The Banking Litigation Law Review

Fourth Edition

Editor
Deborah Finkler

The LawReviews

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that litigation involving banks shows little sign of slowing and continues to evolve.

Disputes that have arisen in the past year cover a broad 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. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

One of the major challenges of 2020 has, of course, been covid-19, and this year has demonstrated the resilience and flexibility of court systems around the world, including in the UK, in adapting their procedures in order to minimise disruption to the administration of justice. At the time of writing, the 'new normal' in many jurisdictions now provides for virtual hearings (including remote witness evidence) and electronic trial bundles as a default. This enforced experiment seems likely to have a lasting impact on court procedures around the world. While it is likely that trials involving witness evidence will revert to being largely in person, the need to do so for many procedural applications is less obvious. In any event, it is to be hoped that some of the positive aspects of operating remotely – for example the reduction in the amount of paper used – are here to stay.

A continuing trend is the increase in the use of class or multi-party actions and representative claims. Although often perceived as a predominantly US phenomenon, the past year has seen growth in the use of class actions within non-US jurisdictions, particularly in the UK, Canada and Australia. Whether this rise is the precursor to a worldwide adoption will depend on a number of factors, including any new mechanisms for group actions that are adopted in countries where they did not previously exist and the way courts in different jurisdictions react to such new actions. In the UK, for example, judgment is keenly awaited in a Supreme Court case that is expected to play a key role in clarifying the operation of a new collective proceedings regime and, depending on its outcome, either energise or curtail the growth of competition class actions in the UK. Related to the rise of group actions, one potential area of reform is third party litigation funding (a frequent driver of such actions). Recent regulatory reforms in Australia means that litigation funders are now required to hold a licence and must comply with the same conduct obligations to which banks and other credit providers are subject, including the requirement to provide their licensed 'financial services' efficiently, honestly and fairly. It will be interesting to see whether other jurisdictions follow suit.

The preface to last year's edition highlighted the concern that claimants will seek to use data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, as a tool in litigation, and noted that this concern is only likely to

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grow. The rise of UK class action cases for damages resulting from data breaches in the past year reinforces the importance of banks managing such risks, both in a regulatory and in a litigation context. Set against the background of increasingly litigious and well-funded claimants, and considering the extensive volume of personal data that banks hold, the need for adequate systems and controls to protect the data of consumers and employees is ever more vital.

At the time of writing, the Brexit transition period is drawing to an end, and nobody is any closer to being able to say what the political or economic impact of Brexit will be. The prospect of the transition period ending with no deal is a real possibility, and it remains to be seen whether the UK can agree a deal with the European Union in the time available. The UK government has declared its intention to sign up to either or both of the 2007 Lugano Convention and 2005 Hague Convention on Choice of Court Agreements, but unless and until that happens there remains a degree of uncertainty over jurisdiction and the enforcement of judgments.

Overall, 2020 has no doubt been a tumultuous year for many. As the year approaches its end, there are some reasons for optimism: global stock markets surged following the results of the US 2020 presidential elections and news of significant strides being made in the development of a covid-19 vaccine. Nevertheless, a substantial amount of political and economic uncertainty remains. Moving forward, the prospect of an unknown future legal landscape in the UK, and to an extent in the remainder of the EU, following Brexit and the continuing effect of covid-19 on the world economy (which may well persist long after the virus itself has been contained) can be expected to generate disputes in the banking sector for a long time to come.

Deborah Finkler
Slaughter and May
London
November 2020

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Chapter 9

PORTUGAL

Manuel Magalhães, Mafalda Ferreira Santos, Francisco Boavida Salavessa and Maria José Lourenço[1]

I OVERVIEW

After a period of significant increase of litigation disputes connected with the banking sector, due to the impacts that the Troika intervention in Portugal had in debt restructuring of companies, as well as to the application of resolution measures to two credit institutions – BES and Banif (whose judicial liquidation procedures are currently on going), in the recent past a trend of stabilisation, or even decrease of litigation, was expected to be observed.

The covid-19 pandemic caused an unpredictable and irreversible change of the course of events. Indeed, the judicial system was almost completed shut-down by the covid-related legal emergency measures adopted in Portugal at a procedural level, which imposed a stay on most ongoing disputes.

