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 13

SWITZERLAND

Daniel Tunik, Lorenzo Frei and Téo Genecand[1]

I SOURCES OF LITIGATION

The banking industry is an essential economic sector in Switzerland and frequently results in litigation. In most cases, litigation is directed against the banks but occasionally it is initiated by them.

The categories outlined below are among a variety of situations that generate litigation in banking matters.

The issue of bank liability for losses incurred by clients on their deposited assets is one of the most recurring themes in banking litigation in Switzerland. The applicable legal principles, as well as the client's expectations towards banks, vary significantly depending on the legal nature of the relationship between the bank and its client. Typically, this relationship is characterised as 'execution only', 'advisory' or 'asset management' and Swiss courts have developed an abundance of case law setting out the relevant criteria to determine whether the bank is liable for its client's losses.

Overdrafts on client accounts constitute an important source of banking litigation in Switzerland. The most frequent situations are the ordinary foreclosure procedures against pledged real estate, as well as procedures on the merits against the client where the overdraft is not covered by any pledged assets.

Enforcing pledges on client assets deposited with banks has generated numerous disputes in instances where banks have attempted to protect themselves against avoidance claims arising from transactions effected for the benefit of their clients, as well as against possible penalties imposed on banks in relation to the undeclared tax status of their clients.

The use of emails and other forms of communication between banks and clients is a regular source of fraud that leads to disputes aimed at determining who should bear the responsibility for the consequences. The actions brought before courts have, in particular, addressed the question of the validity of contractual clauses excluding the bank's liability in situations where it was not able to detect fraud.

II SIGNIFICANT RECENT CASES

i The practice of bank retrocessions as a case of criminal mismanagement

The Supreme Court had already recognised in 2006 that an agent's contractual obligation to give an account of its agency activities and return anything received as a result of such activities fully applies to retrocessions that the agent might have received in the performance

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of the mandate.[2] The matter is particularly relevant for the banking sector with regard to the retrocessions paid or received by banks for business contributions, such as bringing new clients or selling specific banking products.

In the following years, the Supreme Court specified the legal framework applicable in this matter in several rulings. This case law clearly indicates an intent to protect the rights of the principal or client. For example, a client may waive its right to the restitution of the retrocessions. However, the case law provides strict conditions for such waiver to be valid, in particular regarding the information that is due to the client beforehand. If the client has not waived its right or the waiver is not valid, the client is entitled, in civil terms, to claim restitution of the retrocessions received by the agent. This claim is subject to a 10-year limitation period.[3]

In a new decision of 14 August 2018, the Supreme Court took another significant step to increase the protection of clients.[4] The court ruled that the breach by an asset manager of its obligation to give account of its agency activities and return anything received as a result of these activities could constitute a case of criminal mismanagement within the meaning of Article 158 of the Swiss Criminal Code. If the Court first observed that the breach of the obligation of restitution is not per se an act of criminal mismanagement, the judges ruled that the breach of the obligation to give account of agency activities to the client falls under the scope of this offence. The court considered that obligation to give account represents a prerequisite for the client to be able to claim restitution of the retrocessions.

This decision is important to the extent that the topic of bank retrocessions has now moved from a purely civil level to a criminal one. A significant consequence of this evolution is the ability for clients to benefit from investigative and coercive measures offered by criminal proceedings. While civil procedure is governed by rather strict principles, in particular concerning the gathering of evidence by the claimant, criminal procedure is organised in such a way that it provides extensive investigative resources. One could expect that clients may turn to criminal proceedings to recoup retrocessions.

ii Banks' liability for the losses suffered by a client

In the context of execution-only relationships, the bank is under an obligation to execute its client's orders but is not bound by a general duty to safeguard the interests of the client. Accordingly, the principle under Swiss law is that the bank in such relationship shall provide information to its client only upon request. However, over the years, court decisions have held that there are specific situations in which relevant facts should be spontaneously drawn to the attention of the client by the bank. An example of such a case would be if it appears that the client is absolutely unaware of the risks incurred, or if a special trust relationship has developed over the years between the parties.

