THE BANKING LITIGATION LAW REVIEW

Fifth Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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PREFACE

This year's edition of the *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 covid-19 pandemic continued to loom large in 2021, with judicial systems taking part in a forced experiment of embracing new technology to minimise the disruption caused by pandemic restrictions; in some jurisdictions we may see the permanent adoption of measures taken up in response to the restrictions imposed by the pandemic, as well as a general shift towards the greater use of new technology in dispute resolution. This extends to the increased use of virtual hearings (as well as electronic trial bundles and filing systems), although we can expect that physical hearings will continue to play a prominent role, particularly in complex cases. While it is too early to predict the future with any certainty, it seems likely that some form of hybrid approach is here to stay.

Outside the court room, the effects of the pandemic continue to be felt throughout the wider economy. As various restrictions and financial interventions by governments are scaled back, the early signs of the long-term, negative economic effects of the pandemic are now beginning to emerge 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. These conditions typically presage an uptick in banking litigation and it seems likely that disputes arising from the economic fallout of the pandemic will feature in future editions of this Review.

A continuing trend this year has been the broadening of obligations placed on financial institutions in the name of improving consumer protection. Faced with the challenge of increasing bank fraud and other illicit transactions, governments and courts alike have continued to develop the nature and scope of duties imposed on banks to protect their customers. Claimants will no doubt continue testing the limits of these obligations and duties in the courts.

Last year's preface highlighted the political and economic uncertainty produced by Brexit as the transition period drew to an end. Since then, some welcome clarity has emerged around the foundations of the United Kingdom's new relationship with the European Union, including in the area of jurisdiction and enforcement of judgments. However, the new relationship will take time to bed down, with additional complexities (and potentially disputes) likely to emerge as parties navigate the new reality. That said, there is little evidence that commercial parties, including banks and financial institutions, have been deterred from choosing the United Kingdom as a forum for litigating their disputes.

While 2021 has been another challenging year for many, there has been some cause for optimism: globally stock markets have continued to perform well as economic recoveries gather pace in many parts of the world, while the roll-out of the covid-19 vaccine has allowed many jurisdictions to emerge from a period of seemingly endless lockdowns and suppressed economic activity. Despite these positive signs, however, the global economy is likely to feel the effects of the covid-19 pandemic for some time and in various (and often unexpected) ways, as highlighted by the recent emergence of a crisis in the global supply chain. At the same time, other global challenges, such as climate change, will increasingly dominate the political and economic agenda. Given the various headwinds and challenges ahead, the high volume and broad nature of litigation in the financial sector look set to continue.

Deborah Finkler
Slaughter and May
London
November 2021

Chapter 6

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 ongoing), recently 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 completely 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 second lockdown period determined another almost complete shutdown of the judicial system up to the first quarter of 2021, which entailed another halt on the ongoing disputes.

The measures that had already been implemented that 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 and are still impacting – 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 temporary, and therefore their revocation will most likely ultimately result in a significant increase of disputes in the last quarter of 2021 and in 2022, as the unexpected prolonged application of these measures delayed the expected increase of disputes for 2021.

Taking this context into account, debt restructuring procedures will regain particular importance, notably the special procedure of revitalisation of companies and the new extraordinary viabilisation proceeding. 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

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

was supposed to be completed on 17 July 2021. However, due to the covid-19 pandemic, the Portuguese government has conveyed the need to extend the transposal of the directive until 17 July 2022.

In the view of transposing the referred Directive (EU) 2019/1023, on 30 September, the Council of Ministers approved a draft law, to be submitted to Parliament, which aims to legislate on insolvency and recovery, on preventive restructuring schemes, debt forgiveness and disqualifications, and on measures to increase the efficiency of proceedings relating to restructuring, insolvency and debt forgiveness.

Also noteworthy is the approval of a Recovery and Resilience Plan, which aims to implement a set of reforms and investments to leverage sustained economic growth, with an implementation period until 2026, which in its component relating to 'Economic Justice and Business Environment', highlights the need to remove the entropy that still exists in the judicial system, particularly in insolvency and recovery proceedings, making the judicial system more effective and resilient for the benefit of micro, small and medium-sized enterprises (SMEs) and investors.

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, as well as European law. The Administrative Court of the District of Lisbon Central dismissed the claim. Following an appeal filed to the Supreme Administrative Court, on 23 January 2020 it admitted a request for a preliminary ruling to the Court of Justice of the European Union.

In its decision of 20 March 2021,[2] the Supreme Court of Justice ruled that general principles of Portuguese law, such as proportionality and adequacy, have been respected by the deliberations of the BP that determined the application of the resolution measure to Banco Espírito Santo, considering that the creation of Novo Banco was an adequate solution to achieve stability of the financial system, being proportional and necessary.

