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Austria

JULIAN RING AND MARTIN SPITZER

I. Jurisdiction

A. Introduction: A Flood of Cases Concerning Investment Products

Since 2008, a vast number of legal actions against banks and other financial companies have been brought before Austrian courts. These cases concern miscellaneous financial products, ranging from investment products to credit agreements. They are based on various kinds of (alleged or in some cases actually confirmed) wrongdoings by the defendants and they have been filed by both private and business investors alike.

Since there is a special jurisdiction over specific claims against businesses (arising from contracts the defendant entered into in the course of his commercial or professional activities, §§ 51, 52 JN)[1] and since most financial institutions are domiciled in Austria's capital city Vienna, most cases are pending before only two courts of first instance: the Vienna Commercial District Court (BGHS),[2] which has jurisdiction in cases with an amount in dispute of up to €15,000 (§§ 52, 65, 75 JN), and the Vienna Commercial Court (HG),[3] which has jurisdiction in cases involving claims with even higher values (§§ 51, 65, 75 JN).

In November 2012, more than 8,700 of such proceedings were pending before the Vienna Commercial District Court and the Commercial Court of Vienna. In total, these proceedings deal with around 22,000 claims, around half of which are part of so-called 'Austrian class actions'. Many of these claims are directed against only a handful of financial companies, the most prominent being Meinl European Land Ltd (now 'Atrium European Real Estate'; around 3,200 actions),

[1] *Jurisdiktionsnorm*, Court Jurisdiction Act; Federal statutes are available at: http://ris.bka.gv.at/Bund.

[2] Bezirksgericht für Handelssachen Wien.

[3] Handelsgericht Wien.

Constantia Privatbank AG (now 'Aviso Zeta'; around 2,000 actions) and Immofinanz/Immoeast (around 1,300 claims).[4]

B. Constantia

The cases against Constantia result from the aftermath of the bankruptcy of Lehman Brothers. They all deal with a financial product called 'Dragon FX Garant'.[5] Constantia Privatbank AG (Constantia) promoted Dragon FX, which was a certificate based on a basket of various Asian currencies[6] issued by Lehman Brothers Treasury Co. In order to advertise their product, Constantia produced a brochure which eye-catchingly stated that the buyer of the certificate would enjoy 'enormous potential and 100% security' by means of a '100% capital guarantee', boasting three excellent ratings (A1/A+/A+). The investment would have no risk of loss whatsoever.

The brochure, however, did not reveal that the guarantor for the certificate was not a company independent from Lehman Brothers Treasury Co but the Lehman Brothers Holding Inc, a grandparent company of the former. When advertising Dragon FX in 2006, Constantia deemed the risk of default by Lehman to be of a merely theoretical nature. In late 2008, however, theory turned into practice: as commonly known, the Lehman Brothers group filed for bankruptcy. Subsequently, the value of Dragon FX dropped, rendering the capital guarantee worthless.

The first Supreme Court procedure[7] concerning this case was not initiated by investors seeking damages or contract avoidance, but by a non-profit consumer protection organisation[8] which filed a lawsuit against Constantia requesting to prohibit the use of such, or similar, brochures. The claimant argued that the wording of Constantia's brochure violated competition law since, first, it was capable of misleading an average reader of the target group to believe that Constantia itself was giving a guarantee for the product.[9] Secondly, the close connection between the issuer (Lehman Brothers Treasury Co) and the guarantor (Lehman Brothers Holding Inc) was not disclosed. Therefore, investors had at least reason to believe that the guarantor was an entity independent from the issuer.

[4] All previous numbers taken from: S Kalss, 'Der zivilrechtliche Schutz der Anleger in Österreich—ein Überblick über die große Verfahrenswelle' (2013) *ZBB* 126.

[5] For an overview of the Dragon FX cases see also: J Baier, 'Die Rechtsprechung des OGH zum Dragon FX Garant—Ein Überblick' (2012) *ZFR* 113.

[6] Concerned countries were China, India, Malaysia, Indonesia and the Philippines.

[7] 4 Ob 176/10a ÖBA 2011, 265 = ZFR 2011/42 = ÖBl-LS 2011/51 = ecolex 2011, 343 (*Horak*) = RdW 2011, 219; decisions of the OGH can be found at: www.ris.bka.gv.at/Jus.

[8] Verein für Konsumenteninformation (VKI); the VKI is one of the entities entitled by law to file competition law suits even though they are not affected by the respondent's actions: UWG (*Bundesgesetz gegen den unlauteren Wettbewerb*, Act against Unfair Competition) § 14(1) and KSchG (*Konsumentenschutzgesetz*, Consumer Protection Act) § 29(1).

[9] For such claims it is not necessary to prove that the respondent actually misled certain customers, but only that his actions are likely to do so.

The claim was rejected by the Supreme Court, the OGH,[10] which argued that the brochure could not evoke wrong assumptions concerning the guarantor, since it did not contain any information regarding its identity. Moreover, the OGH emphasised that, when Dragon FX was sold, the risk of insolvency of the Lehman Brothers Holding Inc was indeed only of theoretical nature; therefore, the statements concerning the risk of the certificate at hand were not misleading.

Only three months after this judgment, the OGH had to deal with the first claim by *private investors* concerning Dragon FX.[11] Their claim—substantially they reclaimed their lost money—was primarily based on avoidance of the contract due to mistake. For such claim, three main requirements must be met:[12] first, the mistake must be relevant, meaning that it concerns the (subject of the) contract itself[13] and not only the mere motives for its conclusion. Secondly, the mistake must have led to the conclusion of the contract. Finally, the mistake must have either been caused by the contractual partner, or have been obvious to the latter or been clarified in good time.[14] Here, the claimant argued that the mistake (which led to conclusion of the contract) was caused by the defendant by violating duties to inform, thereby invoking regulatory duties set forth in §§ 11 et seq WAG[15] 1997, which provide for duties of care and good conduct.[16]

Of course, the above-cited judgment rejecting the brochure's general capacity to mislead an average member of Dragon FX's target group made it difficult to prove that the claimants in this case were misled unduly. The OGH therefore dismissed the claim for reasons similar to the ones brought forward in the first Dragon FX case: it was not to be assumed that the respondent caused any mistake concerning the identity of the guarantor since he did not give any misleading information at all. Also, the respondent did not violate any duties to inform according to § 871 (2) ABGB[17] by refraining from warning about the general risk of insolvency of the issuer respectively the guarantor. After this decision, the OGH decided on substantive and procedural aspects of numerous comparable cases, all with the same outcome: no avoidance of the contract shall be granted.[18]

[10] Oberster Gerichtshof.

