Switzerland

Aurélie Conrad Hari

Bar & Karrer

NATURE OF CLAIMS

Common causes of action

1 What are the most common causes of action brought against banks and other financial services providers by their customers?

The most common causes of action between customers and banks (and independent wealth managers) relate to breach of contract mostly for breach of fiduciary duties. Typical disputes relate to mismanagement of the assets or breach of the duty to inform or duty of care by the services providers further to losses in investments. Claims are not only directed against asset managers, be it a bank or an external manager but may also target a depositary bank acting as distributor of financial products where breaches in misselling of financial products occurred (article 11 of the Stock Exchange and Securities Dealers Act (SESDA) see question 2).

Non-contractual duties

2 In claims for the misselling of financial products, what types of non-contractual duties have been recognised by the court? In particular, is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

Under Swiss law, the main duties related to the selling of financial products are set forth in the SESDA as well as in the Swiss Code of Obligations (SCO) (ie, the duties of the agent in a mandate agreement (article 398ff SCO and the liability for the issue of an offering memorandum article 752 SCO).

The duties owed to the regulator generally do not have the same grounds as those owed to the investors. There is, however, one specific provision that is a clear exception to the principle.

The most relevant provision for claims related to misselling of financial products is article 11 SESDA, which lays down the main duties of the financial services providers when offering financial products for sale. According to that provision, the financial services providers owes their customers with a duty of information, a duty of care and a duty of fairness (or fidelity). This provision is one of the few examples under Swiss law where the Swiss Federal Supreme Court acknowledged a dedicated liability ground that can be relied upon directly by the investors. Although the SESDA is a statutory act that first aims at regulating the activity of the financial services providers encompassing duties owed to the regulator, the Swiss Federal Supreme Court ruled that article 11 SESDA actually grounded a dedicated liability ground that customers could rely on directly. As a consequence, the breach of article 11 SESDA can trigger the liability of the financial services providers against their customers. Although article 11 SESDA does not encompass any duty related to a sustainability test as it is known under European Law and its MiFID directive, the Swiss Federal Supreme Court confirmed on various occasions that the duty of information when selling financial products was quite broad, although such information can be standardised. In practice, such duty is generally complied with by providing standard forms to the customers describing the risks specifically related to a certain type of financial products.

Statutory liability regime

3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

The statutory liability regime for untrue, misleading or incomplete statement in prospectus is set forth under article 752 SCO. Pursuant to that provision, anyone who has intentionally or negligently made or distributed incomplete, false or misleading statements that do not comply with the legal requirements for issue equity or bond prospectuses or similar instruments is liable to the acquirers of the security for any damage incurred thereof.

Such provision also applies to prospectus or offering memorandum related to structured products or collective investment schemes for instance.

Whether the claimant must demonstrate a causal nexus (ie, that its reliance on the untrue, inaccurate or incomplete information was instrumental in its decision making process to acquire the product) is a question that is debated among scholars. So far, the Swiss Federal Supreme Court has held that there was no reverse burden of proof in the field of prospectus liability, therefore meaning that the investor was also to demonstrate causality for the liability of the provider to be incurred. That is, however, likely to change under the new FinSA.

The FinSA (the new bill on financial services, which was enacted by the Swiss Parliament on 15 June 2018 and is to enter into force on 1 January 2020) details the duties of the prospectus issuer. Under the FinSA, anyone who intentionally breaches duties related to a prospectus will be committing a criminal offence and be subject to a fine up to 500,000 Swiss francs. The liability regime related to prospectus issuance, as well as the duties related thereto, will then be defined under the FinSA as of 1 January 2020. Although the new FinSA prospectus liability provision does not explicitly refer to a reverse burden of proof, it is foreseen that its interpretation may entail such a shift.

Duty of good faith

4 | Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

Absolutely. Good faith is not only an explicit duty under the mandate agreement (article 394ff SCO, which applies in most transactions between a financial services provider and its customer) but also a general principle under Swiss law (article 2 of the Swiss Civil Code (SCC)). According to article 2 SCC, anyone must act in good faith in any of its relationship. The main duties of the agent under the mandate agreement is to act the best interest of the principal. Based on such duty, the agent also owes a duty of fidelity to its principal, which encompasses a duty to act in good faith. Typical claims that would relate to a breach of good faith would rely on breaches related to the information duty or the duty of care of the agent, or both. Duty of fidelity would also generally be at stake, notably where the service provider was selling its own products to the customers or products that may have been issued by a third party but for which the provider had a particular interest in (eg, retrocessions). In the recent years, the Swiss Federal Supreme Court has restated in the evolution of its case law that such duty of fidelity was core in the mandate (agency) agreement and proved rather strict in its application. A core step in that evolution was the acknowledgment that the receipt by the service provider of any retrocession was owed to the customer and therefore to be explicitly disclosed and agreed upon by the customer. Absent such consent from the customer, the service provider was in breach of its fiduciary duties towards its principal and all the retrocessions perceived are due to the customer.