In a decision dated 25 April 2016,[5] the Supreme Court provided further guidance on the bank's special duty of information in the context of execution-only relationships. The judges had to decide whether the custodian bank could be held responsible for the losses caused by the fraud committed by an external asset manager in a situation where the bank had information that cast doubts about the reliability of the manager in question. The

2 Published under ATF 132 III 460.
3 Published under ATF 143 III 348.
4 Published under ATF 144 IV 294.
5 4A_369/2015.

Supreme Court held that the following circumstances constituted the relevant elements that triggered a special warning and duty of information even in the absence of any contractual mandate (execution-only relationship):

a where the bank has doubts about the reliability of the client's external asset manager because of an absolute lack of diversification of the asset management strategy;

b where the bank had previously refused to lend money guaranteed by a pledge on part of a fund managed by the client's external asset manager because it considered this to be a guarantee of insufficient quality;

c where the bank refused to be the custodian bank for a fund managed by the client's external asset manager because it could not understand its functioning; and

d to a lesser extent, where the bank had knowledge of negative press coverage on the directors of the client's external asset manager, even though the press coverage did not concern a matter that was financial in nature.

By contrast, in another decision dated 14 September 2016,[6] the Supreme Court found that the bank had complied with its duty of care by informing its client that it had suspicions of potential criminal conduct by the external asset manager. The judges held that the bank was not expected to take additional precautionary measures on behalf of the client, it being specified that in this case the client did not react despite the alarming information provided by the bank.

In 'asset management' relationships, the bank undertakes to manage all or part of the client's assets at its discretion but in accordance with the strategy, limits and objectives set with the client. In contrast with execution-only relationships, under asset management relationships, the bank has an extensive duty of information, as well as a duty to take whatever measures are necessary to safeguard its client's interests.

In addition to the execution-only and asset management relationships, banking practice has developed an intermediary relationship, namely the 'advisory' relationship. This covers a wide variety of situations ranging from a mandate that, in many ways, is similar to an asset-management mandate through which the investment decisions are taken directly by the client but on the basis of the bank's regular advice, to relationships with one-off advice given by the bank. The bank's duties to inform and advise the client depend on the type of advisory contract as well as on other prevailing circumstances, such as the client's knowledge and experience in banking and finance matters. As a matter of principle, Swiss law considers that the client bears the risks of the transaction if it follows the bank's advice, unless the advice was patently unreasonable at the time it was given.

On 18 April 2017, the Supreme Court reviewed a case[7] in which clients had invested in a Lehman Brothers structured product recommended by the bank. The investment was made in January 2007 and resulted in a nearly total loss following the bankruptcy of Lehman Brothers. The clients claimed that the bank's presentation of the product as being guaranteed-capital structured product was misleading and that they were not (sufficiently) made aware of the risk of issuer. The Supreme Court ruled that this was not relevant. At the time of the advice, the issuer risk related to Lehman Brother was minimal according to the financial expert. Additional explanations on the risk of issuer would thus not have discouraged the clients from investing in the contentious product. Furthermore, as the bank had not

6 4A_361/2015.

7 4A_403/2016.

given any recommendation as regards the amount to invest, the bank was not expected to warn the clients about the risks associated with an absence of diversification, even though the clients had invested approximatively half of their savings in the contentious product.

The question that courts face regularly relates to the calculation of the damages that the client may claim in the event of a breach by the bank of its duties.

In a recent case, the Supreme Court recalled the quite strict requirements regarding the demonstration of the damages.[8] The case involved a relationship manager who had performed unauthorised transactions on a client's account. Following the discovery of the fraud, the client sued the bank for $6 million claiming that this amount corresponded to the difference between the value indicated on the false statements provided by the relationship manager and the effective value of his portfolio. In the course of the proceedings, the client had offered another method to demonstrate his damages based on the difference between his initial investment and the profit of approximately 2.8 per cent gained by a similar portfolio during the same period. The lower court considered that the exact amount of damages could not be determined and, by making an estimate, awarded the client $5.7 million. Following an appeal of the bank, the Supreme Court overruled the decision of the lower court and dismissed the client's claim. The Supreme Court held that since it was possible to individualise the wrongful investments, the client was in a position to determine precisely his damages. This is done by calculating the difference between the actual value of the investments and the hypothetical value that they would have if they had been performed according to the agreed strategy. Hence, the client should have demonstrated his damages for each wrongful transaction, which he did not do. This led to the dismissal of the client's action.

