The Banking Litigation Law Review

Sixth Edition

Editor
Jonathan Clark

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THE BANKING LITIGATION LAW REVIEW

Sixth Edition

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PREFACE

This year's edition of *The Banking Litigation Law Review* highlights that litigation involving banks and financial institutions shows little sign of slowing. The legal and procedural issues that arise in banking litigation continue to evolve and develop across the globe, in the context of both domestic and cross-border disputes.

The impact of covid-19 continued throughout 2022 with many of the temporary measures enacted becoming permanent features of the litigation landscape. In many jurisdictions, procedural rules have been revised to provide for the use of technology, including in the form of virtual and hybrid hearings. Nevertheless, physical hearings remain an option, especially for complex cases that involve witness evidence and large amounts of oral advocacy.

Financial institutions have also had to adapt to the increasing popularity of crypto-assets. Across the globe, regulators have made efforts to provide clarity on the regulatory framework of digital assets and this will no doubt be an evolving area in the years to come. It remains to be seen how courts will adapt to the unique challenges raised in disputes involving such assets.

Signs of the long-term economic effects of the pandemic, war in Ukraine and inflation are now visible in many parts of the world. From the perspective of the financial sector, these conditions are likely to translate into an increase in loan arrears and defaults, debt restructurings, bankruptcies and insolvencies affecting banks, their customers and counterparties. In a number of financial transactions, there will be winners and losers from the current increase in interest rates following a sustained period of historically low rates. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the current global economic environment will feature in future editions of this *Review*.

A continuing trend this year, as in other recent years, has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing fraud, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers, including from their own susceptibility to fraudulent schemes. Claimants, and their funders, are expected to continue testing the limits of these obligations and duties in the courts.

Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector looks set to continue.

Jonathan Clark
Slaughter and May
London
November 2022

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Chapter 6

SWITZERLAND

Nicolas Bracher and Meltem Steudler[1]

I OVERVIEW

Switzerland is a major financial centre. Thus, it does not come as a surprise that there is a considerable amount of case law regarding banking litigation every year. Owing to the traditionally strong wealth management industry in Switzerland, several court decisions in the reporting period deal again with the liability of banks for damage incurred by clients due to unsuccessful investments. Courts have mainly abided by their rigid constant practice in this regard and, in some eminent cases, even raised the hurdle (see below Section II.i).

Furthermore, in this reporting period, the Swiss Federal Supreme Court handed down new leading decisions concerning retrocessions and joint accounts (see Sections II.iii and II.iv).

II SIGNIFICANT RECENT CASES

i Substantiation of damages

While proof of the 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[2] 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 the 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

1 Nicolas Bracher is a partner and Meltem Steudler is an associate at Wenger Vieli AG.

2 cf. for a characterisation of these three standard agreements BGE 144 III 155.

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such a hypothetical scenario in court is equally demanding; in particular, 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.[3]

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.[4] 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 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. In the jurisprudence of the Federal Supreme Court, such cases are rare.[5]

All the more remarkable, therefore, is another recent decision of the Federal Supreme Court concerning an investment advice 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

3 BGer 4A_202/2019 dated 11 December 2019.
4 BGer 4A_449/2018 dated 25 March 2019.
5 cf. BGE 124 III 155.
6 BGer 4A_297/2019 dated 29 May 2020.

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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 taking into account 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$1,072,500) 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.

ii Unauthorised transactions

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, e-mails

7 BGE 147 III 463.

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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.[8]

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.[9] 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. Furthermore, the client must also accept transaction orders issued by telephone, e-mail 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 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; e-mail 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.[10]

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, e-mails or scans and faxes with copied signatures are only means of legitimation if this is contractually agreed upon between the bank and the client.[11] 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

8 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.

9 BGE 146 III 121; BGE 146 III 387.

10 BGE 146 III 121.

11 BGE 146 III 387; BGer 4A_9/2020 of 9 July 2020.

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identification by a third party due to a breach of its duty of care. According to the established case law of the Swiss 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.[12] 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.[13] 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.[14]

In one of these recent decisions, the Swiss 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 in order 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.[15] This issue is likely to continue to be a topic in the practice of the courts, as a number of relevant questions remain open.

