THE BANKING LITIGATION LAW REVIEW

Third Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that the increase in litigation involving banks shows little sign of slowing.

Although disputes arising from the 2008 financial crises are reaching their end, what might be termed 'normal' banking litigation has resumed, and is in no short supply. This crosses the full 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. In all these cases, cross-border issues frequently arise, and banking litigation remains an important source of developments in the conflicts of laws in international commercial litigation.

The context for much of the consumer litigation is the growing – and increasingly complex – range of consumer protection regulation in the various jurisdictions under review. However, while the courts appear content to apply that legislation in order to hold banks to account, its existence – together with the more extensive rights it affords to consumers – has meant that in many parts of the world the courts are less willing to expand consumer rights beyond the context of that regulation, instead preferring to enforce the contractual rights between banks and customers strictly.

In those circumstances, we have seen a growth in the use of class actions and representative claims, often where consumers can take advantage of friendly regulation. These mechanisms are being adopted in countries where they did not previously exist, in some cases by changes in legislation, and in others by changes to court procedure. At the same time, courts in different jurisdictions are reacting very differently to this new or growing type of litigation. In some cases this is by seeking to restrict the circumstances in which such claims can be made but in others by promoting their use. It therefore remains to be seen whether the growth of class actions and representative claims against banks is really a worldwide phenomenon.

These novel forms of litigation, and other more conventional claims, are also subject to a global trend towards making both the courts and, importantly, alternative forms of dispute resolution more available to litigants. We continue to see parties encouraged to settle their claims out of court, by way of general mechanisms such as mediation or by way of specialised banking ombudsmen. Further, some jurisdictions are promoting the use of class or group settlements, which can resolve major disputes with limited court involvement.

At the same time, the impact of data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, has opened a further means by which claimants can bring claims against banks, which are inevitably major holders of personal data. The use of the GDPR both as a tool in litigation and as a source of complaint or damages in itself is, therefore, a concern for banks, both in a regulatory and in a litigation context. This concern is only likely to grow.

One bright spot for banks is a general trend in favour of upholding assertions of secrecy, confidentiality and privilege on the part of banks and their advisers against claimants. This is especially important in the context of investigations against banks. In common law jurisdictions in particular, courts now tend to treat such investigations as akin to adversarial litigation and after the concerns raised over the past year or two, now largely accept that many documents created during investigations should be protected by privilege.

Finally, the general political and economic uncertainty around the world remains a probable source of banking litigation, especially where that uncertainty negatively affects investors. Nobody is any closer to being able to say what the political or economic impact of Brexit will be either to the United Kingdom's banking sector or to that of the European Union. It would be dangerous to predict when clarity in this regard will be available.

Deborah Finkler
Slaughter and May
London
November 2019

Chapter 8

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 past few 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 consolidated assets managed by Liechtenstein banks, including their foreign group companies, reached more than 300 billion francs in 2018. Fifty two per cent, or 159.1 billion francs, of the total consolidated assets are under the management of banks in Liechtenstein. The amount of assets managed is especially remarkable taking into account that merely 14 banks were licensed in Liechtenstein at the end of 2018.[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 arise from time to time. However, we believe the number of cases brought to court is fairly low, especially in relation to the assets managed and in the majority of cases litigation is not initiated by banks.

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]

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1 Hannes Arnold is a senior partner and Sophie Herdina is an associate at Gasser Partner Attorneys at Law.

2 The consolidated assets under management have increased from 294.3 billion francs at the end of 2017 to 305.2 billion francs in 2018; for more information see FMA Liechtenstein Financial Market Report 2019, 12; regarding the number of licensed banks please also see FMA Annual Report 2018, 27.

3 OGH 7 May 2010, 03 CG.2009.3, GE 2010, 190.

II SIGNIFICANT RECENT CASES

Although Liechtenstein is not a common law jurisdiction 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. Owing to the fact that Liechtenstein is a small jurisdiction and the cases brought to and decided by the courts are few, the developments in significant recent cases are limited.