The subsequent measures continuously implemented aimed to protect the economy, companies and citizens (such as the creation of a temporary public moratorium regime, which allows for the suspension of capital and interest payments in certain credit agreements, and the access to credit lines with personal state guarantees to support corporate liquidity), impacted – even if not directly – disputes related to the banking sector. Such a situation is a consequence of the stoppage of effects of situations that, under normal circumstances, would constitute a contractual breach and would lead to an increase of litigation.

These measures are merely temporary, and therefore their revocation will most likely ultimately result in a significant increase of disputes in 2021.

Taking this context into account, debt restructuring procedures will regain particular importance, notably the special procedure of revitalisation of companies. This may lead to an intervention of the legislator in order to ease the access to, and employment of, this regime.

This flexibility may be achieved through the transposal of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt), which shall be completed on 17 July 2021.

1 Manuel Magalhães, Mafalda Ferreira Santos and Francisco Boavida Salavessa are partners and Maria José Lourenço is a senior associate at Sérvulo & Associados.

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II SIGNIFICANT RECENT CASES

Most judicial proceedings initiated against financial institutions in recent years concern mis-selling claims in the context of investments in financial instruments. These proceedings were mainly initiated in the aftermath of the financial crisis of 2008, and triggered by resolution measures the Bank of Portugal (BP) applied to Portuguese banks.

Although the exceptional measures adopted in Portugal to mitigate the effects of the covid-19 pandemic – notably standstills and moratoria on loans, court recesses, suspension of legal proceedings and procedural deadlines – naturally caused a decline in the number of this year's significant case-law, some relevant cases must still be mentioned.

The resolution measure applied to Banco Espírito Santo and to Banif continues to be a topic of discussion and disputes, either involving said banks or the BP and their clients, or both.

Indeed, several stakeholders of Banco Espírito Santo requested the declaration of invalidity of the resolution measure applied to it by the BP on the grounds that it breached the Portuguese Constitution general principles of Portuguese Law, and European Law. The Administrative Court of the District of Lisbon Central dismissed the claim. Following an appeal filed to the Supreme Administrative Court, in 23 January 2020 it admitted a request for a preliminary ruling to the Court of Justice of the European Union.

Moreover, several claims against Banco Espírito Santo and Banif, for breach of duties of financial intermediaries regarding the information to be provided to investors, the obligation to assess the adequacy of some transactions, and the prohibition of conflict of interests were brought before Portuguese courts. In this regard, courts tend to protect unqualified investors and to adopt stringent approach towards financial intermediaries. Indeed, courts frequently hold financial intermediaries liable for damages caused to their clients when they fail to prove diligence in providing complete, up-to-date and reliable information necessary to raise awareness about the risks involved in the investments, for an informed and reasoned decision making by the investor is to be made to the credit institution. The claimant must, however, demonstrate that the other requirements for civil liability, (e.g., the casual link between the breach of duties and the damages) are verifiable.

Recent case law regarding investments in complex financial instruments consider that the financial intermediary is responsible for considering the client's profile (i.e., 'know your client') and for providing information adequate to his knowledge. Indeed, on 28 January 2020,[2] the Supreme Court of Justice ruled that a bank that informs a client without any financial experience that commercial paper is similar to a fixed-term deposit, with guaranteed capital, is not complying with the duty to provide complete, true and objective information regarding the risks inherent to the investment. The Court considered that said conduct infringes the principle of good faith, particularly in terms of loyalty, and that this liability could be incurred with reference to acts executed in the phases preparatory to the transaction. Similarly, on 8 October 2020, the Lisbon Court of Appeal[3] held that a bank omitting information to the investor on the specific differences between bank deposits and subordinated bonds was in infringement of the financial intermediary's duty to provide information.

2 Proceedings No. 2142/16.1T8STR.E1.S1.

3 Proceedings No. 13636/18.4T8LSB.L1-6.

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A decision in the opposite direction was rendered in 8 October 2020 by the Court of Appeal of Guimarães.[4] This court ruled that the duty to provide information does not extend to the obligation on the financial intermediary to follow up on the insolvency proceedings of the issuer of bonds.

