IN-DEPTH

Banking Litigation

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Banking Litigation

Contributing Editor

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In-Depth: Banking Litigation (formerly The Banking Litigation Law Review) provides a practical overview of the litigation landscape and framework for banking disputes in major jurisdictions worldwide. Focusing on recent developments and trends, it examines a wide range of issues – including significant recent cases and legislative changes; procedural considerations; legal privilege; conflicts of law; available remedies; exclusion of liability; and much more.

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Switzerland

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Summary

Introduction

The reporting period was shaped by market turbulence following the Trump administration's tariffs, which typically trigger increased customer claims against banks, especially involving Lombard loans. Disputes from the crash are expected to reach the courts only after several years.

Beyond politically driven developments, recurring themes in case law include damage substantiation, unauthorised transactions, and retrocessions.

Year in review

Recent cases

Substantiation of damages

While proof of damage is a challenging issue in claims for damages under Swiss law in general, it has become a particularly difficult topic in banking litigation during the past decade. Many claims of clients seeking damages from banks or asset managers related to an alleged defective performance of asset management or advisory agreements are dismissed because the damage is not substantiated in accordance with the law. The difficulties stem from a rigorous constant practice developed by the Federal Supreme Court since the turn of the millennium. Pursuant to this case law, the recoverable damage from defective performance of asset management, advisory or execution-only agreements[1] does not equal to the actual loss suffered by the client. Instead, the recoverable damage of the client corresponds to the difference between the worth of the actual assets in which the funds are invested and the worth of hypothetical assets into which the funds would have been invested had there been no breach of duty (e.g., breach of the obligation to inform about the risks of an investment).

Therefore, to prove recoverable damage in accordance with the law, it is not sufficient under Swiss law to prove the actual losses incurred. Instead, the claimant is forced to devise a portfolio of hypothetical assets (hypothetical investment/portfolio) that is in accordance with the contract, and to calculate a scenario about the performance of the hypothetical assets over time. Obviously, such calculation is highly complex and will normally require expert knowledge (which most clients lack). Moreover, proper substantiation and proof of such a hypothetical scenario in court are equally demanding, especially because the legally relevant scenario depends on several parameters (e.g., relevant part of the invested assets to be taken into account and relevant time period) that are determined by the circumstances of the particular case (e.g., quality of breach, extent of affected assets and characterisation of contractual relationship). Against this backdrop, a claimant is regularly required to set forth and substantiate several scenarios to prove their damage.[2]

In recent years, the presented constant practice of the Federal Supreme Court in this area is criticised by an increasing amount of legal doctrine, including renowned authorities, which

point out that the hurdles for claimants seeking damages in this context have become almost insuperable. To date, the Federal Supreme Court has not dealt with these critics. However, in some recent decisions, the court has softened its normally rigorous stance under particular circumstances.

In a decision concerning a portfolio management relationship, the Federal Supreme Court seems to have changed its jurisprudence insofar as it has held that in the case where the client claims only compensation for their loss, without claiming compensation for lost profit, the portfolio manager bears the burden of proof that the loss would have occurred even without a breach of duty.[3] The important practical consequence of this is that the client is not obliged to devise the scenarios described above but can simply prove the loss suffered if they do not seek damages for lost profit.

However, in that same decision, the Federal Supreme Court also made it clear that this does not apply for investment advisory relationships. Instead, pursuant to the court in the context of an investment advice relationship, it is assumed that the client wishes to make investments and that the client would have invested in other financial instruments if they had received investment advice in accordance with the contractual duties of the investment adviser. Only if the client can prove that they would not have invested at all had they been advised correctly can the damage be equated with the loss.[4] In the jurisprudence of the Federal Supreme Court, such cases are rare.[5]

Therefore, all the more remarkable is another recent decision of the Federal Supreme Court concerning an investment advisory relationship in connection with investments in a cum-ex fund, in which the court ruled that the damage of the client equated to its loss and applied the 'passive hypothesis'.[6]

The lower court, the Commercial Court of Zurich, had affirmed a breach of duty with regards to the advice given by the bank, as it had made deceptive statements to the client, a real estate company, about the risk of investing in the fund. Nevertheless, the Commercial Court dismissed the claim for damages because the client had not explained what alternative investments it would have made if it had not invested in the fund.

