarities take this, and the endeavour to complete the procedure quickly, into account.[31]

Cross-border interim measures

Since Liechtenstein is not part of the European Union, it cannot be assumed that foreign interim measures will automatically be enforced in Liechtenstein and vice versa. Regarding detailed information on jurisdictional matters, see Section VI, below.

ii Asset freezing orders based in criminal law matters

Since asset freezing orders are not only issued in connection with civil law matters, asset freezing orders in criminal law should also be dealt with.

In criminal proceedings, the court must issue certain orders, including asset freezing orders, at the request of the Public Prosecutor's Office, to protect the forfeiture pursuant to Section 20 of the Liechtenstein Criminal Code (StGB) or the extended forfeiture pursuant to Section 20b of the StGB if it is to be feared that the collection would otherwise be endangered or considerably impeded. Such an asset freezing order will lead to the state acquiring a lien with regard to credit balances or other assets.[32]

Further, such an order shall not be issued for a period exceeding two years and the validity period may only be extended by a maximum of one year each, upon application, as discussed in Section II.iv, above. An asset freezing order shall be lifted as soon as the circumstances under which it has been issued have lapsed.[33]

V PRIVILEGE AND DISCLOSURE

The Liechtenstein Lawyers Act (RAG) provides for lawyer–client privilege in Article 15, which stipulates that lawyers are obliged to maintain secrecy about all matters entrusted to them and facts that become known to them in their professional capacity, the secrecy of which is in the interest of the lawyer's party. The lawyer–client privilege is also valid with regard to courts or other authorities since the law provides that lawyers have the right to non-disclosure in court and in other official proceedings in accordance with the respective procedural regulations.

According to the Constitutional Court, the identity of the client also falls within the scope of protection of the lawyer–client privilege. The lawyer's right to refuse testimony coincides with the professional duty of confidentiality and covers all information that a lawyer receives in his or her capacity within the framework of the client relationship. Similar to banking secrecy, lawyer–client privilege primarily serves to protect the client's personality.[34]

Further, Article 15, Paragraph 2 of the RAG stipulates that the right of a lawyer to secrecy may not be circumvented by judicial or other official measures, in particular by questioning

30 Article 43; Article 290 EO.
31 OGH 2 December 2004, 01 CG.2002.310-108, LES 2006, 46.
32 Section 97a, Paragraph 1 StPO.
33 Section 97a, Paragraphs 4 and 5 StPO.
34 StGH 30 June 2008, StGH 2007/130, LES 2009, 6.

assistants or ordering the surrender of documents, video, audio or other data media or the confiscation of such. Lawyer–client privilege also extends to correspondence between a lawyer and the party, irrespective of where and in whose custody such correspondence may be located.

VI JURISDICTIONAL MATTERS

As a general remark, it should be noted that judgments rendered by a foreign competent court are not automatically enforceable in Liechtenstein. A court in Liechtenstein would only enforce judgments of foreign courts if enforcement is granted by respective treaties or by mutual agreement according to Article 52 of the EO. Further, enforcement of a decision of a foreign court or other authority may only be granted if certain essential principles of Liechtenstein law are met (e.g., *inter alia*, regarding the competence of the court, the service of court documents and finality of the judgment).[35]

As Liechtenstein is not a member of the European Union, the Brussels Regulation does not apply. Liechtenstein is also not a contracting party to other international agreements on the recognition and enforcement of foreign decisions of ordinary courts. Bilateral agreements exist with Austria and Switzerland only, which ensure the acknowledged enforceability of Austrian and Swiss judgments.[36]

With regard to other foreign judgments, irrespective of whether they were issued in the European Union or a third-country state, no treaty regarding the enforcement of foreign judgments or a mutual promise exists. Therefore, judgments rendered by foreign courts will not automatically be enforced in Liechtenstein. However, the plaintiff can apply for recognition of the judgment and the issuance of a payment order with the Liechtenstein court. Nevertheless, if the defendant opposes such an application, recognition of the foreign judgment could be refused. In such cases, new proceedings on the merits would have to be initiated in Liechtenstein.