In addition to the duties of information, a recent decision of the Supreme Court of 19 May 2020[5] refers to the bank's duty of custody regarding safe-deposit boxes. The Court considered that banks must guarantee the vigilance necessary to prevent an individual, other than the user, from accessing the safe and are accountable for their integrity. Consequently, theft or robbery, through burglary, does not constitute grounds for exemption from liability by the bank. The Court considered that the burden of proof of the absence of fault lies with the bank.

In a decision rendered in 29 September 2020, the Lisbon Court of Appeal[6] confirmed that failure to integrate a customer in the special Out-of-court Proceeding for the Regularisation of Default (PERSI) in consumer credit agreements constitutes a dilatory exception, to be acknowledged by the court suo motu, that may prevent enforcement proceedings for the collection of the owed amounts from carrying on. Nonetheless, the court underlined that the credits subject to enforcement were assigned to a securitisation company (not subject to the PERSI regime) prior to the default of the customer. As the securitisation legal regime (Decree Law No. 453/99) provides that the debtors of the assigned credits can only oppose to the assignee those objections deriving from facts that precede the assignment, the exception was ruled to be unfounded. This decision shows that a bank's customer situation may, under certain circumstances, be negatively affected (in this case, the default could not lead to a PERSI proceeding) as a consequence of a credit assignment.

Finally, it is worth noticing that, in 2019, the Portuguese Competition Authority fined 14 banks in the total amount of €225 million euros for concerted practice of exchanging sensitive commercial data, during 2002 and 2013. Twelve banks presented an appeal to the competent court. This decision may trigger damages claims, which are expected. Deco – the Portuguese Association for Consumer Protection – is evaluating the possibility of taking collective action, on behalf of consumers, against the banks, so that clients can be compensated for their losses.

III RECENT LEGISLATIVE DEVELOPMENTS

i Covid-19 related legislative developments

The past year was dominated by the covid-19 pandemic, which required both national and supra-national entities to adopt measures to contain the pandemic harmful systemic economic effects. Some of these measures affect the Portuguese banking sector significantly in their everyday operations and may be sources of litigation between these entities and their clients, their employees, their shareholders or the relevant regulatory authorities, or both – especially the European Central Bank (ECB) and BP.

4 Proceedings No. 1953/19.0T8GMR.G1.
5 Proceedings No. 3039/15.8T8PNF.P2.S1.
6 Proceedings No. 1827/18.2T8ALM-B.L1-7.

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European regulation

Regulation (EU) 2020/873 amending Regulations (EU) No. 575/2013 and (EU) 2019/876 as regards adjustments in response to the covid-19 pandemic

To maximise the banks' capacity to lend money, this Regulation:

a extended by two years the transitional measures concerning the implementation of IFRS 9 to face a likely increase in provisions for expected credit losses;

b changed the calculation of the levered ration and delayed the introduction of the leverage ratio buffer to January 2023; and

c introduced capital relief measure for certain loans granted to SMEs or backed by pensions or salaries.

This is in line with the position adopted by the European Commission regarding accounting norms (shared by ESMA) and prudential rules.

EBA statement on consumer protection and payment-related measures and guidelines on moratoria on loan-payments

EBA calls on financial institutions to act in the interest of the consumer, particularly in the context of the adoption of temporary measures for consumer and mortgage loans concerning, *inter alia*, charges and costs, in compliance with the applicable EU (namely, with information, transparency and clarity requirements). Additionally, EBA promotes the careful consideration of new and additional charges specifically introduced in relation to contingency measures, designed to alleviate the pressure on consumers and businesses, and cross selling of products to consumers, form a legal and reputational standpoint. EBA also notes that where temporary measures do not automatically lead to loan reclassification from a prudential perspective, their acceptance should not automatically and negatively impact the consumer's credit rating.

In terms of payment services, EBA urges providers – including banks – to facilitate payments that not require physical contact, namely by establishing the maximum threshold allowed for contactless payments (€50 per transaction). Finally, EBA removed the obligation of National Competent Authorities – the BP – to report by 31 March 2020 on payment services providers' readiness to meet strong costumer authentication requirements for e-commerce card-based transactions. It is unclear whether this exemption will continue to apply.