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 a stringent approach towards financial intermediaries. Indeed, courts frequently

2 Proceedings No. 1215/16.5T8LSB.L1.S1.

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 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 considers that the financial intermediary is responsible for considering the client's profile (i.e., 'know your client') and for providing information adequate to their knowledge. Indeed, on 28 January 2020,[3] 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[4] 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.

The Lisbon Court of Appeal has been making decisions in accordance with this line of thought; for example, on its decisions of 8 October 2020[5] and 15 July 2021,[6] the court ruled that if the bank has provided inaccurate information or has omitted relevant information, there is a duty to provide compensation for the caused damages.

A decision in the opposite direction was rendered on 8 October 2020 by the Court of Appeal of Guimarães.[7] 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.

However, the Supreme Court of Justice has upheld that the financial intermediary is responsible for considering the client's profile and providing adequate information on the ruling of 23 March 2021,[8] which indicates that a jurisprudential consensus on this issue might be achieved.

In addition to the duties of information, a recent decision of the Supreme Court of 19 May 2020[9] 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.

3 Proceedings No. 2142/16.1T8STR.E1.S1.
4 Proceedings No. 13636/18.4T8LSB.L1-6.
5 Proceedings No.13636/18.4TLSB.L1-6.
6 Proceedings No.4607/17.9T8LSB.L1-6.
7 Proceedings No. 1953/19.0T8GMR.G1.
8 Proceedings No. 1215/16.5T8LSB.L1.S1.
9 Proceedings No. 3039/15.8T8PNF.P2.S1.

In a decision rendered on 29 September 2020, the Lisbon Court of Appeal[10] confirmed that failure to integrate a customer in the special Out-of-Court Proceedure for the Regularisation of Default Situations (PERSI) in consumer credit agreements constitutes a dilatory exception, to be acknowledged by the court suo motu, which 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. The Porto Court of Appeal has replicated the arguments of the decision of the Lisbon Court of Appeal on its decision of 23 February 2021.[11]

Finally, it is worth noting that, in 2019, the Portuguese Competition Authority fined 14 banks the total amount of €225 million for concerted practice of exchanging sensitive commercial data, between 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 two years have been dominated by the covid-19 pandemic, which required both national and supranational 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 all – especially the European Central Bank (ECB) and BP.

European regulation

Regulation (EU) 2020/873

Regulation (EU) 2020/873 amends Regulations (EU) No. 575/2013 and (EU) No. 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 International Financial Reporting Standard - Financial Instruments (IFRS 9) to face a likely increase in provisions for expected credit losses;

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

10 Proceedings No. 1827/18.2T8ALM-B.L1-7.

11 Proceedings No. 8821/19.4T8PRT-A.P1.

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 the European Securities and Markets Authority (ESMA)) and prudential rules.

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

The European Banking Authority (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 requirements (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, from 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 do 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.

EBA first assessment of the use of covid-19 moratoria and public guarantees across the EU banking sector

EBA concluded that the covid-19-related moratoria on loan repayments constituted a relief measure to banks across the Member States, as many banks reported that loans under moratoria represented a significant share of their total loans. The recourse to these measures was particularly common for SMEs and commercial real estate.

Despite being used to a smaller extent, public guarantees ensured that banks were able to provide new lending to several companies impacted by the crisis associated with the covid-19 pandemic.

National regulation

Law 75/2020 of 27 November 2020

Law 75/2020 of 27 November 2020 approved the extraordinary viabilisation proceedings.

This regime, in addition to the institution of the new extraordinary viabilisation proceedings (PEVE), adjusts the legislation on other recovery instruments and insolvency proceedings bearing in mind the constraints companies are facing due to the covid-19 pandemic.

Decree-Law No. 22-C/2021 of 22 March 2021

According to this regime, which extended the grace period and maturity on capital for certain credit operations, all credit operations made between 27 March 2020 and 23 March 2021, which benefit from guarantees granted by mutual guarantees societies or by the Mutual Counter-Guarantee Fund, may benefit from an extension of the grace period on capital and an extension of the maturity of credits for nine months.

Decree-Law No. 70-B/2021 of 6 August 2021

The legal regime of 2012, which concerns the Action Plan Against Default Risk (PARI) and the PERSI and is aimed at ensuring an effective monitoring of the financial situation of customers covered by the covid-19 credit protection regime, was reinforced to ensure a proper monitoring of the customers covered by the covid-19 legal moratoria created by Decree-Law No. 10-J/2020, as well as other general private moratoria, including:

a the extension of the applicability of the regime to financial companies, payment institutions and electronic money institutions;

b the reinforcement of the obligations that need to be complied with under the PARI and PERSI regimes; and

c the establishment of a duty to report quantitative information to BP.