In conclusion, any final judgment obtained against a Liechtenstein counterparty in a foreign court – except Austrian and Swiss courts – will not be automatically recognised and enforced by the courts in Liechtenstein without potential re-examination or re-litigation of the matters adjudicated.

Owing to this particularity of Liechtenstein, its accession to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards on 7 July 2011, which entered into force in Liechtenstein on 5 October 2011, is of utmost significance. On the basis of the New York Convention, the recognition of foreign arbitral awards is granted and thus, the enforcement of a foreign arbitral award in Liechtenstein is possible, in accordance with the Convention. In light of the above-mentioned difficulties regarding foreign court judgments and Liechtenstein's accession to the Convention, an arbitration clause could be advisable. Arbitration clauses in contracts executed by both parties are binding when the requirements set out by law are complied with (i.e., the prerequisite that the arbitration

35 Article 53 EO.

36 Agreement of 25 April 1968 between the Principality of Liechtenstein and the Swiss Confederation on the recognition and enforcement of judgments and arbitration awards in civil matters; Agreement of 5 July 1973 between the Principality of Liechtenstein and the Republic of Austria on the recognition and enforcement of judgments, arbitral awards, settlements and public documents.

clause is in writing). Further, it has to display the intention of the parties to submit all or specific disputes related to a legal (contractual) relationship under the competence of an arbitral tribunal.

Also, with regard to the applicable law and international jurisdiction, it has to be borne in mind that Liechtenstein is not a member of the EU and thus, neither part of the Brussels Ia Regulation nor the Rome I Regulation, which is why international jurisdiction, as well as conflict of law issues, are determined by national law, in particular by the Act on International Private Law (IPRG) and the Court Jurisdiction Act.

Regarding banking relationships, Article 42 of the IPRG stipulates that these are determined by the law of the country in which the undertaking conducting business under the BA has its domicile[37] and, in the case of banking transactions between such undertakings, by the law of the domicile of the commissioned undertaking.

VII FREQUENT CAUSES OF ACTION

As outlined above, banks in Liechtenstein rarely initiate proceedings themselves but are most commonly the addressees of litigation. In the past few years, lawsuits dealing with the liability of a bank and its bodies for losses in client assets deposited with them and asset freezing orders and their prolongation, as well as the extent of banking secrecy, have prevailed in banking litigation in Liechtenstein. In addition, the enforcement of pledges in client assets has also been dealt with recently by Liechtenstein courts.

However, as mentioned above, not only the jurisprudence of the Liechtenstein courts is of importance concerning banking litigation, but Austrian and Swiss case law also influences jurisprudence in Liechtenstein and, therefore, must be taken into account.

VIII OUTLOOK AND CONCLUSIONS

Liechtenstein offers stability and security as a financial centre and financial intermediaries, such as banks, located in the Principality benefit from privileged access to the European Union and Switzerland, owing to Liechtenstein's EEA membership and its close ties to Switzerland.

The applicable regulatory framework is similar to that of EU Member States', since Liechtenstein transposes most EU law regarding the financial sector. Liechtenstein has already transposed the respective EU provisions on anti-money laundering as well as MiFID II. In the near future, PSD II will also be transposed into Liechtenstein law.

Further, Liechtenstein law provides for very strict banking secrecy, as well as attorney–client privilege, both of which are recognised by courts and other authorities. Finally, Liechtenstein is not part of any multilateral treaties addressing conflict of law issues, international jurisdiction and the enforceability of foreign judgments, which is why the enforceability of foreign judgments in Liechtenstein can be somewhat difficult.

By virtue of Liechtenstein being one of the most stable financial centres in Europe, with its banks having a core capital ratio averaging over 21 per cent and thus being among the best-capitalised banks worldwide, banking litigation is not as significant a topic as might be imagined. At the present time, it cannot be anticipated how the number of banking litigation cases filed with Liechtenstein courts might develop; however, a significant increase is not expected.

37 According to Article 40, Sentence 2 IPRG.

Appendix 1

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