Fiduciary duties

5 | In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

A financial institution owes fiduciary duties to its customers in any circumstances where it acts as an agent for the principal. This entails that in most situations, such duties will apply. While such duties are at stake and will apply in most – if not all – relationships between the service provider and its customer, the exact scope of such duties may vary depending on the exact role of the provider. By way of example, the duty of care and, in particular, the information duty of a depositary bank will be more limited than that of the bank acting as an adviser of its customer.

Master agreements

6 | How are standard form master agreements for particular financial transactions treated?

Standard form agreements are common practice in the Swiss banking area. They are admitted and recognised by case law that has developed several principles to protect the customer. Generally, the attention of the customer must be drawn on any unexpected or unusual provision (which obviously may trigger some difficulties in practice). Such atypical clauses (which may actually have become quite typical but which entail any limitation in the liability of the service provider or encompass any element that may be adversary to the usual position or rights of the customer) would be highlighted (bolded) in the text. The financial institution shall also make sure that any standard documentation (eg, general terms and conditions, waiver form and obviously contracts) will be duly signed by the customer. It should also be mentioned that article 8 of the Unfair Competition Act (UCA) set forth a general principle applying in contracts with customer. According to that provision, anyone is deemed to act unfairly (and therefore subject to the sanctions set forth under the UCA, where, in a manner contrary to good faith, it uses general terms and conditions that create a considerable and unjustifiable imbalance between contractual rights and obligations to the disadvantage of consumers.

When reviewing any disputed clause, which generally boils down to interpretation of the same, the judge shall apply the general principles of contractual interpretation including the contra stipulatorem principle.

Limiting liability

7 | Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Financial institutions can indeed limit their liability to some extent, which they generally do. They can obviously not waive their entire liability. Under article 100(1) SCO, liability cannot be excluded for fraudulent intent or gross negligence. In addition, the Swiss Supreme Court also held that article 100(2) applies in the banking industry. According to that provision, the court has the discretion to disregard any limitation of liability for minor negligence clause that would have been entered into by anticipation.

In financial services, article 399 SCO also is of core relevance. According to that provision, an agent remains liable for any act performed by a third party in case of delegation of its duties. The agent's liability can, however, be limited to its sole duty of care in selecting the third party provided that the investor or customer did agree on the delegation (which is generally included in the general business terms and conditions).

Freedom to contact

8 | What other restrictions apply to the freedom of financial institutions to contract?

Freedom of contract is a general principle that is well established under Swiss law. The main limit to such freedom lies in the mere excessive undertaking set forth under article 27 SCC. In practice, this is, however, not of much relevance in the financial services industry. Same is true in respect of penalty clauses. Such clauses are subject to specific requirements under Swiss law but they are rarely used in contracts between financial institutions and customers (except possibly in credit or mortgage agreement where the penalty would generally correspond to the damage incurred by the financial institution in case of earlier termination).

Litigation remedies

9 | What remedies are available in financial services litigation?

Most types of remedies would be available under Swiss law, such as specific performance, rescission, damages, injunctive or declaratory relief. In financial services litigation, the most common remedy, however, remains the claim for damages. Under Swiss law, compensation can only be sought for actual incurred damages. Punitive damages are not available. Future or hypothetical damages cannot be indemnified either.

The claimant must ensure to seek payment of damages in the currency applying to the claim. Failure to seek a relief in the accurate currency would actually entail the claim being dismissed irrespective of any damages having effectively been suffered.

Limitation defences

10 | Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

Time limitation is a delicate issue under Swiss law especially in the field of financial services. This is mainly because, as with other contractual relationships, the financial services generally encompass steady actions from one party or the other (eg, successive transfers or orders to buy or sell financial products). Also, the contractual relationship may actually last while there is no longer any deposit, be it on cash accounts or on the client's portfolio.