[11] 4 Ob 20/11m, EvBl 2011, 825 (*Klausberger*) = RdW 2011, 474 = JBl 2011, 708; see also: G Graf, 'Sind Drachen wirklich so harmlose Tiere?' (2011) *ecolex* 506.

[12] S Perner, M Spitzer and G Kodek, *Bürgerliches Recht*, 3rd edn (2012) 86 et seq.

[13] This, according to ABGB, § 871(2), is always the case when a duty to inform has been violated.

[14] Perner, Spitzer and Kodek, *Bürgerliches Recht* (n 12) 90.

[15] *Wertpapieraufsichtsgesetz*, Securities Supervision Act. The WAG was revised in 2007 in order to implement the MiFID (Markets in Financial Instruments Directive, 2004/39/EG) into national law.

[16] Contrary to the WAG 2007, the duties in the WAG 1997 were broadly phrased and much less detailed. Of interest in this case was (1) WAG 1997, § 11, providing that a financial institution shall act in the best interest of its customers, and § 14 No 1 providing that a bank may not advise its customers to buy products which do not comply with the customers' interests.

[17] *Allgemeines Bürgerliches Gesetzbuch*, Austrian General Civil Code.

[18] eg 8 Ob 148/10p, 9 Ob 87/10z, 4 Ob 20/11m, 8 Ob 38/11p, 7 Ob 29/11g, 7 Ob 79/11k, 8 Ob 47/11m, 1 Ob 71/11i, 1 Ob 108/11f, 1 Ob 109/11b, 1 Ob 135/11a, 7 Ob 107/11b.

i. Constantia: 6 Ob 116/11v (Avoidance of Contract if Bank Fails to Name Issuer and Guarantor)

An exception to this was the decision 6 Ob 116/11v:[19] here, the claimant was not given the respective brochure, but only had a brief telephone conversation about Dragon FX with one of Constantia's employees. The employee, however, mentioned neither the issuer nor the guarantor of the investment product, causing the claimant to believe that Constantia was the issuer of Dragon FX. The OGH found this to be a violation of duties to inform arising from regulatory provisions applicable to this contract (§ 13 No 4 WAG in the version of BGBl No 753/1996, which provides that investors are to be given all material information concerning the intended transaction). Therefore, Constantia had caused a relevant mistake and claimant was entitled to avoid the contract. The price of the investment papers was to be paid back.

The points of interest in this ruling are, first, the line the OGH draws between solely failing to name the guarantor (which had not been reason enough to avoid the contract in the past; see above) and failing to name both guarantor and issuer of the security (which led to voidability of the contract). Secondly, this case gives a good example for obligations deriving from regulatory law and their impact on civil law.

ii. Constantia: 4 Ob 129/12t (Financial Adviser Can Be Vicarious Agent of Bank)

In 4 Ob 129/12t,[20] the claimants were advised by a third party (AWD), while Constantia solely carried out transactions as customers ordered. Here, the claimants tried to reclaim their money not by avoiding the contract based on mistake, but rather by claiming damages[21] for wrong information provided by AWD, which had—according to the claimants—claimed that Constantia, rather than Lehman, was acting as guarantor for Dragon FX. The harm done, they argued, consisted of the fact that due to AWD's wrong advice they now possessed securities they never wanted, namely securities without the promised guarantee by Constantia.[22] As compensation, they requested the price of the securities in exchange for returning them.[23]

[19] 6 Ob 116/11v; ÖBA 2012, 67.

[20] 4 Ob 129/12t, EvBl 2013, 316 (*Foglar-Deinhardstein*) = ZFR 2013, 85 (*Steinmair*) = wbl 2013, 230 = ÖBA 2013/1921 (*Rabl*) = RZ 2013, 140 EÜ120; see also P Bydlinski, 'Haftung der Bank für Fehlberatung durch den Vertriebspartner?' (2013) *ÖBA* 463; G Graf, 'Bank haftet für ständig betrauten Vertriebspartner' (2013) *ecolex* 762.

[21] For an English introduction into the Austrian tort law as well as law of contractual damages, see H Koziol, *Basic Questions of Tort Law from a Germanic Perspective*; the main requirements for claims for damages are: (1) damage, (2) causation, (3) unlawfulness and (4) fault.

[22] This view is in accordance with settled case-law; see RIS-Justiz RS0022537.

[23] Of course, damages due to wrong advice can never be granted amounting to the theoretical maximum value of the bought securities; see RIS-Justiz RS0108267.

As this suit was not filed against AWD, but against Constantia, the main question here was whether AWD was acting as a vicarious agent for Constantia. In more general terms: under which conditions can a bank be held responsible for actions of a third party financial adviser? Doctrine had discussed this problem thoroughly before the case was decided, but was divided on this question.[24] The OGH clarified these issues as follows: when clients are advised by a third party securities service company, banks may exclude their own duties to inform. If it must be obvious for a bank that, for some reason, the third party adviser will not fulfil his duties properly, however, such exclusion will be null and void. The obligation then still rests upon the bank.[25] If the bank nevertheless assigns this third party to inform clients on the basis of a permanent business relationship, it will be assumed that the bank uses the adviser to fulfil its own duties, which will make it reliable for its actions according to § 1313a ABGB.