iii Right to information of the heirs

In a decision dated 18 July 2019, the Supreme Court determined under which conditions a bank is obliged to disclose to the heirs the identity of the account holder having benefited from a transfer ordered by the *de cujus*.[9]

The *de cujus*, who was a Spanish national, had an account with a bank in Geneva. In 2009, she ordered the bank to transfer all her assets to another account. After her demise, the heirs requested to receive several information from the bank, including the identity of the account holder who benefited from the transfer. Because the transfer had occurred within the same bank the banking documentation pertaining to the deceased's account only contained the number of the account having benefitted from the transfer, but not the identity of its holder.

In defining the scope of the right to information, the Supreme Court made a distinction depending on whether this right to information is based (1) on the contractual relationship that existed between the *de cujus* and the bank; or (2) on the provisions governing the inheritance.

The contractual right to information provides the heirs with the right to receive full information about the assets at the time of the demise. However, this does not include transfers ordered by the *de cujus* before their demise. In that context, the heirs are only entitled to the information necessary to determine whether the bank correctly performed its obligations. Endorsing the interpretation of the lower court, the Supreme Court ruled that the rightful heirs are also entitled to receive information about the transfers made by the *de cujus* to the

8 Published under ATF 144 III 155.

9 4A_522/2018.

extent that this information is necessary for the heirs to assert their forced heirship. Due to its nature, the contractual right to information falls within the subject matter scope of the Lugano Convention, which gives jurisdiction to the courts where the bank has its seat.

The right to information based on the provisions governing the inheritance covers all information that are relevant for the distribution of the estate. However, the heirs only have standing to assert this right to information if they can demonstrate that they have a legal interest in recouping the concerned assets. The inheritance-based right to information falls outside of the Lugano Convention. The applicable Swiss conflicts rules grant jurisdiction over such action to the authorities of the last domicile of the deceased.

In the case at hand, the Supreme Court considered that the heirs were asserting their contractual-based right to information and dismissed their action to the extent that they did not allege that the bank had breached its obligations or that their forced heirship had been breached.

III CHANGES TO COURT PROCEDURE

Switzerland is a federation. Pursuant to the Constitution, material civil law and debt enforcement procedures are governed by the federal state and have been unified thereunder for over a century. By contrast, the authority to legislate on the rules regarding civil procedure remained with the cantons, as a result of which civil proceedings in Switzerland were characterised by the existence of 26 different procedural civil laws. This was eventually deemed to be excessively burdensome, costly and an obstacle to the predictability of proceedings. After a lengthy process, a Federal Code of Civil Procedure (CPC) entered into force as of 1 January 2011 and replaced the previously existing cantonal laws.

Although the unification of the rules of civil procedure did not fundamentally modify banking litigation, it has certainly made it easier for lawyers to appear before other cantonal courts. In that respect, the change in question may be considered to make access to courts easier for clients. There is an ongoing review of the CPC. The major change of the current draft is the additional possibilities for collective action (currently not admissible to claim damages). Additional suggested amendments include considering that attorney privilege also covers the work of in-house attorneys in civil proceedings, a new procedural status for reports of private experts or reduction of the amount of the advance on judicial fees.

IV ATTORNEY–CLIENT PRIVILEGE

Attorney–client privilege, in particular its scope, can raise questions in the context of banking litigation. This happens, in particular, when litigation is related to situations where the factual background is complex and requires fact-finding activities. In such situations, banks often decide to carry out internal investigations, which can be conducted by lawyers.