They are two precedents that are worth being mentioned here as they paved the way for important claims in that field. First, the Swiss Federal Supreme Court held that statute of limitation for the claim for restitution of money unduly transferred to the bank does not start running as long as the account relationship still exists. In other words, the statute of limitation does not commence upon the – disputed – transfer of assets out of the customer's account.

Finally, over the past years, the industry went under some revolution which is referred to as the retrocessions saga. As mentioned previously, the Swiss Federal Supreme Court held in a landmark case in 2006 (confirmed and further specified since then) that any retrocession perceived by a bank from fund providers or other distributors of financial products acquired on behalf of a client was owed to the customer. Such decision also applied retroactively but it was debated for some years which limitation period was to apply to such claims, that is, five or 10 years. In a further landmark case, the Swiss Federal Supreme Court held that such claim for reimbursement of retrocessions would only be time-barred after 10 years, thereby choosing the longer limitation period, which is the same duration that applies to contractual claims between a financial institution and its customer.

PROCEDURE

Specialist courts

11 | Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

The organisation of Swiss courts differs from one canton to the other in Switzerland as it is a cantonal prerogative to organise its judiciary, exclusive of the Swiss Federal Supreme Court, which is the highest court in Switzerland ruling as the last and final instance further to, generally, two cantonal instances.

Zurich has established a commercial court that would rule on the banking matters at the cantonal level. However, in Geneva, as in most other cantons, there is no dedicated court for financial services matter nor general commercial matters. The judges are, therefore, not specialists in financial matters but they are usually used to these kinds of disputes in Geneva and Zurich, where most banks are seated and, therefore, where most financial disputes take place.

Procedural rules

12 | Do any specific procedural rules apply to financial services litigation?

There is no specific procedural rule applying to financial services litigation. Such disputes are subject to the same general procedural rules as any other disputes.

The FinSA will, however, entail a few additional procedural provisions, mainly to urge the parties to refer to mediation.

Arbitration

13 | May parties agree to submit financial services disputes to arbitration?

Under the Swiss Arbitration Act, which is set forth under Chapter 12 of the Swiss Private International Law Act (PILA), any dispute that is of a patrimonial nature can be subject to arbitration. An arbitration agreement, however, has to be validly entered into and be made in writing by the parties.

Although from a formal standpoint, any financial services disputes may be related to arbitration, it is rare that such disputes are subject to arbitration, notwithstanding the fact that Switzerland is well known as an international arbitration hub. So far, the Swiss banking industry has not demonstrated any significant interest in arbitration. The first draft bill of FinSA did provide for specific arbitration mechanisms, but they were clearly rejected by the industry during the consultation process. Although the enthusiasm has so far proved quite limited, this may change in the future.

Out-of-court settlements

14 | Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

There is no such duty in Switzerland to refer to mediation prior to litigate. However, the new civil procedural code that entered into force in 2011 requires that any claim be first submitted to conciliation. Basically, the first step to file a claim before a Swiss court is to file such a request for conciliation, which will be attempted by the court. This step is actually the first action in the proceedings and already creates the lis pendens.

Besides this, the customer may also refer the dispute to the Swiss banking Ombudsman. The latter acts as a mediator in banking dispute and can be used prior to starting any litigation. This is, however, not compulsory. The services of the Ombudsman is free of charge. He or she will make a proposal to the parties who are free to accept or decline it. Their rights to then file the claim before courts remain entirely unaffected.

Pre-action considerations

15 | Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

There is no such requirement by statute. However, any specific mechanisms may be agreed upon contractually by the parties. Should this be the case, the parties shall then comply with them prior to formally start litigation although there is so far only limited case law on the compulsory nature of such mechanisms.

Unilateral jurisdiction clauses

16 | Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses are generally admitted under Swiss law provided that they have been validly entered into. However, the consumer protection regulation may limit such freedom. In particular, the Lugano Convention (LC), applying before the Swiss courts when one of the parties is residing in a member state (which is always the case when one of the litigants is a Swiss financial institution), would limit such freedom, as the customer would still be entitled to bring the claim in a jurisdiction commanded by article 16 LC of the Lugano Convention irrespective of the jurisdiction clause agreed upon in the contract. Indeed, article 17 LC prevents any derogating choice of law made prior to the dispute.