However, as 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. Thus, the text below focuses on developments in Austrian jurisprudence, which will most likely also be of importance with regard to Liechtenstein.

i Recognition of foreign security interests without publicity

Similar to the Austrian legal situation, Liechtenstein law requires publicity[5] in order to validly establish a security interest or conduct a transfer of assets for security purposes, assignment of claims for security purposes respectively. In other words, the establishment of a security interest must irrefutably be visible for the outside world.[6] Thus, the respective assets have to be transferred to the pledgee and may not remain in possession of the pledger, which is why it is not possible to create a pledge by the way of *Besitzkonstitut*.[7]

Based on the above and the provisions of the Austrian International Private Law the Austrian Supreme Court has repeatedly held that a security interest validly created under non Austrian law without fulfilling the requirements of publicity becomes invalid, once the respective assets are transferred to Austria.[8] This based on the principle that the effects of acquired rights *in rem* have to be assessed based on the law of the respective location (*lex rei sitae*).[9] Thus, the existence of a security interest depends on the law of the current location rather than the law of the location at which the security interest was acquired.[10]

In a recent decision the Austrian Supreme Court has revised its longstanding jurisprudence in this regard. It has now held that it is, inter alia, not in line with the principle of acquired rights to uphold the above-mentioned jurisprudence that a security interest validly established under foreign law becomes void by the transfer of assets to Austria, if the principle of publicity has not been complied with.

It is not foreseeable whether the Liechtenstein Supreme Court will also adopt this jurisprudence at this point. However, as the Austrian and Liechtenstein provisions in this regard are similar and Austrian jurisprudence is thus to be taken into account, the authors believe this to be likely.

4 OGH 5 July 2013, 10 CG.2010.152, LES 2013, 156; OGH 9 February 2006, 06 CG.2004.23, LES 2006, 468.

5 Opilio, Law on Property, Article 365 SR, 008.

6 OGH 25 May 1992, 03 C 144/87-58, LES 192, 144.

7 *Constitutum Possessorum*, the possession remains with the prior possessor which possesses for the current possessor.

8 öOGH 14 December 1983, 3 Ob126/83.

9 öOGH 14 December 1983, 3 Ob126/83.

10 RIS-Justiz, RS0076753; öOGH 14 December 1983, 7 Ob 723/88; 15 October 1997, 3 Ob 2403/96w.

ii Liability in case of violation of duties to inform about internal commissions

In a recent case the Austrian Supreme Court has further specified its jurisprudence with regard to liability in connection with the violation of duties to inform. In a prior decision[11] the Austrian Supreme Court provided banks that had, in breach of their obligation to inform, not informed their customers of internal commissions earned for the brokerage of ship and real estate funds with the possibility to avoid liability for damages, by holding that, if the bank succeeded in proving that it would have recommended the respective product regardless of the commissions, there would not be any grounds for liability.

In its more recent decision the Austrian Supreme Court has clarified that the fact that the acting adviser had no knowledge of the respective commissions is irrelevant, if special sales-promoting measures within the bank influence the advisory activities of the respective employees as well as the investment decisions of the clients.[12] With this decision and by focusing also on sales-promoting measures, the Austrian Supreme Court seems to leave open the possibility for banks to avoid liability, in particular if the bank can prove that the adviser has no knowledge of the respective commissions and no sales-promoting measures were undertaken and there is thus no direct or indirect influence of the advisers recommendation of a specific product.[13]

As the provisions on which this decision is based are similar in Austria and Liechtenstein, it is most likely that the Liechtenstein Supreme Court would follow this jurisprudence when concerned with a similar case.

III RECENT LEGISLATIVE DEVELOPMENTS

By virtue of its EEA membership, Liechtenstein implements EU legislation with EEA relevance. In particular in the financial services sector, 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 and subsequently Liechtenstein's financial centre.

Recent relevant legislative developments in the banking sector have been the strengthening of the deposit guarantee by the enactment of the Deposit Guarantee and Investor Compensation Act, the Regulation (EU) 2017/1109 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading on a Regulated Market (Prospectus Regulation) entering into force and the amendment of the Financial Market Act in the course of establishing an institutional framework for macroprudential policy and supervision.

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.

