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4 Rb. Rotterdam 3 maart 2021, ECLI:NL:RBROT:2021:1769.

5 Rb. Rotterdam 3 maart 2021, ECLI:NL:RBROT:2021:1768.

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7 Rb. Noord-Nederland 29 januari 2021, ECLI:NL:RBNNE:2021:285.

8 National Court Rules WHOA Cases at District Courts (Landelijk procesreglement WHOA zaken rechtbanken), see

(the "WHOA Court Rules").

9 For example, see Rb. Den Haag 15 januari 2021, *JOR* 2021/77, m.nt. O. Salah, ECLI:NL:RBDHA:2021:198; Rb. Gelderland 21 januari 2021, ECLI:NL:RBGEL:2021:363.

10 Rb. Gelderland 21 januari 2021, ECLI:NL:RBGEL:2021:363

11 Rb. Amsterdam 15 januari 2021, ECLI:NL:RBAMS:2021:84.

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14 Rb. Den Haag 2 maart 2021, ECLI:NL:RBDHA:2021:1798.

Switzerland

NEW SWISS FINANCIAL ARCHITECTURE: ENFORCEMENT OF CLAIMS BY FINANCIAL SERVICE CUSTOMERS

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The recent enactment of the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) concluded the substantial reform of Swiss financial market laws which constitute the new "Swiss financial market architecture". The new regime introduces comprehensive regulation of financial services mirroring MiFID II. The prudential regime was extended significantly by subjecting all types of asset managers and trustees to public-law supervision and enforcement.

This International Briefing focuses on the civil-law enforcement of claims by financial service customers under Swiss law. During the political discussions that led to the new financial market architecture, which spanned approximately two decades, the individual enforcement of rights has been an important topic. However, the FinSA ended up introducing only minor amendments regarding the civil judicial procedure. In particular, no class-action-style procedural rules were introduced, as these still seem to be viewed as conceptually incompatible with Swiss civil law enforcement culture.

The Briefing will look at: (i) the "spillover effect" of the FinSA conduct of business rules into private law; (ii) the prospectus liability; (iii) the – very limited – special civil procedure rules in the FinSA; and (iv) ongoing legislative efforts to strengthen the procedural position of the customer.

"SPILLOVER EFFECT" OF THE FINSA CONDUCT OF BUSINESS RULES INTO PRIVATE LAW

The FinSA conduct of business rules for financial service providers, such as suitability and appropriateness testing, duties of information and the obligation to avoid or mitigate conflicts of interests are in principle of a public law nature. The double applicability theory, according to which the public law rules would be directly applicable to private contracts, was rejected in the legislative process. Instead, the conduct rules are considered to have a "spillover effect" into private law. The civil court adjudicates private law claims in connection with financial services exclusively on the basis of private law rules, in particular, for example, the liability under contract law (Art 398 para 2 of the Code of Obligations (CO)) and not on the basis of the duties of conduct under supervisory law. In other words, private parties cannot bring about the application of a public-law (FinSA) rule in financial regulation, as they are limited to suing under private law. However, the civil court may refer to the FinSA rules of conduct for financial service providers when interpreting private law rules. Hence, the FinSA standards may indirectly impact the private law relationship between the customer and the financial service provider without having a binding effect on the civil court.

It remains to be seen how significant the "spillover effect" postulated by the legislature and legal writers is in practice. First of all, the FinSA duties of conduct are in principle nothing new, since a large part of them represent a duplication of duties that are already known from the private law on service contracts. In addition, an "opposite" spillover effect of private law into supervisory law would have to be affirmed as well, so that it can be assumed that supervisory and private law obligations of financial service providers are applied in a largely synchronized manner from the start.

PROSPECTUS LIABILITY

The prospectus liability rule of the former Art 752 CO was transposed into Art 69 FinSA with few changes. The transfer to the FinSA, which is in general a public-law act, does not change the private liability nature of the rule. The provision regulates individual liability claims of purchasers of a financial instrument against persons who have made (or omitted) disclosures in the prospectus. Through the behavioural control function of the threat of liability, the provision helps to enforce the relevant disclosure rules, in particular the "content general clause" of Art 40 para 1 FinSA, on a private-law level, and furthermore serves to protect investors and their functions on the capital market.

A significant tightening of the rule, for example by means of a presumption of fault or a presumption of causality corresponding to the US-American "fraud on the market" theory, was not considered necessary

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in the legislative process. Based on the economic market efficiency theory, the fraud on the market theory assumes that all publicly available information is "priced into" the market price of shares, including material misinformation. Therefore, the US courts presume that the investor relied on the false information if the investor can show that: (i) the alleged misinformation was publicly known; (ii) the information was material; (iii) the stock was traded in an information-efficient market; and (iv) the stock was traded by the investor during the relevant period, ie while the misinformation was priced in by the injured party. The party being sued must then disprove the presumed causal link between the misinformation and the price paid for the shares. The fraud on the market theory also has its proponents in Switzerland, but was rejected by the Federal Supreme Court, and now also by the legislature in the FinSA reform. The burden of proof for a successful prospectus liability action thus remains relatively high.