Disclosure obligations

17 What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

Swiss law does not encompass any disclosure in the sense known in common law jurisdictions. There is therefore no broad or fishing disclosure that can be applied in a Swiss proceeding. However, this does not mean that no disclosure can be achieved at all. Indeed, the parties still have some procedural means to request specific documents from the opposing or third parties. This request must, however, be made timely and must be very specific. The requesting party will then have to be in a position to describe precisely the type of document that is sought, most likely its date, and must establish that the document (i) exists, (ii) is in the hands of the required party and (iii) is necessary or relevant to the outcome of the case.

In relation to financial services dispute, banking secrecy (article 47 Banking Act (BA)), is of particular relevance. It is however not a rampart that would prevent any disclosure of any document by a bank. First, banking secrecy cannot be opposed in criminal proceedings, which supersedes such duty to keep secret any banking information related to the client. Any breach of such duty under article 47 BA is a criminal offence.

In civil proceedings, banking secrecy can be invoked as a ground for refusal to give testimony or to provide information/documents. Such a ground shall, however, only be deemed legitimate provided that the secret holder can render likely that the interest in keeping the secret shall prevail on the interest in the establishment of the truth (article 163 (2) of the Swiss Civil Procedural Code (SCPC)). Absent such prevailing interest, the required party shall have no legitimate ground to refuse to collaborate and shall then give evidence. In practice, it is very unlikely that keeping the secret shall prevail on the establishment of truth and such defence is therefore rarely admitted.

Finally, taking of evidence on Swiss soil also is subject to blocking statutes. Typically, when documents are sought from a bank located on Swiss soil, any request to provide evidence in a foreign proceedings, which the bank is not a party in, shall be made through the mutual assistance channel. Any request that would be directed by a party or its representative directly on Swiss soil without relying on the official channel would constitute a criminal offence under Swiss law (article 271 of the Swiss Criminal Code (SCC)). As a consequence, anyone who takes any step in view of serving a Swiss based entity or individual on Swiss soil with any disclosure request will be exposed to prosecution and criminal sanctions under Swiss law.

Beside, any transfer of data shall also comply with data protection regulation and may therefore prevent the transfer of data related to employees or clients.

Protecting confidentiality

18 Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

When the client is a party to the proceedings, it should generally not be in a position to oppose to any disclosure of documents related to itself.

When disclosure is required in respect of third parties to the proceedings, the bank can rely on banking secrecy and use the ground set forth under article 163 (2) SCPC to refuse disclosing such information. As detailed above (see question 17), such a ground for refusal is unlikely to be admitted unless it can be easily demonstrated that such information would be irrelevant to the outcome of the case.

Disclosure of personal data

19 May private parties request disclosure of personal data held by financial services institutions?

The parties can request the disclosure of their personal data at any time, even outside of any court litigation. This has been confirmed by the Swiss Federal Supreme Court on various occasions and article 8 of the Data Protection Action actually now also grounds a further mean for customers to get access to information related to their file. This provision is a new course of action to gather information by the customer, which before relied only on the duty to account that the agent owed to its principal under article 399 SCO.

Data protection

20 What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Full disclosure is unknown as such under Swiss law (see question 17). For this reason, there is no reliance on electronic disclosure in Swiss proceedings as we have no discovery proceeding. As a consequence, the developments that occurred in the common law jurisdictions as to the admissibility of e-disclosure and then the modalities to perform it have not occurred in Switzerland where such issues are moot.

INTERACTION WITH REGULATORY REGIME

Authority powers

21 What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

The main regulatory authority in Switzerland is FINMA, whose main task is to supervise the financial institutions, banks, insurance companies, stock exchanges, securities dealers and collective investment schemes. FINMA is therefore also in charge of enforcement proceedings against the supervised entities when regulatory breaches are suspected. In order to perform its duties, FINMA is empowered with various tools and can notably:

- request that information be provided;
- open formal proceedings against the supervised entities;
- appoint independent and suitably qualified person to investigate circumstances under review; and
- to issue sanctions against the supervised entities in case the breaches are confirmed.

Although FINMA would actually lead and conduct its own enforcement proceedings, it would not bring civil proceedings before civil court but may report any suspicion of criminal offences to the public prosecutor's office.

The public prosecutor then is entitled to investigate and prosecute any criminal offence. Both administrative enforcement investigated by FINMA and criminal investigation by the public prosecutor office can be conducted in parallel.