Law No. 50/2021 of 30 July 2021

Law No. 50/2021 of 30 July 2021 extends the effects of Decree-Law No. 10-J/2020 of 26 March 2020, which establishes a legislative moratorium.

The exceptional measures that were designed to protect non-financial undertakings, sole proprietorships, private charity institutions or other social economy-related entities operating or with headquarters, or both, in Portugal that engaged in credit operations with credit institutions, from the harmful effects of the covid-19 pandemic, were extended until 31 December 2021.

Nonetheless, the execution of the measures established by this law was dependent on the reactivation of the regulatory and supervisory framework established by the Guidelines EBA/GÇ/2020/02 of the EBA, from 2 April 2020, which did not occur until the end of the legal moratorium for most credits (i.e., all the credits where the adhesion to the moratorium was prior to 1 January 2021) on 30 September 2021.

At the end of August 2021, the overall amount of loans covered by moratoria was €36.3 billion, of which there were 23.500 companies covered by moratoria in August in the most vulnerable sectors, and the amount of loans to individuals covered by moratoria was €14.1 billion, of which €12.8 billion corresponded to housing loans.

BP communication on the implementation of its Macroprudential Recommendation on new credit agreements for consumers

The BP has concluded that the implemented measures concerning personal credits with maturities of up to two years, duly identified as intended to mitigate households' temporary liquidity shortage situations, were generally complied with, having the risk profile of debtors improved during the past year.

BP Public Consultation No. 6/2020

The BP led a public consultation regarding the preliminary draft for a new Code of Banking Activity, which aims to substitute the previous General Framework of Credit Institutions and Financial Companies and connected instruments, to consolidate the applicable law in this matter.

ii Sustainable finance

Within its mandate to promote the relationship 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 uniform 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 and became applicable on 10 March 2021.

On 23 June 2021, EBA published its report on management and supervision of environmental, social and governance (ESG) risks for credit institutions and investment firms, recommending institutions to incorporate ESG risks-related considerations in strategies and objectives and governance structures, and to manage these risks as drivers of financial risks in their risk appetite and internal capital allocation process. Environmental risks are also addressed in BP Circular Letter 2021/00000010 of 9 March 2021, where institutions are expected to gradually adapt to the guide on climate-related and environmental risks of the ECB. BP included in the revised draft of the Code of Banking Activity a provision specifically aimed at the management of sustainability risks.

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 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 No. 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.

The BP, in its communication of 4 January 2021, has clarified that from the 1 January 2021 the rules that limit or prohibit the payment of fees have become binding.

IV CHANGES TO COURT PROCEDURE

Court procedure rules did not suffer major changes during 2021.

Notwithstanding, Law No. 117/2019 of 26 July 2019, which came into force on 1 January 2020 and amended the Portuguese Civil Procedure Code (CPC),[12] 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:
- there was a lack or nullity of service;
- the defendant was unaware of service without fault; and
- the defendant was unable to file their 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 No. 97/2019 of 26 July 2019, 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.

12 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.

V INTERIM MEASURES

Interim measures are essentially governed by the 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).

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 or the creditor obtains payment, or both;

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 No. 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).[13]

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.

13 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.

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.

Disputes concerning banking operations are frequently submitted to arbitration where practices from the International Chamber of Commerce and International Institute for the Unification of Private Law (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.[14]

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 on 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 No. 593/ 2008).

Moreover, the provisions contained in the 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).[15]

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.[16] Within this context, in principle, the applicable law will be that of the domicile of the bank, as the provider of the service.

14 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.

15 Article 23 of the Law on General Contractual Terms.

16 Article 4 of Regulation 593/2008.

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 conflicts of 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 consumers' rights arising from the agreements. Such a clause shall be deemed void. Similarly, 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 on banks' 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, among others, 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 the risk of litigation and likelihood of civil liability of credit institutions. This situation is particularly visible in two areas of 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

The Markets in Financial Instruments Directive (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 (i.e., digital platforms typically managed by third parties where bank clients access and operate their multiple accounts opened with different banks), and digital lending (i.e., 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 the Payment Services Directive (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, which 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.

This trend is expected to continue in 2022. Indeed, the European Union is promoting the consideration of ESG issues in rules establishing duties of disclosure, risk management, classification and prudential treatment of assets. EBA is highly involved in these matters and it is expected to issue guidelines and regulatory technical standards on ESG-related issues. 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 in financial regulation were, or are soon to be, reformed. Indeed, upon the approval of the Capital Requirements Directive (CRDV) and the Capital Requirements Regulation (CRR2) in 2019, Member States are expected to adopt measures to implement the changes introduced. Furthermore, a consultation regarding the reform of the MiFID/Markets in Financial Instruments Regulation (MiFIR) regulatory framework was conducted in May 2020; hence, the European Commission is expected to propose adjustments to the regime soon.

Appendix 1

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