This activity is generally considered to be covered by the attorney–client privilege. This is based on the general rule that provides that attorney–client privilege covers typical activities of a lawyer, such as legal representation, provision of legal advice and drafting of legal documents. Other activities, such as serving as a director, asset manager, testamentary executor or trustee, are regarded as atypical activities for which this particular protection is not justified and are thus not covered by attorney–client privilege. This distinction is, however, not always clear and some activities are considered mixed.

A decision by the Supreme Court made on 20 September 2016[10] caused particular concern in the legal community and illustrates the types of difficulties that may arise where the tasks carried out by lawyers may be viewed as overlapping with activities that a bank would be compelled, by law, to conduct. The case involved a Swiss bank, whose employee – a wealth manager – was the subject of a criminal investigation in relation to a corruption matter involving Greek officials. In this context, the bank mandated two law firms to carry out an internal investigation to determine if anti-money laundering legislation had been violated. The internal investigation also included the review of the bank's internal notes and the interviewing of its employees. The question arose as to whether the work product of the bank's attorney was covered by attorney–client privilege after various documents, including memos and minutes of interviews, were seized in the context of the criminal investigation. Following an appeal by the bank, the Supreme Court considered that the results of the internal investigation were not entirely covered by attorney–client privilege. To understand the reasoning of the Supreme Court, it must be noted that the Anti-Money Laundering Act (AMLA) imposes on Swiss banks (and other entities concerned) a duty to document transactions and clarifications carried in a manner that enables a third party to make a reliable assessment of the transactions and business relationships, and of compliance with the provisions of the AMLA. In the case at hand, the judges held that the fact-finding work done by the bank's attorneys was part of the bank's duty to document the clarification work done and that the bank had, in fact, delegated its duty to its attorneys. The Supreme Court concluded that this work could not be subject to attorney–client privilege, otherwise it would mean that the AMLA provisions could be circumvented by delegating these duties to attorneys. The Supreme Court confirmed this ruling on 21 March 2018,[11] in a procedure directed against representatives of a bank for violation of their duty to report a case under the AMLA.

Since then, the scope of these decisions has been the subject of intense debate among scholars and has not settled yet. However, the lesson from these rulings is that attorneys and banks should be aware of this issue and take the appropriate steps before and during the performance of an internal investigation to isolate the information covered by attorney–client privilege from the rest of their (fact-finding) work.

V JURISDICTION AND CONFLICTS OF LAW

Swiss banks usually provide in their general terms and conditions that the contract shall be governed by Swiss law and that Swiss courts shall have sole jurisdiction over any dispute. In the context of clients residing abroad, the question that arises is whether Article 15 Paragraph a, letter c of the Lugano Convention (CL) may result in setting aside such contractual agreement.

In its ruling dated 9 February 2016,[12] the Supreme Court considered that the client of a Swiss bank falls under the broad definition of a consumer within the meaning of Article 15 CL. However, in order to set aside a jurisdiction and choice of law clause, the bank's client had to prove that he was actively solicited by the bank in his country of residence at the outset of the relationship.

10 1B_85/2016.

11 1B_433/2016.

12 Published under ATF 142 III 170.

In the context of foreign proceedings, banks also frequently face document production orders issued by Swiss authorities following an international mutual assistance request; be it in administrative, criminal or civil matters. In civil proceedings, when banks are ordered as third parties to produce documents, they may – or shall, based on their contractual relationship with the client – try to dismiss the order based on the argument that banking secrecy should prevail on the interest to produce the documents in the civil procedure pursuant to Article 166, Paragraph 2 CPC. The Swiss judge shall weigh up both interests and decide whether to maintain the order. In Swiss proceedings, the client to whom the documents are related is not in a position to intervene in this process. The Supreme Court rendered an interesting decision setting different standards in the context of international mutual assistance in civil matters, in a dispute where the Hague Convention of 18 March 1970 (HC70), on the taking of evidence abroad in civil or commercial matters, was applicable. In its decision dated 21 December 2015,[13] it indeed considered that the client – if he or she is not a party to the foreign procedure – shall be heard in this procedure before any production order may be addressed to a Swiss bank through the channel of international civil mutual assistance. If the client had not been heard in the foreign procedure, the international civil mutual assistance request was to be rejected based on Article 12, paragraph 1, letter b HC70. In a decision dated 29 August 2017,[14] the Supreme Court specified that the client had to inform the foreign judge that he disputes the request for international mutual assistance and requests to be heard if he wishes to assert rights under the above-mentioned case law.