Additionally, EBA has issued guidelines clarifying that the application of a legal or contractual moratorium adopted as a result of the pandemic, broadly applied to a range of debtors, under the same conditions and only scheduling payments, may not lead to a reclassification under the definition of forbearance; that is, cases where credit institutions grant a concession due to financial difficulties experienced by a borrower.

National regulation

Decree-Law No. 10-J/2020, of 26 March 2020, establishing a legislative moratorium

Credit operations engaged in by credit institutions, where the counterparty is a non-financial undertaking, a sole proprietorship, a private charity institution or other social economy related entity operating or with headquarters, or both, in Portugal are subject to exceptional measures designed to protect these entities from the harmful effects of the covid-19 pandemic. Individuals who entered into housing loan agreements may also benefit from such measures.

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The support measures include:

- *a* a ban on the possibility of cancellation of the credit granted;
- *b* prorogation of the credits to be reimbursed at the term of the agreement;
- *c* suspension of the payments of capital, rents and interests made by instalments; and
- *d* inapplicability of default and early termination clauses to situations covered by (b) and (c), where interest continues to accrue during the prorogation period and are to be capitalised. Security and guarantees remain effective and its validity is correspondently extended. All these measures are applicable while the Decree-Law is in force.

These measures are not automatic as they require the beneficiaries to submit an application to the credit institution together with evidence that their tax and social security situation is regularised.

BP Macroprudential Recommendation on new credit agreements for consumers

The BP established that personal credits with maturities of up to two years, duly identified as intended to mitigate households' temporary liquidity shortage situations, are exempted from compliance with a DSTI (debt service-to-income) ratio limit and from observing the recommendation concerning regular principal and interest payments.

ii Sustainable finance

Within its mandate to promote the relation between sustainability and finance, the European Commission is implementing the strategy set out in the action plan on financing sustainable growth.

As a result, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020, on the establishment of a framework to facilitate sustainable investment, entered into force on 12 July 2020.

The Regulation establishes an EU uniformised classification system, or 'taxonom', which determines the criteria to identify whether an economic activity is environmentally sustainable. The harmonisation achieved by the Regulation is expected to remove barriers to the collection of funds to sustainable projects within the internal market, enhance investor confidence and awareness of the environmental impact of the financial products (including corporate green bonds) and to address the concerns with 'greenwashing' (i.e., gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when environmental standards have not been met).

The Regulation applies to financial market participants that make available financial products, as banks frequently do. Particularly noticeable are the transparency requirements in non-financial statements, as well as in pre-contractual disclosures and periodic reports, concerning financial products connected with sustainable economic activities, made under Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, which must take into account the criteria established in the Regulation.

iii Protection of consumers – limitations to bank fees

Law No. 53/2020, of 26 August 2020 prohibits payment service providers from charging fees to consumer payer or payees in payment transactions performed by third parties, notably withdrawal of funds, payment of services or transfers, provided a certain threshold is not

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exceeded (€30 per transaction, €150 during a month or 25 transfers). Where these thresholds are exceeded, payment service providers are also limited in the amounts that they may charge to their customers.

Law 57/2020, of 28 August 2020 prohibits credit institutions from charging certain fees in connection with consumer credit agreements and credit agreements for consumers relating to residential immovable property that, until now, were commonly included in the Portuguese credit institutions' price lists. Examples include fees relating to the analysis and renegotiation of credits, payment processing fees (if the processing is conducted by the creditor) or issuance of documents for the extinction of *in rem* guarantees.

These new provisions shed some light on the content of a general provision that was already contained in Law No. 66/2015 requiring all fees charged by credit institutions to correspond to a service effectively rendered. Moreover, they clarify that fees must be reasonable and proportionate to the costs borne by the credit institution.

IV CHANGES TO COURT PROCEDURE

Court procedure rules did not suffer major changes during 2020.