The client filed an appeal to the Federal Supreme Court that overruled the decision of the Commercial Court of Zurich. The Federal Supreme Court assumed that the client would have refrained from investing if it had been informed correctly about the risks of the fund. The client had thus far invested exclusively in real estate. The purchase of the fund units was a test run with a short-term period, after the expiry of which one could, if necessary, decide to make further investments based on the experience gained. Therefore, the Federal Supreme Court obliged the bank to reimburse the purchase price and the client to repay the fund units.

Notably, the decision was made considering the fact that there had been no prior business relationship between the parties and the purchase of the fund units was the client's first investment in the financial market. Therefore, considerations of the decision cannot be unreservedly generalised.

The requirements of substantiation and proof of damages when it comes to loss of profit are still very strict. In a recent case, which the Federal Supreme Court had to judge, the client decided to acquire 25,000 shares at the time of a company's initial public offering (IPO) and instructed the bank to acquire these shares on his behalf at a price of US$25 per share. On 6 November 2013, the bank confirmed the purchase. However, on 11 November

2013, the bank informed the client that his instruction was not carried out. The client claimed from the bank the difference between the share price on 11 November 2013 (US$1.072 million) and the share price at the time of the IPO (i.e., on 7 November 2013 (US$625,000). The cantonal court rejected the client's claim arguing that he had not alleged and proven in due time that he would have sold the shares on 11 November 2013 or at a later point, whereupon the client appealed to the Federal Supreme Court.

The Federal Supreme Court held that the amount claimed by the client could not be the difference between the price of the shares on 11 November and 7 November 2013 because he had not instructed the bank to purchase the shares on 11 November 2013. Rather, according to the Federal Supreme Court, the damage claimed by the client was based on a mere presumption. At the relevant time of the damaging event, the day of the IPO, the future share price was aleatory: it could have risen, but it could also have fallen. Since the client had not taken the risk of instructing the bank to sell his shares before he learned on 11 November 2013 that they had not been purchased, the Federal Supreme Court held that he was not able to prove a certain loss. The court emphasised that a hypothetical and aleatory gain is not sufficient and that the client could not pass the risk of a resale that he had not taken on to the bank.[7]

It must be noted that this case is insofar different than other cases mentioned above as it is not about damages due to a defective performance of asset management or advisory agreements, but the non-execution of a purchase order. Unfortunately, the decision of the Federal Supreme Court only deals with the condition of damage. The question of whether there was a breach of duty was not addressed.

It is also worth mentioning a recent decision in which the Federal Supreme Court confirmed the strict requirements of substantiation and proof of damages, this time to the detriment of the bank. The case involved a client who had entered into several e-forex contracts to speculate on the USD/CHF pair. On January 15, 2015, the Swiss National Bank decided to abandon the CHF/EUR floor rate, causing the Swiss franc to soar against both the euro and the US dollar, which triggered panic in the financial markets. The USD/CHF pair was severely impacted, and the client's positions were automatically liquidated in accordance with the bank's general terms and conditions, resulting in the client's account to become negative. The bank then demanded that the client settle the negative balance.