VI EXCLUSION OF LIABILITY

As a matter of legal principle, banks bear the risk of executing orders from unauthorised persons. Indeed, to the extent that a bank executes a payment without having validly received an order to this effect from the client, the bank is not authorised to debit the client's account in order to cover the amount of the transfer. However, banks usually include a clause in their contractual documents and general conditions, which shifts this risk onto the client. Pursuant to Article 100 CO – applicable by analogy to this type of clause – such transfer of risk is not valid in case of serious misconduct or gross negligence on the bank's part. In the event the behaviour is attributable to officers with functions falling within the meaning of corporate bodies, the transfer of risk may be considered as invalid, even in the case of mere negligence.

As regards the bank's duties when it receives a transfer order, it is generally admitted that banks are required to verify the authenticity of orders only within the limits agreed by the parties, unless the circumstances surrounding the order give rise to doubts and warrant to carry out additional checks.

In a decision dated 5 December 2016,[15] the Supreme Court ruled that the following elements are to be considered when assessing whether the circumstances warrant carrying out additional checks before executing an order:

a where the style of the communications issued by the client change dramatically, such as by suddenly using poor vocabulary and containing syntax and spelling errors despite being written in the native language of the client;

13 Published under ATF 142 III 116.

14 4A_167/2017.

15 4A_386/2016.

b where the timing or beneficiary of the order given is unusual for the client. In the case at hand, the first order emanated from a hacker and was only the second exit of funds ordered in the past 10 years and the first in favour of a third party who was neither located in Switzerland nor in the home country of the account holder. The bank unsuccessfully argued that in view of the rarity of transfers it was not possible to determine what was usual for this account, as the client had on several occasions indicated that he held this account to diversify his funds in Swiss francs as well as for the purposes of safety and stability;

c where the amount of the envisaged transfer is unusual for the client. In the case at hand the first order involved nearly a quarter of the assets under management despite the fact that the client had wired the majority of his assets to his Swiss account a few months before and mentioned that they represented his savings and were intended to be kept long-term;

d where the cause of the transfer is not specified immediately, despite the fact that the client usually shared spontaneously his intended actions and the underlying reasons for them;

e where the order is required in an urgent manner without clear reasons justifying the need to act quickly; and

f where an executed order is only signed with the first name of the client and not with the signature known by the bank.

In the context of this decision, the Supreme Court addressed the disputed question of the impact of the client's contributory negligence. In other words, can a bank argue that a client's claim is to be reduced or discarded by virtue of the fact that the client contributed to the damage by reason of its negligence or reckless conduct? The Supreme Court took a formal and strict approach by stating that the client, in this type of situation, is not entitled to seek damages strictly speaking, but rather the mere performance of the contract by prohibiting the bank from debiting the client's account on the basis of an unauthorised order. In such cases, according to the Supreme Court, the indemnity cannot be lowered as a result of contributory negligence within the meaning of Article 44 CO. On the other hand, the judges considered that the bank could assert its own claim against the client by invoking a breach by the client of its contractual obligations resulting in damages caused to the bank (i.e., the fact that it had to pay the third party without being in a position to debit the client's account to cover the payment in question). In practice, this means that the bank may not simply oppose the client's contributory negligence in its defence against the client's claim, but has to prove that the conditions for a contractual or tort liability against the client are met, which is undoubtedly more difficult to prove.