Notwithstanding, Law 117/2019 of 26 July 2019, which came into force on 1 January 2020 and amended the Portuguese Civil Procedure Code (CPC),[7] introduced the following pertinent modifications:

a extension of the grounds of the extraordinary appeal of review (decisions that became *res judicata*) and of opposition to enforcement proceedings, in particular in cases where the defendant did not intervene in the previous declarative proceeding, and it is evidenced that (1) there was a lack or nullity of service, (2) the defendant was unaware of service without fault, and (3) the defendant was unable to file his defence by reason of force majeure;

b limitations on the seizure of property used by the defendant for personal and permanent residence, established to increase the legal protection of the family homes; and

c where enforcement proceedings concern credits emerging from contracts containing general contractual terms, the contract and terms must be filed with the proceeding's initial application.

Moreover, Decree-Law 97/2019 of 26 July, which amended the electronic processing of judicial proceedings, introduced the formula 'digital by definition', meaning that judicial proceedings – (including most procedural acts) are now entirely electronic. These changes are expected to introduce greater agility, flexibility and efficiency in judicial proceedings.

V INTERIM MEASURES

Interim measures are essentially governed by the Portuguese Civil Procedure (CPC) and follow a relatively well-established regime, which remains generally unchanged for some years.

Interim measures may be specific or common (applicable where there is no suitable specific measure).

7 The Portuguese Civil Procedure Code was approved by Law No. 41/2013 of 26 June 2013, with all the amendments introduced up to and including the Law No. 117/2019 of 13 September 2019.

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The specific interim measures applicable in the context of banking litigation are essentially:

- *a* attachment or asset freezing (Articles 391–396 CPC) – assuming a preventive function: the purpose of these commonly used measures is to prevent the disposition of the attached assets – such as bank accounts and financial instruments – until the dispute is decided by the Court and/or the creditor obtains payment;
- *b* listing of assets (*arrolamento*) (Articles 403–409 CPC) – usually applicable where there is a justified fear of loss or dissipation of assets: this measure involves the description and evaluation of the relevant assets, later deposited with a depositary, which is often the bank; and
- *c* freezing of vehicles (Article 15 of Decree-Law 54/75 of 12 February 1975) – this measure is usually adopted in case of breach of financing agreements secured by mortgage over the vehicle or of agreements containing retention title clauses.

The common interim measures are adaptable to the specific claim, subject to a wide discretion of the court regarding their form and content. In the context of banking litigation, these measures are often used to impose injunctions preventing the enforcement of bank guarantees, where there is clear evidence of blatant abuse or fraud in the exercise of certain contractual rights.

Additionally, in financial leasing agreements, common interim measures are often adopted to allow banks to recover the leased asset (e.g., real estate and vehicles) when the lessee does not acquire the property, but fails to deliver it, after the registration of the lease is cancelled (Article 21 of Decree-Law No. 149/95 of 24 June 1995, as amended).[8]

VI PRIVILEGE AND PROFESSIONAL SECRECY

Under the Portuguese Bar Association Conduct Rules, all the information obtained in the course of the work of a lawyer is covered by professional secrecy.

Notwithstanding, lawyers are required to report to the Bar where there is a suspicion that certain operations are related to anti-money laundering or terrorism financing. The breach of this duty of professional secrecy is, as a rule, a punishable criminal offence.

Information covered by secrecy may not constitute mean of proof or be considered by the court while deciding a case, unless the secrecy duty was waived by the Bar or a court. This may occur where divulgation is essential to preserve the legal rights or legitimate interests of the lawyer or a client. It is important to note that the Bar adopts a more conservative approach than the courts in allowing for these waivers.

VII JURISDICTION AND CONFLICTS OF LAW

In Portugal, European Union regulations – namely Regulation No. 1215/2012 of 12 December 2012 (Brussels I), Regulation No. 593/2008 of 17 June 2008 (Rome I) and Regulation No. 864/2007 of 11 July 2007 (Rome II) – are the primary sources of rules on jurisdiction and conflicts of law for cross-border disputes.

8 Article 21 of Decree-Law No. 149/95 of 24 June 1995, with all the amendments introduced up to and including the Decree-Law No. 30/2008, of 25 February 2008.

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Disputes concerning banking operations are frequently submitted to arbitration where practices from the International Chamber of Commerce and UNIDROIT principles play a key role.

The CPC, the Portuguese Securities Code and the Law on General Contractual Terms are the primary sources of rules on jurisdiction and conflicts of law for internal disputes.