In court, the client contested the negative balance. The Federal Supreme Court upheld the decision of the lower court, which found that the bank had failed to prove the negative balance. The documents produced by the bank were difficult to understand, if not incomprehensible, contained inconsistencies, and were insufficient to establish the loss resulting from the liquidation of the positions. Due to the insufficiency of the bank's assertions, the client was not required to contest them in a substantiated manner. The courts also held that only an expert opinion would have been sufficient to prove the loss; however, such evidence had not been offered by the bank.[8]

Unauthorised transactions by third parties

A recurring topic in banking litigation is unauthorised transactions. Bank accounts are a popular target for criminals. A major gateway has always been the communication between bank and client in the context of payment transactions. To protect themselves from criminal activities, banks agree with their clients on means of identification by which

the client or their representatives must prove to the bank that they are the authorised persons. Such means of legitimation are the signature of the client, passwords and access codes for e-banking, emails and – for representatives of the client – bank powers of attorney, among others. Forgery or misuse of means of identification is not uncommon in banking practice. If this causes damage, the question arises as to whether the bank or the client must bear this damage.

On the basis of its constant practice in this regard, the Federal Supreme Court clarified further important questions in several published leading decisions in the reporting period. Pursuant to these decisions, Swiss courts must apply a three-step test to decide whether the bank or the client bears the loss arising from an unauthorised transaction.[9]

First, for the client's main action for restitution of their credit balance that has not been reduced by undue debits (Article 107, Paragraphs 1 of the Swiss Federal Code of Obligations (CO)), the judge must examine whether the debits were carried out with or without a mandate from the client, which presupposes, in the case of representation of the account holder, that the question of the representative's powers or of the account holder's ratification of the debits must be addressed.[10] In banking transactions, the bank may, in principle, rely on the means of legitimation agreed with the client. In particular, it does not have to systematically assume forfeitures. As a rule, the principal who notifies the power of attorney that has been granted to an agent, to a third party in writing, is bound by the legal act performed by the agent if the act falls within the scope of the written power so notified. The client must also accept transaction orders issued by telephone, email or fax, provided that they have consented to these communication channels and means of legitimation. In principle, the client bears the risk of forged or abusive transactions, provided that they are covered by a power of attorney or an agreement with the bank regarding the permissible means of identification. However, the bank cannot rely on an agreed means of identification if it recognises its forgery (e.g., forged signature; email from an unauthorised person) or misuse (e.g., authorised representative enriches himself or herself without authorisation) or should have recognised it within the scope of its duty of care. Therefore, in the case of unusual orders, the bank must consult with the client before executing them.

In a recent leading decision, the Federal Supreme Court clarified that the need for rapid processing of payment transactions does not constitute a reason to restrict the duty of care in banking transactions. In addition, the bank cannot reduce its due diligence requirements by formulating the power of attorney forms accordingly. Increased due diligence requirements apply if the transaction drains the bank client's account to a large extent or if the bank is in a conflict of interest. An example of the latter is if the bank has granted a loan to the authorised representative who misuses the power of attorney granted to them for payments in their favour.[11]

If a transfer is made without the client's order, the transfer does not constitute fulfilment of the contract in relation to the client. The client may therefore still demand payment of the corresponding amount. On the one hand, this applies if the bank carries out a transaction without being able to rely on a contractually agreed means of legitimation. For example, emails or scans and faxes with copied signatures are only means of legitimation if this is contractually agreed upon between the bank and the client.[12] On the other hand, the contract is also not fulfilled if the bank has not recognised the forgery or misuse of an agreed means of identification by a third party due to a breach of its duty of care.[13]

] According to the established case law of the Federal Supreme Court, it is therefore not the client but the bank that suffers a loss in these cases. This applies in principle even if the bank cannot be accused of any fault and has made a payment in good faith to a fraudster.

Only if the orders were executed without a mandate from the client does the judge have to examine, in a second step, whether the damage is a damage of the bank (legal system) or whether, due to the conclusion of a risk transfer clause, the damage is borne by the client.[14] In banking practice, the risk of double payment for banks resulting from the legal system is regularly avoided by way of specific risk transfer clauses in the bank's general terms and conditions. In these clauses, it is agreed that in the event of an incorrect transfer, the client, and not the bank, must bear the damage, unless the bank itself has acted with gross negligence. Gross negligence is assumed if the most elementary care is violated; that is, the bank disregards very serious, almost obvious indications of forgery or misuse. According to the Federal Supreme Court, such risk transfer clauses are generally permissible.