Here, the OGH found that this was exactly the case. Therefore, any wrongful acts of AWD concerning advising Constantia's customers will be seen as undertaken by Constantia itself. The OGH emphasised that the bank does not have to bear the damages ultimately since it has the right to take recourse against the financial adviser. The OGH did not decide on the merits here, but sent the case back to the court of first instance to verify whether AWD had indeed claimed that Constantia was guarantor of Dragon FX. More recently, in a case very much comparable to this one (also with Constantia as respondent, but not concerning Dragon FX), the OGH continued this reasoning and granted damages to investors.[26]

C. Meinl Bank

Maybe the most emotionally debated cases concerning a bank's duty of care are the Meinl Bank cases. The respondents were the Austrian-based bank Meinl Bank AG (Meinl Bank) and its daughter company Meinl Success Finanz AG, which specialised in advising investors about Meinl Bank's financial products. The product of interest here was a share certificate of a real estate company, called Meinl European Land (MEL), based on Jersey. Since MEL is not Austrian, its shares could not be traded 'directly' on the Austrian stock market. Instead, Meinl Bank sold certificates which represented the value of the actual MEL shares.

Until mid-2007, MEL did not make public that it had bought back a number of its own certificates worth around €1.8 billion. While Austrian courts are still investigating whether this act constituted illegal price manipulation,[27] the Jersey

[24] See references in the decision.

[25] See also 1 Ob 48/12h ZfRV-LS 2013/23 (*Ofner*) = ecolex 2013, 323 = ÖBA 2013, 506 (*Thiede*) = Jus-Extra OGH-Z 5369 = RdW 2013, 334 = ZVR 2013, 76.

[26] 2 Ob 24/13p, ecolex 2013/310 (*Wilhelm*), VbR 2013/10.

[27] The opinion approving this found support in a report of an expert appointed by the public prosecutor; see A Möchel, 'Ein fragwürdiger Market-Maker' *Wiener Zeitung* (27 August 2012).

Financial Services Commission found this to be permissible under Jersey law.[28] Nonetheless, holders of MEL certificates lost trust in the company and started selling their securities; the stock price dropped drastically, giving investors reason to find legal grounds to reverse the deal they had made.[29] Again, it was a brochure—issued by both Meinl Bank and Meinl Success Finanz AG to advertise the MEL certificates—that gave rise to claims by investors that they had been misinformed and/or misled. In this brochure the respective securities were inaccurately called 'shares'; in fact they were, as stated above, certificates representing shares. Also, the risk of the securities was downplayed in the brochure (it did, however, refer to the official prospectus of the security for further information).

Just like in the Dragon FX case series, the first MEL case before the OGH concerned the bank's compliance with *competition law*. The OGH ruled that the respondents could no longer use the term 'shares', if they did not disclose that the certificates in question were in fact share-representing certificates. In respect of the brochure's statements about the risk of the paper, the OGH admitted that it is not a bank's duty to inform about all possible risks in advertising brochures, for such detailed information is to be communicated in the prospectus of the respective security. If a bank decides to inform about such risks in advertising material, however, the given information must not be misleading. Since this was the case, further use of the respective statements was to be refrained from.

i. Meinl Bank: 4 Ob 65/10b and 8 Ob 25/10z (Contract Avoidance Due to Mistake Caused by Bank)

After the above-cited competition law judgment, public attention focused on the fourth senate of the OGH, which had to give its first, highly anticipated judgment concerning a customer who claimed to have been misled by Meinl Bank's brochure and, therefore, that he had the right to avoid the contract over the certificates in question.[30] Of course, the fact that there already had been a competition law judgment against the respondent did not mean that the claimant would succeed in his claim to avoid the contract due to mistake: as mentioned above, for this purpose, it is necessary to prove that the claimant was actually misled and, furthermore,

[28] Press Release of the Jersey Financial Services Commission in February 2012, available at: www.jerseyfsc.org/the_commission/general_information/press_releases/release279.asp.

[29] Meinl claims that this was only due to the global economic crisis; see www.meinlbank.com/.

[30] As examples for media attention in the daily press, see: P Aichinger, *Die Presse* (27 October 2009) 11; C Höller, *Die Presse* (18 November 2009) 15; J Urschitz, *Die Presse* (19 November 2009) 1; J Hierländer, *Die Presse* (27 November 2009); doctrine also discussed the outcome of such case beforehand; see: G Wilhelm, 'Irreführende Werbung und ihre rechtsgeschäftlichen und Haftungsfolgen' (2009) *ecolex* 92; H Krejci, 'Zur Anfechtung von Wertpapierkäufen wegen irreführender Werbung und Beratung' (2010) *ÖJZ* 10.

that his misconception led to the conclusion of the contract. Proving the general capacity to mislead an average member of the security's target group is not sufficient for such claim.[31]

Still, the OGH decided in favour of claimant: although the Court admitted that wrong assumptions about future price developments are naturally always to be seen as mere motives for investing in certain securities, and thus do not constitute a relevant mistake,[32] it found that the claimant thought that he would be investing in low-risk securities while he actually received high-risk investments.[33] Therefore, the mistake concerned the subject matter of the contract; furthermore, the respondent had caused the mistake by stating wrong information in the brochure[34] which, in turn, led to the agreement. These requirements being met, the contract could be avoided.

Shortly after this decision, the eighth senate of the OGH decided on an almost identical case: here, the claimant was certain that he had actually bought MEL shares, not share-representing certificates. Again, the OGH decided in favour of claimant.[35]

ii. Meinl Bank: Addendum

In several decisions that followed, the OGH determined investors' rights in this context more precisely. Among scholars, special attention was paid to the judgments concerning the so called '*aliud* problem'. Whereas 4 Ob 65/10b and 8 Ob 25/10z were decided upon the assertion of mistake during completion of contract, in 4 Ob 93/11x[36] the claimant based his argument not on avoidance of contract due to mistake. Instead, he claimed that the contract he had entered into was concluded over shares, and not certificates. What was delivered

[31] As most recently emphasised in 2 Ob 19/13b, factors like expertise and/or general education of the claimant, on the other hand, cannot preclude him from claims based on contract avoidance due to mistake. Of course, it will make it harder to furnish proof of the necessary requirements.