11 öOGH, 27 April 2017, 2 Ob 99/16x.

12 öOGH 26. February, 8 Ob 166/18x.

13 Kellner, ÖBA 2019, 517 (518).

i Deposit Guarantee and Investor Compensation Act

Whereas EU Member States were obliged to transpose Directive 2014/49 EU on Deposit Guarantee Schemes (DGS III) by 3 July 2015, the respective regulation has not yet been adopted into the EEA acquis. At this point it is not foreseeable when the DGS III will be incorporated into the EEA Agreement, which is why Liechtenstein decided to transpose DGS III early to ensure equality to the EU acquis.[14]

Thus, the Deposit Guarantee and Investor Compensation Act as the national transposition law was recently enacted and entered into force on 1 June 2019.[15]

The main goal of the respective act is the protection of the depositories in the case of the insolvency of a Liechtenstein bank. As in the EU uniformly an amount of €100,000 is guaranteed, Liechtenstein law guarantees 100,000 francs per depositor and per bank. Whereas the well-established Liechtenstein deposit guarantee will be retained and the organisational structure of the deposit guarantee scheme at the level of the Liechtenstein Banking Association will be recognized *ex lege* as a deposit guarantee scheme, the reimbursement period after the occurrence of a triggering event will be gradually reduced from a maximum of 30 (20+10) working days to a maximum of seven working days.[16]

ii Prospectus regulation

Similar to the Deposit Guarantee and Investor Compensation Act, the Prospectus Regulation also has investor protection as its core task. The Prospectus Regulation, as a regulation with EEA relevance, has, meanwhile, been incorporated into the EEA Agreement and is in force. Whereas the Prospectus Regulation is directly applicable in Liechtenstein, it has a limited scope of application as Liechtenstein currently does not have a regulated market and no corresponding regulation on stock exchanges.[17]

With the applicability of the Prospectus Regulation the administrative and cost burden in connection with the preparation of a prospectus shall be reduced, especially with regard to small and medium-sized enterprises, issuers of secondary issues as well as constant issuers. The threshold value for the obligation of publishing a prospectus has been harmonised at €1 million euros and simplifications with regard to the preparation and design of prospectuses have been introduced and prospectus summaries have been streamlined. With investor protection in mind, the practice of sometimes excessive catalogues of risk factors has been abolished and such information must now be minimised.

Where the Prospectus Regulation leaves some flexibility with regard to the implementation, the legislator has taken into account the particularities of Liechtenstein in the course of the transposition. As issues with a total value of less than one million euros over a period of 12 months are rare and in practice issues are far above that threshold, Liechtenstein did not make use of the option to provide for other disclosure obligations for such issues.[18] Furthermore, Liechtenstein has decided to exempt issues of securities with a

14 BuA 2018/98, 7 et seq.

15 Article 64 Deposit Guarantee and Investor Compensation Act.

16 BuA 2018/98, 11 et seq.

17 BuA 2019/12, 5 et seq.

18 BuA 2019/12, 27.

total issue amount that does not exceed eight million euros and that are only offered publicly in Liechtenstein from the obligation to prepare a prospectus. In practice, issues limited to the Liechtenstein market are rare.[19]

iii Macroprudential policy and supervision

In transposition of Recommendation ESRB/2011/3 of the European Systemic Risk Board, Liechtenstein has amended the Financial Market Act and established a Financial Market Stability Committee in order to contribute to the prevention and mitigation of systemic risks to financial market stability. The newly established committee will consist of two representatives each of the FMA and the Ministry for General Government Affairs and Finance. The tasks of the Financial Market Stability Committee include dealing with warnings and recommendations of the European Systemic Risk Board, discussing issues relevant to the stability of the financial market, issuing recommendations and warnings as well as submitting recommendations to the FMA or government.[20]

The respective amendments to the Financial Market Act entered into force on 1 May 2019.[21]

IV CHANGES TO COURT PROCEDURE

As court procedures in civil law matters are governed by the Liechtenstein Civil Procedure Code (LCPC) from a procedural perspective and civil law matters naturally form the majority of cases relevant for banks, the extensive revision of the LCPC is of utmost interest with regard to banking litigation.