If the bank bears the loss in the case of incorrect transfers because no risk transfer clause was agreed or such a clause does not apply due to gross negligence on the part of the bank, the bank may, under certain circumstances, counter the client's claim for performance with a claim for damages. Therefore, in a third step, it must then be determined whether the client has contributed to the occurrence of the loss or to its increase by a breach of duty. In several recent decisions, the Federal Supreme Court pointed out that such a breach of duty may lie in the fact that the client does not check their bank correspondence in a timely manner.[15] The banks' general terms and conditions often stipulate that the client must check their account statements and complain about unusual or unjustified transactions within a short period of time. In its more recent case law, the Federal Supreme Court has derived from this complaint clause, which is customary in the industry, a duty of care on the part of the client to check communications from the bank in a timely manner to prevent losses from incorrect bookings and unauthorised transactions. This applies even in those cases in which correspondence is held by the bank based on a hold-mail agreement.[16]

In one of these recent decisions, the Federal Supreme Court had the opportunity to discuss in more detail the bank client's duty of care. It specified that the bank must prove the following to assert its claim for damages arising from a breach of this duty of care by the client. First, the bank documents showing the unauthorised transactions must actually have been delivered to the client or stored by the bank in case of hold-mail arrangements. Second, the documents must be designed in such a way that the client would have been able to identify the unauthorised transactions if they had inspected the documents. Depending on the context, the false entries must immediately catch the eye.[17]

In a recent case involving fraudulent transfer orders via e-mail, the Federal Supreme Court found a breach of duty by the client, as they had received bank statements from the fraudster that showed clear signs of falsification.[18] However, the bank had also violated its own internal directives, which required additional investigations in case of transfers over 500,000 Swiss francs. As a result, the bank was allowed to set off its claim up to 60 per cent of the client's claim for performance.

Unauthorised transactions by an employee of the bank

If a bank client's assets are embezzled by a bank employee, this is also referred to as unauthorised transactions. However, in a recent decision, the Federal Supreme Court held that the above-mentioned rules do not apply in such cases. This means that the client does not have a claim for performance against the bank. Instead, they have an action for damages in tort (Article 41 CO) against the bank employee and a contractual action for damages against the bank (Article 398 Paragraph 1 CO and Article 97 et seq. CO) because the bank is liable for the acts of its auxiliary persons within the meaning of Article 101 CO.[19]

The distinction between a claim for performance and a claim for damages is not only of dogmatic interest but also has practical implications. In the case of an action for performance, the client can demand the restitution of the amounts wrongly deducted. In an action for damages, the client must prove their loss according to the difference theory (i.e., the difference between the current amount of their assets and the amount that the same assets would have had if the damaging event had not occurred) (see the section on 'Substantiation of damages').

Another difference between a claim for performance and a claim for damages is that in the latter case contributory negligence on the part of the client can be taken into account to reduce their claim for damage. Serious contributory negligence can even interrupt the causality between breach of duty and damage. However, this difference is put into perspective insofar as, according to the case law of the Federal Supreme Court, in the case of a claim for performance the bank can assert a claim for damages against the client if the customer does not consult their bank correspondence, for example (see the section on 'Unauthorised transactions by third parties').

Retrocessions

The Federal Supreme Court already decided in 2006 that retrocessions must be handed over to the client.[20] In further decisions, the Federal Supreme Court specified its jurisprudence. According to case law, clients might waive their right to receive the retrocessions. However, the financial service provider must inform the client in advance about the amount of retrocessions.