[32] Mistakes concerning only motives for the conclusion of the contract generally do not make contracts voidable.

[33] 4 Ob 65/10b = ecolex 2010, 952 (*Wilhelm*) = EvBl 2011, 28 = ZFR 2011, 25 (*Pletzer*) = RdW 2010, 767 = ÖBA 2011, 582; see also: G Graf, 'Zur Schadenersatzhaftung des schuldhaft Irrenden' (2010) *ecolex* 1131; P Leupold and M Ramharter, 'Ausgewählte Aspekte der Irrtumsanfechtung beim Wertpapierkauf' (2011) *ÖJZ* 107; M Oppitz, 'Zur irrtumsrechtlichen "MEL"-Judikatur des OGH' (2011) *ÖBA* 534; A Riedler, 'Schadenersatzpflicht irregeführter Anleger?' (2011) *ecolex* 194; A Vonkilch, 'Von Geschäftsirrtümern und Sollbeschaffenheiten beim Wertpapierkauf, irrtumsrechtlichen Kausalitätsbeweisen und Mitverantwortlichkeiten von Irrenden' (2011) *JBl* 2.

[34] Again, the reference to the accurate prospectus in the brochure could not prevent this fact.

[35] 8 Ob 25/10z Zak 2010, 377 = EvBl 2011, 31.

[36] 4 Ob 93/11x Zak 2012, 15 = RdW 2012, 16 = ÖBA 2012, 114/1776 = ecolex 2012, 27 (*Wilhelm*); = JBl 2012, 175 (*Geroldinger/Radler*) = JAP 2011/2012/20 (*Liedermann/Philadelphy*) = ZFR 2012, 88 (*Rabl*) = ZIK 2012, 76; see also P Leupold, 'Aktien vs Zertifikate—zur aliud-Problematik—Zugleich eine Besprechung von OGH 22. 11. 2011, 4 Ob 93/11x' (2012) *Zak* 23; A Riedler, 'Aktien erklärt, Zertifikate gekauft—"(k)ein Zweifel"?' (2012) *ecolex* 20; G Wilhelm, 'Das unbekannte Qualifikations-Aliud—Eine Kritik zu 4 Ob 93/11x' (2011) *ecolex* 1073.

afterwards—MEL certificates—was, according to the claimant, something entirely different, which had to be considered a so-called 'aliud'. Hence, this case was not decided as a case of vitiation of consent but rather a case of breach of contract. Granting claims for breach of contract would result in markedly different rules on the respective limitation periods: while the latter prescribe only three years after the conclusion of the contract (§ 1487 ABGB) or after the damage becomes evident (§ 1489 ABGB), such claim can be enforced within 30 years after conclusion of the contract (§ 1478 ABGB). For many investors who had waited too long to sue Meinl Bank this line of argument now somewhat constituted their 'last resort'—for banks, of course, it was a serious threat.[37] The OGH decided in favour of respondent: since the certificates at hand had almost *identical functions* as shares, they were not to be considered an aliud; the claim was dismissed.

In 2014, the OGH decided over a case comparable to the above cited 4 Ob 65/10b and 8 Ob 25/10z. Here, a customer claimed inter alia that he had been purposely misled (*List*), a line of argument that also leads to the long period of limitation of 30 years (§§ 1487, 1478). The OGH granted the claim,[38] which lead to the assumption that MEL will continue to be subject of a vast number of disputes in the future.[39]

D. Immofinanz

Immofinanz is a listed real estate company based in Austria, which was tightly connected with Constantia, which provided the entire management, infrastructure as well as personnel for Immofinanz.[40] Since the former CEO of both Constantia and Immofinanz is suspected of having taken part in several financial offences,[41] Immofinanz has been subject to intensive media attention. Before this, in the course of several increases of capital stock, optimistic shareholders invested billions in Immofinanz shares. Thereby, Constantia worked as the issuing bank. In the course of the global economic crisis, Immofinanz' shares dropped in value in 2008 and investors took legal steps against Immofinanz. Inter alia, they claimed that the capital they invested was not used as the company claimed, namely for investment in real estate, but rather to support associated companies.

[37] M Schauer, 'Zertifikate statt Aktien: Das Aliud als Ausweg?' (2011) *RdW* 3; G Schima, 'OGH: Aktienzertifikate kein "Aliud" gegenüber Aktien' (2012) *RdW* 3.

[38] 6 Ob 203/13s.

[39] O Jaindl, 'Anwalt: Bahnbrechende OGH-Entscheidung im Fall MEL' *Wirtschaftsblatt* (4 April 2014).

[40] Geschäftsbericht 2002/2003, 17, available at: http://www.immofinanz.com/de/investor-relations/berichte/.

[41] See eg APA, 'Immofinanz will Buwog-Provision zurück' *Der Standard* (7 July 2013).

i. Immofinanz: 7 Ob 77/10i (Protection of Investors Has Priority Over Prohibition of Investment Reimbursement; Investor Carries Burden of Proof Concerning Alternative Investments)

In this very thoroughly discussed decision[42] the claimant sued Immofinanz, Constantia as the issuing bank as well as their CEO. The claims against the first and second respondent were based on liability for the prospectus of the issue of the respective shares according to § 11 KMG.[43] According to this provision, the issuer shall be liable for damages caused by culpably communicating wrong information in the prospectus. The same applies according to § 11(1) No 3 KMG to the issuing bank if it had acted with gross negligence. In case both entities violate the respective stipulations, § 11(3) KMG provides for a joint and several liability.