SPECIAL CIVIL PROCEDURE RULES IN THE FINSA

The preliminary draft of the FinSA contained various norms aimed at simplifying civil procedural enforcement. These included a reversal of the burden of proof with regard to information and clarification obligations, special arbitration rules, a legal costs fund for financial services disputes to be established by financial services providers, which was intended to be used to cover the legal costs of customers, and collective legal enforcement instruments ("class-action-style" procedures by associations and group settlement proceedings). The above-mentioned proposals were all rejected in the legislative process.

However, the special provisions regarding the right to the disclosure of documents (Art 72 et seq. FinSA) and the ombudsman's office for financial services disputes (Art 74 et seqq. FinSA) have prevailed in the enacted version of the FinSA. The ombudsmen are not authorities and have no jurisdiction. Proceedings before the ombudsman should be "straightforward, fair, swift, impartial and inexpensive or free of charge" for the customer (Art 75 para 1 FinSA). It can replace pre-trial settlement proceedings before a civil court (Art 76 para 2 FinSA).

In comparison to the procedural rights of financial service customers proposed in the preliminary FinSA draft, the disclosure of documents and ombudsman rules seem miniscule in comparison. However, the fundamental concerns, notably that the individual customer's position in civil law proceedings should be strengthened, were included in the currently ongoing revision of the Code of Civil Procedure (CCP).

ONGOING LEGISLATIVE EFFORTS TO STRENGTHEN THE PROCEDURAL POSITION OF THE CUSTOMER

Although the draft provisions of the CCP do not contain any specific procedural norms for financial services disputes, the general intention is to reduce cost barriers and facilitate procedural coordination in line with the rules proposed in the preliminary draft of the FinSA. The CCP Bill was highly controversial with regard to the strengthening of collective redress, which is why this topic is being heard separately in Parliament.

According to current practice, anyone wishing to initiate civil proceedings must advance the entire court costs. This cost barrier may make it especially difficult for private parties (such as financial service retail customers) with limited financial means to enforce their rights. Therefore, the draft provisions of the CCP generally provide, with certain exceptions, that the advance of costs should only relate to half of the expected court costs. Furthermore, the draft CCP facilitates procedural coordination. For instance, under the draft provisions of the CCP, it will be permissible to file, under certain circumstances, several actions in the same proceeding even if the actions are subjected to different jurisdictions or types of proceedings (Art 90 para 2 draft-CCP). Although the draft CCP does not provide for any improvements specific to the financial services sector, financial service customers will nevertheless be able to benefit from a significantly lower advance of court costs as well as the simplified assertion of several actions in the same proceeding.

In addition to the representative action (*Verbandsklage*), which organisations could have used to represent consumer interests following a certification procedure, the preliminary draft CCP originally also provided for the possibility of a class settlement. In a class settlement, one or more persons accused of a violation of law and one or more organisations acting in the common interest of all persons affected by the (alleged) violation and thus (allegedly) harmed, conclude a group settlement. In the consultation process of the draft CCP, these proposals were met with scepticism and rejection especially among business associations and certain political parties, who deemed that the representative action and class settlement were highly susceptible to abuse and would promote an undesirable "lawsuit industry". They further objected that the expected new litigation and settlement cost risks would be passed on to consumers via pricing. However, there seems to be an overwhelming consensus in Parliament that the current instruments of collective redress are inadequate. Nevertheless, the Federal Council (the highest body of the executive branch of government) decided to separate the highly controversial topic of collective redress from the draft CCP in order to avoid a delay in the latter's implementation. Recently, no legislative activity relating to the topic of collective redress has occurred and it is currently difficult to predict if, when and how the Parliament will address this issue.

CONCLUSION

The regulatory rules of the FinSA are designed to have a "spillover effect" on private law rules. While the FinSA "code of business conduct" cannot be enforced by an individual, the contractual rules, which are adjudicated by the civil courts, should already be largely in line with the regulatory duties of financial service providers in Switzerland.

While the initial intention of the executive authorities to improve individual procedural rights of financial service customers in the FinSA was rather ambitious, the final version of the law does not add anything truly significant to the civil procedural rules. However, the ongoing general CCP revision may fortify the procedural position of financial services customers by allowing them to benefit from a significantly lower advance of court costs as well as the simplified assertion of several actions in the same proceedings.

The introduction of a proper collective settlement system in Switzerland is not imminent, as most political actors still consider a class-action-style settlement procedure as incompatible with Swiss legal culture. ■