The LCPC, which is based on the Austrian Civil Procedure Code, dates back to 1912 and has undergone only a few substantial changes since then. It is thus no surprise that the LCPC no longer fully satisfied the requirements for providing a procedure that is as simple, quick and inexpensive as possible. As it is not only of central importance for the confidence in the judicial system that judicial protection is granted within reasonable time, but the duration of proceedings is also a crucial factor from an economical point of view, the legislature decided to finally reform the LCPC in large parts following the amendments the Austrian legislature has made to the Austrian Civil Procedure Code over the past years.[22]

Against this background the LCPC has been revised comprehensively and the respective provisions entered into force on 1 January 2019. A detailed discussion of the changes made would, however, be of a more procedural nature and would of course go beyond the scope of this chapter.

V INTERIM MEASURES

The Liechtenstein Enforcement Act (EO) has been reformed to some extent in the past year. As the authors do not consider the respective changes to be of interest this regard, the revision is not discussed hereinafter.[23]

19 BuA 2019/12, 29 et seq.

20 BuA 2018/76, 4.

21 II of the Law on the Amendment of the Financial Market Act, LGBl. 2019.100.

22 BuA 2018/19, 8 et seq.

23 Law on the Amendment of the Enforcement Act, LGBl. 2018.472.

Civil law interim measures

Developments

The 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.[24] The relevant provisions concerning interim injunctions are contained in Article 270 et seq EO and have been implemented on the basis of Austrian law. Consequently, the courts and legal representatives must consider Austrian legal doctrine and jurisprudence when dealing with interim injunctions based on the EO.

The Liechtenstein Supreme Court has recently held that the issuing of interim injunctions by means of a third-party prohibition[25] is generally considered as a civil law dispute within the meaning of Article 6 of the European Convention on Human Rights. Thus, such a procedure is a bilateral one and the opponent must be heard before issuing the respective injunction. Only in cases where the purpose of the interim injunction can be thwarted by a prior hearing, must such hearing not be held. The omission of the court to hear the opponent prior to granting an interim injunction must be reasoned briefly and conclusively, otherwise the respective court decision will show a failure to state reason and may be appealed.[26] As banks are more commonly third-party debtors than claimants, or even less commonly, debtors, the third-party prohibition as a security measure is of special interest, which is why this development is relevant for banking litigation as well.

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. With regard to the required determinedness of the respective application for interim injunction, the Liechtenstein Supreme Court has recently held that the assets affected by the interim injunction as well as the prohibited actions must be sufficiently defined.[27] In this regard the Supreme Court has stated that the application for interim injunctions, which is intended to prohibit the counterparty from disposing of his or her assets up to a certain amount, is not sufficiently determined, if no detailed description of the assets concerned and the term 'disposal' is made therein and is thus to be rejected.[28]

As according to Article 51 EO the LCPC is applicable with regard to procedural matters not governed by the EO, the revision of the LCPC is also of importance with regard to interim measures.

24 Article 270, Paragraph 1 EO.

25 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. In contrast to the legal situation in Austria, in Liechtenstein, the creditor will acquire a lien on the secured claims. 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.

26 OGH 7 September 2018, 01 CG 2018 91, LES 2018, 265.

27 OGH 5 April 2019, 01 CG 2016 461, LES 2019, 107.

28 OGH 5 April 2019, 01 CG 2016 461, LES 2019, 107.

VI PRIVILEGE AND PROFESSIONAL SECRECY

We are not aware of any changes with regard to privilege and professional secrecy, which took place in the last year. The Liechtenstein Lawyers Act (RAG) still provides for a strong lawyer–client privilege, which provides 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.

VII JURISDICTION AND CONFLICTS OF LAW

As outlined above, the Austrian Supreme Court has recently held that security interests created in accordance with foreign law, and without fulfilling the requirements of publicity, will be recognised by Austrian courts.[29] As this was not the case before,s and as the establishment of security interests is inherent to the banking business, this development is very much of interest in this regard.