This case gave the OGH the chance to deal with a much disputed question: the relationship between the *prohibition of repayment of contributions* to shareholders according to § 52 AktG[44] and claims of shareholders concerning contracts over shares. The OGH had to balance the interests of the stock company's creditors (which § 52 AktG seeks to protect from diminishing the capital) and the interests of shareholders. The OGH decided in favour of the claimant: § 52 AktG does not prevent claims for damages of shareholders—a decision that caused great controversy.[45]

The second topic the OGH had to deal with—although not for the first time[46]—was the *burden of proof* for the *causation* of damages due to 'wrong investments'. In other words: who is it to prove that, if respondent had acted rightfully (here: if he had not stated wrong information in the respective prospectus), the claimant would not have suffered damage (for example by investing in similar securities which also subsequently lose value)? The OGH held that—not only in cases concerning wrong advice, but also for example prospectus liability—the burden of proof lies with the claimant; he has to furnish evidence that he would have invested in securities

[42] 7 Ob 77/10i GES 2011, 223 = GesRZ 2011, 251 (*Diregger*) = ÖBA 2011, 501 = wbl 2011, 500 = AnwBl 2011, 355 = ZFR 2011, 238 (*Gruber*) = ecolex 2011, 609 (*Wilhelm*) = RdW 2011, 401 = AnwBl 2011, 407 = JAP 2011, 181 (*Jaindl*) = ZVR 2012, 75 = SZ 2011/40; see also A Auer, 'Naturalrestitution für geschädigte Wertpapieranleger' (2011) *RdW* 725; G Graf, 'OGH verteidigt Prospekthaftung' (2011) *ecolex* 599; M Karollus, 'Neues zur Prospekthaftung (Konkurrenz zum Verbot der Einlagenrückgewähr und zur "fehlerhaften Gesellschaft", Kausalität des Prospektfehlers für die Disposition des Anlegers, Schadensberechnung und Schadensnachweis)' (2011) *ÖBA* 450; H Krejci, 'Anlegerschutz des Aktionärs, Kapitalerhaltung und fehlerhafte AG' (2011) *GesRZ* 193; C Völkl, 'Anlegerschutz: OGH macht's einfach(er)' (2011) *wbl* 474; U Torggler, 'Emittentenhaftung: roma locuta und alle Fragen offen' (2011) *ecolex* 1121; W Sindelar, 'Durchbrechung des Grundsatzes der Kapitalerhaltung auch bei Geltendmachung von Schadenersatzansprüchen aufgrund des Aktienerwerbs am Sekundärmarkt' (2012) *ÖBA* 763; J Told, 'Noch offene Fragen zur Geltendmachung von Prospekthaftungsansprüchen nach 6 Ob 28/12d?' (2012) *GES* 333; M Trenker, 'Kapitalmarktrechtliche Ansprüche von Genussrechtsinhabern in der Insolvenz' (2013) *VbR* 16.

[43] *Kapitalmarktgesetz*, Capital Market Act.

[44] *Aktiengesetz*, Stock Corporations Act.

[45] See esp Karollus, 'Neues zur Prospekthaftung' (n 42); Krejci, 'Anlegerschutz des Aktionärs, Kapitalerhaltung und fehlerhafte AG' (n 42).

[46] See RIS-Justiz RS0106890 (T9).

which are still of value now, if the information in the prospectus had been correct. Since this means proving a hypothetical course of events, a lower standard of proof than usual is to be applied:[47] in general, claimants must prove that the facts asserted in their claim took place with a 'high probability';[48] when proving a hypothetical course of events, however, a preponderance of evidence is sufficient.[49]

E. General Relevance of Past Jurisprudence

The vast majority of cases regarding a bank's duty of care have been decided in the context of the sale of investment products. This gives rise to the question of whether and to what degree this jurisprudence is relevant in other case, such as for example credit agreements. Recently, the OGH has shown a tendency towards facilitating the extensive jurisprudence in similar circumstances. In a recent case concerning credit agreements, the OGH explicitly referred to its jurisprudence regarding investment products:[50] the rule stating that a financial product with an unwanted level of risk in itself constitutes damage regardless of the value of the investment product (see below at section V.B) was accordingly applied here. Also, the OGH referred to the above-cited jurisprudence concerning a bank's vicarious agent in regard to duties to warn.

II. Legal Nature of a Bank's Duties

A. Duties Based on Supervision Law

i. General Part

In its centrepiece, the WAG 2007,[51] which was revised in order to implement the MiFID[52] into national law, imposes various rules of good conduct on—to use the

[47] RIS-Justiz RS0106890 (T27).

[48] W Rechberger in H Fasching and A Konecny (2004) Vor § 266 ZPO, Rz 11 et seq.

[49] RIS-Justiz RS0022900; authors rejecting this opinion explicitly named in the decision: BC Steininger, discussing 7 Ob 220/04k, ÖBA 2006, 61; P Bydlinski, 'Haftung für fehlerhafte Anlageberatung: Schaden und Schadenersatz' (2008) *ÖBA* 159; H Koziol, 'Zum Ersatzanspruch unzulänglich aufgeklärter Anleger—Eine angeregte österreichische Diskussion als Anregung für das deutsche Recht?' (2010) *FS Picker* 539 et seq; G Wilhelm, 'Zu Haftungsbegründung und Haftungsausfüllung beim Anlegerschaden' (2010) *ecolex* 232. See also (with further references) P Bydlinski, 'Anlageberaterhaftung: Beweislast, Beweismaß, Beweiswürdigung und Non liquet hinsichtlich Schaden(shöhe) und Kausalität' (2012) *ÖBA* 797.

[50] 8 Ob 66/12g EvBl 2013,922 (*Cach*); see also: G Graf, 'Der zu Unrecht empfohlene Fremdwährungskredit' (2013) *VbR* 3.

[51] Hereinafter WAG.

[52] Effective 2018 MiFID will be substituted by MiFID II and MiFIR, which seek to find solutions to institutional problems that were revealed during the financial crisis; see eg W Sindelar, 'Quo vadis MiFID II—Welche Neurungen und Herausforderungen bringt die neue Finanzmarktrichtlinie?' (2014) *ÖBA* 478.

words of the law—'legal entities';[53] such being investment services enterprises, certain insurance companies and especially credit institutions, and their branch companies. As its predecessor, the WAG 1997, the WAG 2007 contains supervisory and regulatory provisions and is therefore to be considered public law. As will be shown below, however, the WAG has a great impact on the law of (pre-)contractual damages as well as tort law.