12 BGE 146 III 121; BGE 146 III 387.
13 BGE 146 III 121; 4A_161/2020 of 6 July 202; 4A_337/2019 of 18 December 2019.
14 cf. BGer 4A_70/2021 of 15 July 2021.
15 BGer 4A_337/2019 of 18 December 2019.

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iii Retrocessions

The Swiss Federal Supreme Court already decided in 2006 that retrocessions must be handed over to the client.[16] In further decisions, the Swiss 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.[17] It is not sufficient if only the percentage range of the individual product categories is shown.[18]

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.[19] 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 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.[20]

In another recent decision, the Federal Supreme Court dealt with the controversial question whether banks have to inform their clients about retrocessions 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.[21] However, the bank might be obliged to inform its clients about retrocessions they pay due to regulatory and criminal provisions.

iv Joint accounts

A joint account (or joint custody account) is a banking relationship giving several holders a joint right of disposal. Under Swiss law, the joint account is based on the concept of 'active solidarity'. This means that the account holders, as joint creditors, are each individually entitled to dispose of the assets without restriction, in particular, to manage, withdraw or transfer them. The joint account is often also referred to as an 'or account' or 'compte joint'.

16 BGE 132 III 466.
17 BGE 137 III 393.
18 BGer 4A_355/2019 of 13 March 2020.
19 BGE 143 III 348.
20 BGer 4A_601/2022 of 8 September 2022.
21 BGer 4A_436/2020 of 28 April 2022.

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The advantage of a joint account is that each account holder has access to the account. It simplifies processes for each account holder to initiate transactions at the bank on their own. However, this sole power of disposal of each account holder also entails risks. A recent decision of the Federal Supreme Court illustrates this clearly.

The decision of the Federal Supreme Court was based on the following facts. A father and his son had a joint current account as well as a joint trust account at a bank in which substantial assets were held. The father instructed the bank to transfer the amount of €18 million from the joint accounts to an account at another bank. Before the bank carried out this order, it informed the son about the father's order. Thereupon, on the same day, the son instructed the bank to transfer the entire available balance in the current account to another account at the same bank of which he was the sole holder. The bank then informed the account holders that it would only follow a joint order signed by both account holders. The son then immediately filed a lawsuit against the bank demanding the execution of his order. The father, in turn, initiated a debt collection action against the bank about a month later.

In the lawsuit between father, son and the bank, the court of first instance ruled in favour of the father and obliged the bank to first execute the father's order, as it had been given first, and then to transfer the remaining balance to the son's individual account. The first instance justified its decision, among other reasons, by stating that it would be shocking if the bank, which had triggered the son's own order in the first place by notifying him of his father's order, were then to execute the son's order first, which had been issued later. The appellate court overturned this decision and upheld the son's claim, since he was the first to sue and the bank was therefore obliged to comply with the son's order in accordance with Article 150, Paragraph 3 CO, irrespective of the father's first order.

The Federal Supreme Court agreed with the ruling of the appellate court and dismissed an appeal against that ruling. In its decision, the Federal Supreme Court had the opportunity to confirm the following principles regarding the joint account. The holders of a joint account are to be qualified as joint and several creditors. This means that each account holder alone can dispose of the entire account balance. The bank is obliged to execute orders of each individual account holder and can achieve full discharge of its debt by making payment to one of the account holders (Article 150, Paragraph 2 CO). However, as soon as there are contradictory orders from several account holders, this legal situation changes and the bank's obligation to execute orders ceases to apply. However, the bank remains entitled to perform in this situation and is free to choose which order it executes. This applies until one of the account holders initiates legal action (debt collection or lawsuit) against the bank in relation to the joint account (Article 150, Paragraph 3 CO). In this case, the bank must pay to the account holder who was the first to initiate debt collection proceedings or file a lawsuit. A mere oral or written reminder from an account holder, however, is not sufficient to bring about this legal situation.