Disclosure restrictions on communications

22 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

Mutual assistance between administrative and criminal authorities is acknowledged in the Swiss regulation. As a consequence, any communication and documents transferred from the financial institutions to the regulator is not strictly privilege as such as the regulator may provide it to the public prosecutor office. In addition, the Swiss Federal Supreme Court also ruled that any internal investigation conducted by the financial institution absent any formal enforcement proceedings was also to be disclosed to the public prosecutor by the financial institution itself upon request of the criminal authorities without the entity being in a position to rely on any privilege in respect of such a report. Such outcome is highly criticised among Swiss scholars.

Finally, privilege fully applies among private parties. While an investor can report breaches to the regulator, it will not be given any status in the enforcement proceedings and therefore will not be granted any access to the regulator's investigation file (unlike in a criminal proceedings should the investor be a private plaintiff). As a consequence, a report to the regulator cannot be used as a tactic by a claimant to gather information on the financial institution.

Private claims

23 | May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Private parties cannot bring a court claim against financial institution directly for regulatory breaches. The civil court would actually not have jurisdiction to hear such claim. Further, a private party would not have any standing to sue in such claim. That being said, a private party may report a regulatory breach to the regulator. The role of the private party would, however, be limited to that initial reporting. It would then not have any further role in the enforcement proceedings against the supervised authority and would in particular not become a party to the investigation proceedings.

24 | In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

No, the regulator is under no such duty to disclose any ongoing or past investigation against a supervised entity. It is only under specific circumstances that FINMA may decide to report on a specific ongoing investigation should a particular public interest command for such information to be disclosed. In particular, FINMA publishes a warning list of the entities and individuals that may be carrying out unauthorised services while not being supervised by FINMA.

Enforcement

25 | Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

Generally, the review is conducted by FINMA or a delegated investigating expert appointed by FINMA. Outside any formal enforcement proceedings initiated, it may, however, happen that some review may have been done already by private parties, in particular by the institution itself. In such cases, FINMA is likely to request to review the investigation performed and may use the outcome of the same. The financial institution and FINMA may agree on specific review to be conducted by private parties, be it the institution itself or an appointed expert or investigator. In such cases, FINMA will then assess the outcome of the conducted review and then decide whether a formal enforcement proceedings will be started.

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& KARRER

Aurélie Conrad Hari
aurelie.conradhari@baerkarrer.ch

Bär & Karrer Ltd.
12, quai de la Poste
CH-1211 Geneva 11
Switzerland
Tel: +41 58 261 57 00
Fax: +41 58 261 57 01
geneva@baerkarrer.ch

Changes to the landscape

26 | Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

Main changes in the landscape lie in the increasing and constantly evolving regulation. Compliance duties have extensively increased, too. In Switzerland, the entire regulation on financial services has been completely reviewed and restructured in two new bills that will enter into force on 1 January 2020, the FinSA and the Financial Institutions Act (FinIA), which main purpose aims at strengthening the investor's or customer's protection.

Complaints procedure

27 | Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

As previously discussed, there is no duty for any party to first attempt any out-of-court settlement process prior to starting litigation. However, mediation is urged and specific regulation in this respect is specifically set forth in the FinSA but will remain an option and does not become compulsory either.

There is no dedicated complaint procedure that a party may or must have to consider prior to starting court proceeding. However, a private party may first seek the services of the Swiss Banking Ombudsman to attempt solving the dispute outside of courts.

Recovery of assets

28 | Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

There is under Swiss law a specific depositor protection mechanism for clients of banks and securities dealers. This is a three-tiered system to protect the clients' deposits to the best possible extent. As a first step, upon the bankruptcy of a financial institution, cash deposits of the clients will be immediately reimbursed to clients up to 100,000 Swiss francs per client provided that the institution has sufficient liquid assets (first tier). Absent sufficient liquid assets, the amount to the above-mentioned limit will be paid out by the depositor protection scheme (second tier). In addition, when a financial institution is declared bankrupt, additional deposits up to 100,000 francs are treated preferentially and secured to provide extra protection. Such deposits are ranked under the second creditor class and therefore are paid out before the claims of third-class creditors (third tier).

The deposits in excess of the above thresholds do not qualify for any dedicated protection and will therefore be recovered through usual bankruptcy proceeding as liquidation dividend if possible.

Finally, it is worth mentioning that unlike deposits, custody assets (eg, shares, fund units, etc) belong to the client and are therefore distracted from the bankruptcy estate to be transferred back to the client. The value of the investor's portfolio is irrelevant to assess its benefits under the depositor protection scheme, which applies on top for cash deposits.