§ 38 WAG contains a general clause of good conduct, stating that a legal entity shall act 'honestly, fairly and professionally in accordance with the best interests of its clients'. The following provisions define this duty more closely. Thereby, these rules of good conduct are generally owed to both *professional* and *private customers*, but vary in their intensity depending on whether the customer is a professional or not. In some aspects, the WAG also differentiates between the different types of services provided by the financial institution (see duties to investigate discussed below, which vary from an obligatory 'appropriateness test', to a 'suitability test' or no such duty, depending on which financial service is offered).

ii. Duties to Warn/Inform

§ 40 WAG provides for a 'basic' *duty to inform*. This information is to be provided regardless of the kind of service offered. The information provided may be communicated in a standardised way[54] and only has to concern the form of investment in general rather than the specific financial product. In this 'basic information', according to § 40(1) No 5 and (2) WAG, customers also have to be *warned* about the risks inherent to the respective investment instruments and strategies. The content of these warnings is specified in annex No 3 of § 40 WAG, which refers to the customers' 'level of knowledge' implying that in regard to *business customers* a lower standard of such duties is to be applied.

iii. Duties to Investigate

In two provisions, §§ 44 and 45, WAG also provides for duties to *investigate*, ie to obtain information from the client.[55] § 44 WAG concerns entities that manage portfolios of their clients or advise[56] them on their investments. Here, the highest standard of such duties to investigate is to be applied. In order to ensure that the entity has a reasonable basis of information about its customers, it must inquire about the investor's knowledge and skills in respect of the securities of interest,

[53] See WAG, § 15 ('*Rechtsträger*'); in the following, the terms 'financial institution' and 'investment firm' are used with the same (broad) meaning.

[54] Under MIFID II, which is to be effective from 3 January 2018, Member States are free to choose if they want to allow financial institutions to use such standardised information; see MiFID II, Art 24(5). If a Member State chooses not to offer this possibility, financial institutions providing only standardised information violate supervision law. For the relationship between supervision law and private law, see below, section II.B.

[55] These provisions are supplemented with WAG, § 43.

[56] 'Advising' means specifically suggesting certain investment instruments; see eg G Graf in M Gruber and N Raschauer (2011), WAG § 44 Mn 3.

his financial situation and his goals concerning the investment (*suitability test*).[57] If the financial institution finds that the specific product is not suitable for the customer, it must warn him accordingly. For *professional clients*, § 44(6) WAG provides that it may be presumed that they have sufficient skills in respect of their professional activity. Also, professional clients who obtain financial advice are presumed to have sufficient financial resources for the investment of interest.

§ 45 WAG deals with legal entities that offer any financial services not mentioned in § 44 WAG and therefore applies to all financial services apart from portfolio management or financial advice. Especially order execution without financial advice is typically subsumed under § 35 WAG.[58] For these transactions, a lower standard for such duties to investigate applies: the entity must take into account the client's experience and knowledge about the respective security and evaluate if the security is suitable for the customer. The financial situation and the goals concerning the investment, however, do not have to be taken into account (*appropriateness test*). An occurring inappropriateness of the specific product must, again, be warned of. In respect of *professional customers*, there is no duty to investigate for such transactions.[59]

According to § 27 WAG, an investment firm is released from its obligation to investigate about the client's skills, experience and (when § 44 is applicable) goals and financial situation, if a *different licensed entity* according to § 15 WAG has already fulfilled these duties. According to the OGH, this also applies to the subsequent assessment of appropriateness/suitability,[60] since a 'duplication' of these duties is not reasonable. Furthermore, the entity may trust in the correctness of advice given by such third party. The legal relationship between the third party and the investment firm (eg vicarious agent, carrier or agent) is generally of no relevance.[61]

Furthermore, according to § 46 WAG, under certain circumstances, entities may offer *execution-only* services to both professional and private clients without giving rise to any obligations to investigate for themselves or third parties.[62] This requires, first, that these services concern non-complex financial instruments,[63]

[57] Terminology taken from Recital (56) of the MiFID Implementing Directive.

[58] M Gruber, 'Die Wohlverhaltensregeln' in P Braumüller, D Ennöckl, M Gruber and N Raschauer (Hrsg), *Von der MiFID zum WAG 2007* (2008) 83 (138).

[59] Graf in Gruber and Raschauer, WAG § 45 Mn 16.

[60] OGH explicitly following *Knobl/Gasser*, 'Aufklärungspflichten und irrtumsrechtliche Gehilfenzurechnung bei Einschaltung einer kundennäheren Wertpapierfirma' (2012) *ÖBA* 352; in 1 Ob 48/12h ZfRV-LS 2013/23 (*Ofner*) = ecolex 2013, 323 = ÖBA 2013, 506 (*Thiede*) = Jus-Extra OGH-Z 5369 = RdW 2013, 334 = ZVR 2013, 76; contrary: G Graf, 'Zur Aufklärungspflicht der Bank bei Einschaltung eines weiteren Finanzdienstleisters' (2012) *ÖBA* 229;

[61] 1 Ob 48/12h ZfRV-LS 2013/23 (*Ofner*) = ecolex 2013, 323 = ÖBA 2013, 506 (*Thiede*) = Jus-Extra OGH-Z 5369 = RdW 2013, 334 = ZVR 2013, 76.

[62] To execution-only deals in general, see M Oppitz, 'Das "Execution-only-Geschäft neu" Zur Befugnis für die Geschäftstätigkeit nach § 46 WAG 2007' (2007) *ÖBA* 953.

[63] As defined in WAG, § 1 Nr 7, eg shares.

secondly, that the service is provided at the initiative of the client or potential client, and thirdly, that the customer has been informed that the service he ordered will be executed without giving rise to duties to investigate.[64] The general information according to § 40 WAG (including warnings) is still to be provided.