Article 150, Paragraph 3 CO is not mandatory law and can therefore be contractually modified or excluded. Since no such exclusion had been agreed in the case at hand, the bank had to execute the son's order. Although the son's order had been received later than the father's order, he had been the first to take legal action against the bank through his lawsuit.[22]

It was not clarified in this case whether the bank was liable to the father by informing the son of the father's first order and thus giving the son the opportunity to place a contradictory order before the first order was executed. At the time the father's order was received, as far as

22 BGE 148 III 115.

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is known, there were no contradictory orders, so that the bank would have been obliged to execute the order at that time, in accordance with the principles also confirmed by the Federal Supreme Court. If the bank does not execute the order of one account holder and gives the other account holder the opportunity to place a contradictory order, the account holder who first placed an order may suffer a loss due to the intervention of the other account holder (e.g., if financial instruments are not sold at a certain time).

III 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, but the transitional period for the duty to produce a key information document was extended until 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 and, thus, are now stated in regulatory law 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.[23] 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 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

23 BGer 4A_519/2021 of 15 February 2021.

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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.

IV CHANGES TO COURT PROCEDURE

On 1 January 2011, the Swiss Civil Procedure Code came into force. Before this, Swiss civil procedures were governed by cantonal law as each canton had its own Code of Civil Procedure (the same was true for penal procedure). While the uniformity of the court proceedings in all cantons was a positive change, many hurdles regarding litigation remain, mainly in relation to the costs of litigation.

On 26 February 2020, the Swiss Federal Council published a report and a draft bill concerning the revision of the Swiss Civil Procedure Code. The aim of the revision is to facilitate the access to court and thus the enforcement of rights in private law.

In particular, the cost barriers and the litigation cost risk are to be lowered. The changes in this regard are the following. The claimant shall, as a rule, only advance half of the full expected court costs, which is opposed to today's rule where the court can oblige the claimant to advance 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 current regime, the successful claimant bears the collection risk. The draft bill provides that the collection risk for the court costs shall shift from the successful claimant to the state.

A rather controversial proposal is the extension of the right to refuse to cooperate in civil proceedings. Nowadays, in-house legal counsels do not have such a right. The draft bill intends to grant this privilege not only to attorneys, but also to in-house legal counsels.

Furthermore, the Swiss Federal Council proposes 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 draft bill gives the cantons the possibility to establish international commercial courts. English can be recognised as the language of proceedings. Notably, the commercial court of Zurich already accepts documents in English; however, submission must be made in German.

In the original draft bill of the Federal Council, there were also measures to improve collective redress. As these were very controversial, the Federal Council has decided to address them in a separate legislative process.

Both the Council of States and the National Council have adopted the Federal Council's bill with some additions and amendments. One important amendment is the possibility of a court to allow persons to participate in oral procedural acts by means of electronic instruments. Due to differences between the National Council and the Council of States' resolutions, the discussion of the draft bill is still ongoing.

The revision of the Swiss Civil Procedure Code is expected to come into force in 2024, at the earliest.

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V OUTLOOK AND CONCLUSIONS

Substantiation and proof of damages remains a hot topic in banking litigation. Although some recent decisions show a tendency towards lowering the requirements for clients when it comes to proving losses, the hurdles remain very high, in particular in cases in which the client not only claims compensation for his or her loss but also compensation for lost profit. In addition, several questions, such as the relevant period for the calculation of damages, have not yet been answered, which leads to an uncertainty for clients and litigators.

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.

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Appendix 1

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Nicolas Bracher is a partner and head of the dispute resolution practice group at Wenger Vieli AG. In the area of financial services law, he advises and represents banks and other financial services providers in all banking contract law matters and disputes (e.g., payment transactions, investment business, retrocession issues and lending business). His particular area of expertise is the enforcement and defence of liability claims arising from investment transactions. He regularly publishes articles on liability issues in financial services law in academic publications and is also a speaker at conferences in this area.

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