The jurisdiction of courts solving disputes related to conflicts arising from banking activities is determined according to the rules of the CPC. Accordingly, Portuguese courts have exclusive jurisdiction over matters relating to immovable property in Portuguese territory, to commercial companies headquartered in Portugal, to Portuguese public registers and to insolvency and revitalisation procedures of legal persons domiciled in the Portuguese territory (Article 63). These rules are in line with those of the European Union.

Apart from these cases, the parties agree on the court that will have jurisdiction to decide on disputes, provided that the requirements imposed by Regulation No. 1215/2012 and by the CPC are complied with. When assessing the validity of agreements on jurisdiction, Portuguese courts tend to recognise the parties' wide discretion, even within the context of banking litigation.[9]

The same contractual freedom is offered to the parties when it comes to the choice of applicable law. However, in the context of banking litigation, some rules demonstrate specials concerns that impose the application of Portuguese law.

Portuguese law is thus necessarily applicable to certain aspects of securities issued by entities regulated by Portuguese law and also to public offers specifically directed to natural and legal persons with residency or domicile in Portugal (Articles 39, 40 and 108 of the Securities Code). These are justified by the need to find a balance between the internationalisation and dematerialisation of securities and the maximisation of application of national law.

Additionally, due to concerns with consumer protection and to the consideration that agreements entered into by banks and consumers are non-arm's length, such agreements must be governed by the law of the habitual residence of the consumer (with the exception of those foreseen in Article 6, No. 4(d) of Regulation 593/ 2008).

Moreover, the provisions contained in Law on General Contractual Terms that are protective of consumers apply when the agreement has a close connection with the Portuguese territory, independently of the applicable law (Article 23).[10]

Finally, when the parties do not choose the law applicable to their contractual relations, these relations shall be governed by the law of the country most closely connected to the contract. The contract will be presumed to be most closely connected to the country of residence or domicile of the party who is to perform the obligation that characterises the contract.[11] Within this context, in principle, the applicable law will be that of the domicile of the bank, as the provider of the service.

9 See, for reference, proceeding 877/12.7TVLSB.L1-A. S1 before the Supreme Court, from 11 February 2015; Proceeding 540/14.4TVLSB.S1 before the Supreme Court, from 26 January 2016.

10 Article 23 of the Law on General Contractual Terms.

11 Article 4 of Regulation 593/2008.

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VIII SOURCES OF LITIGATION

Recent case law concerns most frequently breaches of duties of financial intermediaries regarding the information to be provided to investors, the obligation to assess the adequacy of some transactions, and the prohibition of conflict of interests and prohibition of inducements.

The resolution measures BP applied to *Banco Espírito Santo* and *Banif* are also relevant sources of litigation. Claimants request the declaration of the invalidity of said measures and ask for compensation for the damages caused by them.

IX EXCLUSION OF LIABILITY

According to the usual construction of Articles 809 and 800(2) of the CPC made by the courts, clauses excluding or reducing liability may not cover situations of wilful misconduct or gross negligence, only negligence. Any clause pursuant to which a creditor waives indemnity rights in advance is, in principle, deemed void, unless it covers exclusively negligent contractual breaches.

The Law on General Contractual Terms establishes an equivalent rule. Therefore, where clients merely adhere to contractual terms without negotiation – as it happens in most credit agreements and cardholder agreements entered into with individuals – banks should be conservative in establishing these clauses. A provision typically included in these agreements is one establishing that the bank's liability is excluded to the extent permitted by law.

Within the scope of consumer credit agreements and credit agreements for consumers relating to residential immovable property, Decree-Law No. 133/2009 of 2 June 2009 and Decree-Law No. 74-A/2017 of 23 June 2017 respectively prohibit waivers, exclusions or restrictions on consumer's rights arising from said agreements. Such a clause shall be deemed void. Likewise, under Article 154 of the Securities Code, the responsibility of, inter alia, financial intermediaries for the content of the Prospectus shall not be waived or modified by convention. Additionally, the responsibility of a financial intermediary for the acts of its representatives and auxiliaries may not be contractually excluded.

It is possible, however, to contractually establish a penalty clause so as to determine, in advance, the amount of compensation owed in the event of breach of contract. Such an amount is limited by the value of the damage resulting from the breach and, where it is disproportional, it may be reduced by the court or, in case of agreements subject to Decree-Law No. 446/85 of 25 October 1985, on General Contractual Terms and Conditions, the disproportionate clause may be deemed null and void.