For a waiver of restitution in advance to be valid, the client must be aware of the parameters that allow the overall amount of the retrocessions to be calculated and make a comparison possible with the fees agreed for the asset management. In other words, the waiving client must be able to compare the amount of these retrocessions with the agreed asset management fee in order to know how much their agent will ultimately receive. The expected retrocessions must therefore be stated as a percentage of the assets under management within a certain range.[21] It is not sufficient if only the percentage range of the individual product categories is shown.[22]

In a recent decision, the Federal Supreme Court clarified that this case law refers to asset management relationships and is not directly applicable in case of execution-only mandates and investment advisory relationships, in which clients themselves order the transactions and, unlike in the case of asset management relationships, there are no assets under management that could be used as a reference value.[23] Thus, in the event of execution-only mandates and (transaction-based) investment advisory relationships, it is sufficient if the percentage range of the individual product categories is disclosed.[24]

According to case law of the Federal Supreme Court, the statute of limitation applicable to claims for restitution of retrocessions is 10 years, and begins with the receipt of the retrocessions by the agent.[25] In a recent decision, the Federal Supreme Court confirmed this jurisprudence and clarified that this also applies to claims for damages due to the violation of a duty to inform about and pass over retrocessions to the client (Article 400 CO). The Federal Supreme Court also held that the bank had not acted in abuse of rights by invoking the statute of limitations only because it had argued before that it was not obliged to pass over the retrocessions.[26]

In another recent decision, the Federal Supreme Court dealt with the controversial question of whether banks have to inform their clients about retrocessions that they pay – and not receive – to third parties, such as portfolio managers. It held that the duty to inform about retrocessions exists in connection with the obligation of the agent to return to the principal assets received from third parties indirectly in the performance of the mandate (Article 400 CO). Therefore, the client must obtain the information on this subject from the recipient of the retrocessions and not the bank paying the retrocessions, since, from the point of view of monitoring the bank's activity on the appellant's account, the information requested is not relevant.[27] However, the bank might be obliged to inform its clients about retrocessions that they pay due to regulatory and criminal provisions.

Lombard loans

When financial markets experience turbulence – such as the volatility triggered by President Trump's tariffs – investors may suffer significant losses. This is particularly true for those who finance their investments through Lombard loans. Bank loan agreements typically stipulate that the bank may demand additional collateral if the value of the pledged assets declines. This demand, known as a margin call, requires the customer to provide additional cash or assets within a short timeframe, often just a few days.

Despite the legal foundation for the bank's right to realise pledged assets under Lombard loans, financial service providers face liability risks. These risks may arise from breaches of the duty to inform, such as failing to disclose the heightened risks associated with financing investments via Lombard loans, or neglecting to account for increased loss potential during a suitability assessment.

The Federal Supreme Court has affirmed that banks may be held liable for damages if they liquidate pledged assets without a valid margin call.[28] In such cases, the client must demonstrate that they would have fulfilled the margin call obligation. Liability may also arise if the bank fails to issue a timely margin call, thereby exacerbating losses due to further price declines. Additionally, banks may be liable if assets are liquidated below market value or if conflicts of interest are present.[29]

In a recent decision, the Federal Supreme Court confirmed that a clause in the general terms and conditions of a loan agreement, allowing the bank to close uncovered transactions at any time, irrespective of the deadlines set out in a margin call, particularly during periods of market turbulence, is permissible.[30]

Recent legislative developments

On January 2020, the Financial Services Act entered into force together with the Financial Institutions Act. While the Financial Institutions Act lays down authorisation requirements and other organisational requirements applicable to financial institutions, as well as their supervision, the Financial Services Act stipulates uniform regulatory provisions on the provision of financial services and the offering of financial instruments. On 31 December 2021, the transitional period for fulfilment of the provisions set out in the Financial Services Act ended. The transitional period for the duty to produce a key information document ended on 31 December 2022.

The Financial Services Act is a regulatory framework whose content is specified in greater detail in the Financial Services Ordinance (FinSO or the Ordinance). Many obligations set out by the Financial Services Act have already existed based on civil law and, for regulated financial market participants, have also been based on the relevant requirements of the Swiss Financial Market Supervisory Authority (FINMA).