Finally, the law exempts entities offering transmission of orders and executing orders on behalf of the customer from all obligations laid down in §§ 38–57 WAG when a customer qualifies as an '*eligible counterparty*'. This is only the case when the client is a financial institution, investment firm, insurance company etc itself.[65]

B. Duties Based on Contractual Relationships

The relationship between the rules of the WAG (which are, as stated above, primarily public law) and private law (foremost the law of contractual damages or tort law) has drawn a considerable amount of interest and attention among legal scholars.[66] While it is commonly accepted that the WAG does have an impact on civil law,[67] different positions have been taken in respect of the degree as well as the reasoning for this influence. One opinion claims that the rules of good conduct of the WAG *directly affect* the contractual relationship between the financial institution and its customer. The WAG, they argue, lays down previously unwritten (pre-)contractual duties.[68] A violation of WAG rules of good conduct therefore 'automatically' constitutes unlawfulness within the system of contractual damages.[69] A different opinion claims that, on the contrary, the WAG rules are only to be used for the interpretation of contractual duties without necessarily being in complete accordance with the former and thus assume a non-obligatory *indirect effect* on civil law.[70] So far, the OGH has not decided in favour of one opinion or the other.

[64] Also, the obligations provided in WAG, §§ 34 and 35 concerning conflicts of interest must be complied with.

[65] The qualifying entities are listed in WAG, § 58 (2) Nr 1–4. For eligible counterparties in general, see also MiFID, Art 24, which WAG, § 60 is based on.

[66] eg H Baum, 'Das Spannungsverhältnis zwischen dem funktionalen Zivilrecht der "Wohlverhaltensregeln" des WpHG und dem allgemeinem Zivilrecht' (2013) *ÖBA* 396; Brandl and Klausberger, '"Ausstrahlungstheorie"—Zum Verhältnis zwischen Aufsichtsrecht und Zivilrecht nach MiFID und WAG' (2009) *ZFR* 131; P Knobl and K Grafenhofer, 'Haftung einer Bank für allfälliges Fehlverhalten von externen Anlageberatern oder Vermittlern' (2010) *GesRZ* 27.

[67] E Brandl and P Klausberger in E Brandl and G Saria (2015), *WAG Kommentar*, § 38 Mn 7; Graf in Gruber and Raschauer, WAG § 38 Mn 44; S Kalss, M Oppitz and J Zollner, *Kapitalmarktrecht* (2015) § 6 Mn 5 figuratively speak of the 'janus-faced' character of supervision rules.

[68] M Gruber in P Braumüller, D Ennöckl, M Gruber and N Raschauer, *MiFID* (2008) 153 et seq; G Graf, 'Anlageberatung—quo vadis?' (2009) *ZFR* 82.

[69] Naturally, the further requirements—mainly: damage, causation and fault—for such claim must also be met in order to warrant recovery of damages; see n 21.

[70] With references to German literature, see: Brandl and Klausberger in Brandl and Saria (n 67) § 38 Mn 9; Brandl and Klausberger, 'Ausstrahlungstheorie' (n 66) 131; P Knobl and G Janovsky, discussing 6 Ob 110/07f, (2008) *ZFR* 70; C Wendehorst, 'Anlageberatung, Risikoaufklärung und Rechtswidrigkeitszusammenhang' (2010) *ÖBA* 562.

A lower limit for the degree of this influence is rendered by EU law. Since the WAG implements an EU directive, the principle of *effet utile* may not be violated. Naturally, the assumption of an only indirect effect of the WAG (and therefore the MiFID) on civil law does not per se lead to a violation of the principle of effectiveness. Instead, for each single provision of the WAG, it must be evaluated to what extent its violation must also affect civil law in order to ensure the provision's effectiveness.[71]

On the other side, it has been argued that duties deriving from contractual relationships may reach *further* than those provided by the WAG. If, for example, an entity has provided sufficient information according to § 40 WAG, but must notice that in this particular case further information is needed, a failure to provide such shall cause civil law unlawfulness without violating the WAG.[72] The same should apply when an entity does not give financial advice in terms of suggesting a certain security and therefore is only subject to a duty to investigate according to § 45 WAG, which does not include investigations about the client's financial situation and his goals in respect of the investment instrument. If, in such case, an entity must notice that a certain investment instrument may be in conflict with the client's goals/financial situation, but nevertheless fails to warn its customer, a breach of duties deriving from the contract is to be assumed. This—according to the cited opinion—is owing to the fact that the inflexible, formalistic character of the WAG cannot completely represent the duties of care deriving from a contract, which have to be construed on a case-to-case basis.[73] These arguments are convincing; the OGH, however, has explicitly left open this question so far.[74]

The WAG is not applicable to *credit agreements*. Where *private customers* are concerned, the VKrG[75] is to be applied, which provides for a duty to investigate in respect of client's funds, a duty to inform before entering into a contract and a duty to inform in the contract itself.[76] The VKrG, however, neither contains a general clause comparable to § 38 WAG, providing that financial institutes must act in accordance with 'the best interests of their clients', nor a suitability or appropriateness test, as stipulated in the WAG. Therefore, when a credit agreement is not suitable for a customer for reasons other than his personal funds or in cases where professional clients are concerned, further (unwritten) (pre-)contractual duties to warn, inform etc, may derive from general contractual law.[77] In 2013, the

[71] So far, the ECJ has also refrained from a more general statement in this question; see ECJ, 30 May 2013, C-604/11 *Genil 48 SL e.a./Bankinter SA e.a.* at [57].

[72] Graf in Gruber and Raschauer, WAG § 40 Mn 8.

[73] Graf, 'Anlageberatung—quo vadis?' (n 68) 82.

[74] Most recently: 6 Ob 179/12k.

[75] The VKrG (*Verbraucherkreditgesetz*, Consumer Credit Act) implements Directive 2008/48/EG into national law.