Furthermore, and for the sake of completeness, we note that Liechtenstein has still not joined any international agreements on the recognition and enforcement of foreign court decisions in addition to those with Austria and Switzerland[30] and thus judgments rendered by foreign courts will not automatically be recognised and enforced in Liechtenstein.

VIII SOURCES OF LITIGATION

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 banks and its bodies for losses in client assets deposited with the bank, 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 is commonly dealt with 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.

IX REGULATORY IMPACT

Regulation not only has an impact with regard to the regulated institutions but also affects civil law aspects such as liability. With regard to unlawful conduct Liechtenstein law stipulates that the violation of protective provisions establishes unlawful conduct[31] and may thus lead to liability. Protective provisions are to be understood as any legal provision that pursues a protection purpose in terms of content.[32] The qualification of unlawful conduct is significant

29 öOGH 23 January 2019, 3 Ob 249/18s.

30 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.

31 Section 1311 ABGB – the Austrian and Liechtenstein provisions are identical.

32 öOGH 28 January 2002, 2 Ob 310/01 d; RIS Justiz, RS0027415; OGH 2. October 2015, 01 CG.2012.379, LES 2015, 225.

with regard to liability, as liability based on a violation of a protective law grants claims for damages for pure financial losses even if neither contractual obligations nor absolutely protected legal interests were violated.[33] When assessing the unlawful conduct the material scope of the protective provisions must be taken into account and the damages occurred must have been such, which the protective provision aimed to prevent on the basis of its ratio. Based on the purpose of the Liechtenstein Banking Act (BA) expressly determined in Article 2 Paragraph 2, in particular the protection of creditors and investors of banks and investment firms as well as the safeguarding of confidence in the Liechtenstein monetary, securities and credit system and the stability of the financial system, the Supreme Court has held that the violation of licensing requirements qualifies as a violation of a protective provision within the meaning of Section 1311 ABGB.[34]

X OUTLOOK AND CONLCUSIONS

From our experience the regulatory environment especially on an EU level is becoming more vast each year, the level of detail is increasingly high and the density of Level II and Level III legal acts is increasing steadily. We do not see any indications for a trend of reduction of regulation in the financial market sector at this point and it is thus to be expected that further regulation will be enacted in the future.

As Liechtenstein is an EEA member, EU legislation with EEA relevance is also adopted in Liechtenstein. It is thus to be expected that the regulatory framework in place in Liechtenstein will develop similar to the EU framework. Liechtenstein is in general eager to transpose relevant EU legislation promptly to guarantee a level playing field and subsequently often decides to transpose the respective legislation into national law even before the respective legislation has been incorporated in the EEA acquis.

One of the current regulatory projects in Liechtenstein is the transposition of Directive (EU) 2015/2366 of 25 November 2015 on Payment Services in the Internal Market, better known as PSD II. The national implementation of PSD II creating a framework for payment service providers, will again take place before PSD II has become part of the EEA acquis.[35] The PSD II and thus the national transposition law, the Liechtenstein Law on Payment Services aims to ensure adequate consumer protection, transparency and security of payments and fair competition in relation to payment services as well as to promote the market continuity and to create a clear legal framework.[36] The Liechtenstein Law on Payment Services has entered into force 1 October 2019.[37]

Further, it is expected that Liechtenstein will implement Directive 2014/17/EU on Credit Agreements for Consumers Relating to Residential Immovable Property, which aims to create a uniform legal framework with regard to the provision of mortgage credit agreements vis-à-vis consumers. Thus, it is likely that new lending rules with regard to residential real estate will enter into force in foreseeable future and therewith the requirements with regard to pre-contractual information will be determined and uniform standards concerning the assessment of creditworthiness, employment training and remuneration will be introduced.

33 Schacherreiter in Kletečka/Schauer, ABGB ON (2010), Section 1311 ABGB, Rz 5.

34 OGH 2 October 2015, 01 CG.2012.379, LES 2015, 225.

35 BuA 2019/11, 9.

36 Article 1 paragraph 2 lit a and b Zahlungsdienstegesetz.

37 Article 118 Zahlungsdienstegesetz.

Appendix 1

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