This means that there are now parallel regulatory and civil duties of conduct and organisational requirements, although their content is not completely identical. For example, there is no differentiation between transaction- and portfolio-related investment advisory in civil law. The extent of assessment and disclosure requirements under civil law depends on the circumstances of each individual case. Another example is the duty to assess the suitability of an investment based on the client's financial situation and investment objectives as well as their knowledge and experience. In a recent decision, the Federal Supreme Court confirmed that, from a civil law perspective, a suitability test is necessary for all investment advisory relationships.[31] According to the Financial Services Act, however, a suitability test is required only for retail clients and not for professional clients.

The comprehensive regulatory adoption of investor protection provisions under the Financial Services Act and the FinSO is expected to have relevant effects on civil liability. This is especially the case where the detailed stipulation of regulatory obligations affects the parallel civil obligations of financial service providers and makes those more concrete. This most likely occurs when it comes to the disclosure requirements and organisational rules, which might lead to an increase in liability risks.

Yet the question might occasionally arise as to what extent regulatory exemptions must also be considered under civil law. What needs to be clarified, for example, is whether and to what extent a client's advance waiver of disclosure requirements or a limited suitability test as provided under the Financial Services Act for professional clients is also permissible for the parallel civil disclosure and assessment requirements. Until this has been clarified, scenarios like these will involve civil liability risks, in particular if the classification of the client is based on an opting-out clause, and the client only opted out because of both the scope of their assets and their lack of knowledge and experience.

Just recently, FINMA issued a circular on the rules of conduct for financial service providers, which entered into force on 1 January 2025. In this circular, FINMA sets out its supervisory practice regarding key aspects of the Financial Services Act, with the aim of enhancing transparency, legal certainty, and ensuring a consistent level of investor protection across supervised institutions. The circular provides guidance on the interpretation and implementation of conduct obligations, including duties to inform clients, perform appropriateness and suitability assessments, manage conflicts of interest, and disclose third-party compensation.

Changes to court procedure

On 1 January 2025, the revised Swiss Civil Procedure Code entered into force. The revised code aims to facilitate the access to court and thus the enforcement of rights in private law.

One central aspect in this regard is the costs of litigation. Whereas under the previous code the court could oblige the claimant to advance the full expected court costs, under the revised code the claimant shall, as a rule, only advance half of the full expected court costs. If the respondent loses the proceedings, they have to reimburse the successful claimant for the court fees. However, under the old regime, the successful claimant bears the collection risk. The revised code provides that the collection risk for the court costs is borne by the state and no longer by the successful claimant.

Furthermore, the new law introduces an optional conciliation procedure in cases heard by the commercial courts. In principle, before initiating civil proceedings, the parties must undergo a conciliation procedure. The compulsory conciliation procedure is waived, inter alia, if a commercial court has jurisdiction.

Finally, the revised code gives the cantons the possibility to establish international commercial courts. The cantons may declare the commercial court competent if a litigation relates to at least one party's business activity, the amount in dispute exceeds 100,000 Swiss francs, the parties agree on the jurisdiction of the commercial court and if at least one party has its seat outside Switzerland when it agreed to the jurisdiction of the commercial court. English can be recognised as the language in such international commercial proceedings. In Zurich, the project of establishing the Zurich International Commercial Court (ZICC) is ongoing. In July 2025, the Cantonal Government of Zurich submitted the necessary legal amendments to the Cantonal Parliament for approval. It is to be expected that the ZICC will be launched in 2027.

Notably, the commercial court of Zurich already accepts documents in English; however, submission must be made in German.

Interim measures

Substantiation is of utmost important not only in damage claims but also in asset freezing proceedings, as illustrated by a recent case. The bank had granted the clients a loan for trading in financial assets. In return, they had pledged their assets to the bank. As a result of the covid-19 pandemic, there had been a shortfall in cover, which had authorised the bank to terminate the OTC transactions in question after two unsuccessful margin calls. After charging the pledged accounts and offsetting against other accounts of the clients to eliminate the resulting loss, there was still a total outstanding negative balance of approximately US$5 million. For this amount the bank requested a freezing order regarding the client's assets held at other Swiss banks.