X REGULATORY IMPACT

i Impact of regulation in bank's civil liabilities

The systemic importance of credit institutions and the need for protecting less sophisticated agents that engage in (sometimes complex) financial transactions with such entities justifies the heavy regulatory environment within which banks and the like conduct their activity. Although stringent regulation contributes to create a sound and secure financial market, it also materialises operational risk, generally understood as the risk of loss caused by failures in, or inadequacy of, internal processes or resources, or both (either people or systems, or both), or by external events, including legal risk. Indeed, the heavier the regulation, the greater

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the risk of litigation and likelihood of civil liability of credit institutions. This situation is particularly visible in two areas of the banking activity: consumer credit and financial intermediation.

ii Consumer credit

Decree-Law No. 133/2009 of 2 June 2009 imposes on credit institutions informational and assistance duties to be complied with both during the performance of the credit agreement and during the pre-contractual phase. Moreover, some mandatory clauses must be included in these agreements and limitations on the content of some clauses (e.g., those concerning interest calculations or termination of the agreement) apply. Where these requirements are not met, credit institutions may be held liable towards clients for damages caused by their actions or omissions. This liability is in addition to administrative sanctions that may be imposed by regulatory authorities.

iii Financial Intermediation

MiFID II imposed several duties on financial intermediaries. As a result, in the past couple of years financial intermediaries had to adopt and implement internal policies and procedures to comply with these duties. The most relevant duties concern information to be provided to investors, the obligation to assess the adequacy of some transactions, record keeping, assessment of conflict of interests and prohibition of inducements.

iv Expected regulatory developments

Regulatory developments impacting several branches of the banking activity are expected in the near future.

The development of open banking, that is, digital platforms typically managed by third parties where bank clients access and operate their multiple accounts opened with different banks, and digital lending, that is, entering into credit agreements through digital platforms such as home banking or mobile apps, are disrupting the way banks provide payment services and grant credit.

These developments received a great deal of attention by BP and the European authorities of the financial sector, which recognise the need for regulation caused mainly by the involvement of non-financial and non-regulated entities in such operations. Regarding payment services, as of 14 September 2019 rules on electronic payments apply as a result of the transposition of PSD2. Further regulation is expected to impose extra duties on credit institutions, namely concerning consumer protection, data preservation and use, cybersecurity and authentication and anti-money laundering.

Within the capital markets, innovations requiring regulation are mostly related to the issuance of securities – namely by banks – on platforms based on distributed ledger technologies (e.g., Ethereum). The lack of regulation is a general concern for this market that is beginning to thrive, and therefore regulatory voids are expected to be filled soon.

XI OUTLOOK AND CONCLUSIONS

The Sections above provide evidence that, during the past year, the main promotors of legal changes within the area of banking litigation were sustainable finance, digital outbreaks and the covid-19 pandemic. Such changes are primarily substantive because legal procedures generally remained unaltered.

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This trend is expected to continue in 2021. Indeed, the EU is promoting the consideration of environmental, social and governance (ESG) issues in rules establishing duties of disclosure, risk management and classification and prudential treatment of assets. EBA is highly involved in these matters and it is expected to issue reports, guidelines and regulatory technical standards on ESG-related issues. Additionally, an EU Green Bond Standard is likely to be adopted since the consultation regarding its implementation ended in October 2020. Regarding digital finance, in addition to European initiatives, the BP is expected to issue a Circular Letter with recommendations concerning digital commercialisation of banking products and services. As for the pandemic impact on legislative production, it is highly dependent on how the pandemic develops and how strongly it impacts the global economy, especially once temporary measures taken by governments, such as the Portuguese, cease to apply.

Finally, two milestones of the financial regulation were, or are soon to be, reformed. Indeed, upon the approval of the CRDV and CRR2 in 2019, Member States are expected to adopt measures to implement the changes introduced. Furthermore, a consultation regarding the reform of the MiFID/MiFIR regulatory framework was conducted in May 2020; hence, the European Commission is expected to propose adjustments soon to the regime.

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