This approach was confirmed in a decision dated 29 May 2018.[16] In this case, the Supreme Court also clarified the test to be performed under those circumstances and the issue of the burden of proof. There, a company active in the diamond trade that used to transfer large sums was claiming the reimbursement of an amount corresponding to two transfers made to South Korea. The company was arguing that these transfers had been instructed by a third party after the email account of one of its representatives had been hacked. However, the company had not lodged a criminal complaint nor provided any other evidence that its email had been hacked. The Supreme Court ruled that, before assessing

16 4A_81/2018.

whether the bank was negligent in executing these orders, the client had to demonstrate that the instructions did not come from an authorised representative and that a third party had hacked the representative's email account and falsely impersonated him. Since the company had not provided evidence of its allegations, the action was dismissed.

The general conditions of banks usually contain a clause pursuant to which the client is deemed to have accepted an order in the absence of reaction within a certain period of time. The Supreme Court had considered, however, that this legal fiction of ratification of the order is to be disregarded in situations where the client never received the information in relation to the transfers, such as for hold mail accounts. The Supreme Court recently limited the application of this rule in situations where the client is claiming reimbursement of unauthorised orders coming from a third party.[17] In the case at hand, an asset manager had meticulously forged the signature of her client to order transfers. The bank had identified that the transfers were unusual, but called the external asset manager – who had the necessary power of attorney to order the relevant transactions – to ensure that the orders reflected the client's intent. After the Supreme Court had considered in 2017 that this was a serious misconduct on the bank's part not to contact the client directly,[18] the question remained whether the bank could set off the client's claim with its own claim against the client for not having picked up her hold mail for four years. The Supreme Court responded in the affirmative and held that a client who does not pick up its hold mail for four years breaches its duty of care and may be liable. Although the agreement with the bank did not provide any obligation of the client to pick up its hold mail, the Supreme Court considered that the principle of good faith imposed such a duty on the client.

VII REGULATORY IMPACT

As a matter of principle, Swiss regulatory rules usually aim at protecting public interests rather than private interests and, thus, do not apply directly in the private law relationships between banks and their clients. For example, the Supreme Court stated in a decision[19] that a person could not base a liability claim against a bank solely on a violation of regulatory rules (such as the one provided in the AMLA); the person has to prove that a law protecting his or her own private interests was violated by the bank – such as money laundering pursuant to Article 305 *bis* of the Swiss Criminal Code in order to have valid grounds for a liability claim.

That said, there has been an increasing number of exceptions to this principle with regulatory provisions that envisage specific liability claims. By way of example, Article 145 of the Federal Act on Collective Investment Schemes provides that all persons involved with the establishment, management and distribution of the fund (e.g., the custodian bank) are subject to direct liability towards individual investors and other creditors of the company.

The Swiss Federal Council's message accompanying the draft Swiss Federal Financial Services Act (FFSA) and the draft Swiss Federal Act on Financial Institutions (see Section VIII) state that the various prudential rules that the actors of the financial sector will be expected to comply with are regulatory rules that are not directly applicable to client–bank

17 4A_118/2018.

18 4A_379/2016.

19 Published under ATF 134 III 529.

relationships. They do, however, point out that civil judges will be able to review these obligations to interpret and clarify the applicable civil obligations. This approach highlights the increasing impact of regulatory rules and its impact on civil banking litigation.

VIII LOOKING AHEAD

Following the 2008 financial crisis, as well as the international developments in financial regulations in general, the Swiss Federal Council has been actively involved in the enactment of two new pieces of legislation that will have an impact on the financial sector as a whole: the FFSA and the Swiss Federal Act on Financial Institutions. These two laws are still in draft form and will be subject to further discussion and amendments at the federal parliament. Without entering into detail, it can be said that that several provisions of the FFSA are likely to impact the procedural rules governing disputes arising between banks and their clients. As an example, the current version of FFSA provides for the possibility to opt for a mediation procedure as an alternative to the mandatory conciliation procedure. In addition, there are discussions regarding the enactment of a rule that would exclude the possibility for banks to claim an indemnity for legal fees – as is usually the case in Switzerland for the successful party to a litigation – except where the amount in dispute exceeds a certain level. Although it is still uncertain whether these changes will eventually be enacted, they certainly reflect the prevailing trend that aims at favouring the position of clients in relation to banks in the context of litigation. Banking litigation will undoubtedly continue to evolve in Switzerland.

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