The courts declined the bank's request for a freezing order because the bank had failed to substantiate its claims against the clients. The negative balance as alleged by the bank comprised various components, such as the loan granted to the clients, the shortfall of the loan due to the loss in value of the collateral provided, the liquidation proceeds of the OTC transactions and the other credit balances of the clients.

The courts held that in such a case the bank cannot limit itself to asserting the total amount of the loss and expect the court to collate the individual positions of the calculation from the files. Rather, a legally sufficient substantiation of the claim requires that the calculation with the individual positions contained therein be shown at least in outline.[32]

Privilege and professional secrecy

With the revised Swiss Civil Procedure Code, client–attorney privilege is extended to a party's in-house legal department and in-house legal counsels. According to the revised code, a party may refuse to cooperate and produce documents relating to the activities of its in-house legal service if:

1. it is registered as a legal entity in the Swiss Commercial Register or in a comparable foreign register;
2. the legal service is headed by a person who is admitted to the bar of a canton or who fulfils the professional requirements to practise as a lawyer in his or her country of origin; and
3. the activity in question would be considered profession-specific in the case of a lawyer.

It must be pointed out that this in-house counsel privilege is only valid in civil proceedings. There is no such privilege in criminal and administrative proceedings, which often take place beforehand.

Jurisdiction and conflicts of law

In 2022, the Federal Supreme Court rendered two decisions regarding the controversial question of whether contractual claims can be enforced in criminal proceedings. According to the Swiss Criminal Procedure Code, victims of criminal offences have the right to bring civil claims as private claimants in criminal proceedings. In legal doctrine, it was disputed whether such civil claims also include contractual claims or only claims arising from a tortious act.

In a first decision, rendered by the criminal chamber of the Federal Supreme Court, the court decided that only claims arising from a tortious act can be enforced in criminal proceedings. For contractual claims, the criminal court has no jurisdiction.[33] Shortly after, the first civil chamber of the Federal Supreme Court confirmed this decision.[34] It also held that, consequently, the statute of limitations of contractual claims cannot be interrupted by bringing civil claims in a criminal proceeding. However, there are still some questions

to be answered by the courts, such as the lis pendens of a civil claim brought in a criminal proceeding.

These two decisions raised the question of whether a civil claim brought within criminal proceedings has a blocking effect on a claim filed before a civil court. In 2025, the Federal Supreme Court had the opportunity to answer this question. It held that, since a criminal court is not permitted to assess contractual claims in the context of an action brought within criminal proceedings, such actions do not have a blocking effect on contractual claims that fall outside the jurisdiction of the criminal court. Accordingly, if a claimant can base their demand for performance on multiple legal grounds – such as contract and tort – they may, in addition to filing an adhesion claim, assert their contractual claims separately in ordinary civil proceedings. Conversely, the *lis pendens* of the action brought by the injured party in criminal proceedings cannot be invoked against a negative declaratory action filed by the accused, insofar as contractual claims are concerned. However, the Court acknowledged that this procedural framework may result in an increased workload for the courts and carries the risk of contradictory decisions. These concerns must be addressed through procedural coordination measures, such as the suspension of proceedings.[35]

These two decisions are also important in banking litigation, as it is not uncommon for civil and criminal proceedings to be pending at the same time, especially in cases of fraudulent actions by an employee of the bank or an external asset manager.

Sources of litigation

Frequent sources of litigation in banking law concern disputes regarding unauthorised transactions, the information about and restitution of retrocessions, margin calls and the breach of the duty to inform about the risks of an investment.

Looking ahead, disputes arising from the duties of financial service providers as set out in the Financial Services Act and disputes concerning cryptocurrencies may well become a topic in banking litigation.

Outlook and conclusions

Substantiation and proof of damages remain a hot topic in banking litigation. Although some recent decisions indicate a tendency to lower the requirements for clients when proving losses, the hurdles remain high, particularly in cases where the client not only claims compensation for their loss but also seeks compensation for lost profits. In addition, several questions, such as the relevant period for the calculation of damages, have not yet been answered, which leads to uncertainty for clients and litigators.

As a result, claims for performance are much easier to enforce. However, a claim for performance exists only in case of unauthorised transactions by a third party. If the unauthorised transactions are attributable to a bank employee, the client must file a claim for damages against the bank.

A certain degree of legal uncertainty also exists when it comes to the relationship between the contractual and regulatory duties of financial service providers, as both contract law and the Financial Services Act set forth duties of financial service providers. In the future, disputes that revolve around the discrepancies between the contractual and regulatory duties can thus be expected.

Endnotes

1 See for a characterisation of these three standard agreements BGE 144 III 155. ^ Back to section

2 BGer 4A_202/2019 of 11 December 2019. ^ Back to section

3 BGer 4A_449/2018 of 25 March 2019. ^ Back to section

4 BGer 4A_449/2018 of 25 March 2019; recently confirmed in BGer 4A_131/2022 of 20 June 2023. ^ Back to section

5 Cf. BGE 124 III 155. ^ Back to section

6 BGer 4A_297/2019 of 29 May 2020. ^ Back to section

7 BGE 147 III 463. ^ Back to section

8 BGer 4A_301/2023 of 16 July 2024. ^ Back to section

9 BGE 146 III 121; q.v. BGE 146 III 326; BGE 146 III 387; BGer 4A_616/2019 of 17 April 2020; BGer 4A_161/2020 of 6 July 2020. ^ Back to section

10 BGE 146 III 121; BGE 146 III 387. ^ Back to section

11 BGE 146 III 121. ^ Back to section

12 BGE 146 III 387; BGer 4A_9/2020 of 9 July 2020. ^ Back to section

13 BGer 4A_577/2024 of 10 July 2025. ^ Back to section

14 BGE 146 III 121; BGE 146 III 387. ^ Back to section

15 BGE 146 III 121; 4A_161/2020 of 6 July 202; 4A_337/2019 of 18 December 2019. ^ Back to section

16 Cf. BGer 4A_70/2021 of 15 July 2021. ^ Back to section

17 BGer 4A_337/2019 of 18 December 2019. ^ Back to section

18 BGer 4A_539/2021 of 21 February 2023. ^ Back to section

19 BGE 149 III 105. ^ Back to section

20 BGE 132 III 466. ^ Back to section

21 BGE 137 III 393. ^ Back to section

22 BGer 4A_355/2019 of 13 March 2020. ^ Back to section

23 BGer 4A_574/2023 of 24 May 2024. ^ Back to section

24 BGer 4A_574/2023 of 24 May 2024. ^ Back to section

25 BGE 143 III 348. ^ Back to section

26 BGer 4A_601/2022 of 8 September 2022. ^ Back to section

27 BGer 4A_436/2020 of 28 April 2022. ^ Back to section

28 BGer 4A_521/2008 of 26 February 2009; BGer 4C.243/2006 of 10 July 2006, E. 3. ^ Back to section

29 BGer 4C.243/2006 of 10 Juli 2006; BGer 4C.285/1993 of 5 May 1994. ^ Back to section

30 BGer 4A_389/2024 of 8 May 2025. ^ Back to section

31 BGer 4A_519/2021 of 15 February 2021. ^ Back to section

32 BGer 5A_515/2023 of 23 February 2024. ^ Back to section

33 BGE 148 IV 432. ^ Back to section

34 BGE 148 III 401. ^ Back to section

35 BGer 4A_249/2024 of 4 March 2025 (to be published as a leading decision). ^ Back to section

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