[76] On contracts within the scope of the VKrG in general, see R Pesek, *Der Verbraucherkreditvertrag* (2012).

[77] G Graf, 'Der zu Unrecht empfohlene Fremdwährungskredit' (2013) *VbR* 3.

OGH assumed a breach of such duties in a case in which a bank must have noticed that a certain foreign currency loan was not suitable for its customer, but failed to warn accordingly.[78]

C. Duties Based on Pre-contractual Relationships

Any kind of wrong information communicated to customers by financial institutes—eg in advertisement material—before entering into a contract may induce liability according to the general principle of *culpa in contrahendo*, given the fact that the error has caused damage and the tortfeasor has acted culpably. Whenever duties laid down in the WAG apply—see especially the duty to inform according to § 40 WAG—the pre-contractual relationship between customer and bank may be specified by these obligations.

In case of wrong information in prospectuses, the legal consequences are explicitly laid down by law: According to § 11 (1) No 1 KMG,[79] the *issuer* of a financial product is liable for damages arising out of wrong or missing information communicated in prospectuses provided the other requirements for such claim[80] are met. *Entities professionally trading financial products*, and other intermediaries accepting investors' contract declarations, however, are only liable if they know of the error or incompleteness or are unaware of this owing to gross negligence. Owing to these explicitly laid down legal consequences, the OGH refers to prospectus liability as a further development of the *culpa in contrahendo*.[81]

D. Duties Based on Tort Law

A claim in Austrian tort law is based on the same main requirements as a claim for contractual damages.[82] In tort law the requirement of 'unlawfulness' is induced mainly either by a behaviour that violates 'absolutely protected interests'[83] and not just pure economic interests, or 'protective laws'. In order to qualify as such a protective law, it must be the law's intent to protect a victim against damages typically caused by the forbidden behaviour. The OGH has generally denied that § 15 of the WAG 1997, which explicitly stated that a violation of the respective duties to inform causes liability, constitutes such a protective law.[84] The Court argued that

[78] 8 Ob 66/12g, EvBl 2013, 922 (*Cach*).
[79] § 11 KMG implements Directive 2003/71/EC, Art 6 into national law.
[80] See n 21.
[81] RIS-Justiz RS0108218 (T2).
[82] See n 21.
[83] Like property, life, health etc. Pure economic interests (which are of interest here) are not absolutely protected. Such damages are only to be compensated if 'protective laws' or contractual obligations have been violated. See Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (n 21), Mn 1/24.
[84] RIS-Justiz RS0120998.

this rule laid down (pre-)contractual duties. So far, the OGH has not held that any rules of good conduct of the WAG 2007 are to be considered protective laws.

The Court stated, however, that § 48a(1) No 2 lit c BörseG,[85] which prohibits market manipulation through communication of wrong information, is to be seen as a protective law.[86] This was of relevance in a case in which customers were given the (poor) advice by a third party, AWD, not to sell their Immofinanz and Immoeast shares, but to keep them and wait until their value would rise again. It is undisputed that Constantia did not violate any duties laid down in the WAG 1997 in this case, since these duties mostly apply at the time of sale of the products to the customer.[87] Here, however, Constantia is alleged to have communicated wrong information to AWD, which then, in turn, gave wrong advice. The OGH sent the case back to the courts of first instance in order to decide whether § 48a (1) No 2 lit c BörseG was violated and, therefore, the claimants could claim damages not only against AWD, but also against Constantia.

Since damages caused by banks by wrong advice etc typically occur within contractual or pre-contractual relationships, tort law generally plays a minor role in this aspect.

E. Duties towards Third Parties

The WAG typically governs the relationship between financial institutions and their customers. Hence, duties towards third parties are not explicitly laid down in the WAG. The doctrine of *Vertrag mit Schutzwirkung zugunsten Dritter* (contracts having protective effect on third parties), however, may be applied in cases in which a bank violates duties of care.[88] According to this principle, a third party may claim damages resulting from a breach of contractual duties between two other parties. Thereby, this third party may base their claim on contractual damages, having the benefit that the burden of proof concerning the tortfeasor's fault lies with the latter and purely economic damages are to be compensated.[89] Furthermore, the doctrine of vicarious agents applies. Requirement for the applicability of this doctrine is the fact that the third party is foreseeably affected by the fulfilment of the contract and has no other possibility to claim contractual damages.[90]

A prominent example of a bank's duties towards persons other than their customer is § 25 KSchG, which applies whenever a consumer guarantees (or provides

[85] *Börsegesetz 1989*, Stock Exchange Act.

[86] 8 Ob 104/12w ZFR 2013, 89 = Jus-Extra OGH-Z 5326 = ÖBA 2013, 438 = RdW 2013, 395 = RZ 2013 EÜ130 = Graf, ecolex 2013, 864 = ecolex 2013, 871.

[87] This also is the case in regard to the current WAG. In the absence of duties of bank to inform etc, a third party adviser cannot be a vicarious agent according to § 1313a ABGB.

[88] Graf in Gruber and Raschauer WAG § 38 Mn 53.

[89] This is disputed; see Reischauer in P Rummel, 3rd edn (2007) § 1295 Mn 33.

[90] Perner, Spitzer and Kodek (n 12) 319.

other personal securities) for someone else's loan granted by a financial institution.[91] In such cases, the creditor must warn this third party accordingly, if it knows, or has reason to know, that its customer, the credit recipient, may not be able to pay back the loan. If the creditor fails to do so, the third party is not obliged to pay back the loan despite having given the guarantee.[92]

Another example is the liability of a bank working as *intermediary* between the customers and another financial institution, as laid down in § 11 KMG. Even though the contract of sale concerning the investment products is concluded between the customer and the other financial institution, the bank may be held liable for damages caused by wrong information in the product's prospectus, if the bank has acted with at least gross negligence. If both financial institutions violate § 11 KMG, they can be held liable jointly and severally (§ 11 (3) *leg cit*).

III. Specific Duties

A. Information about Financial Products

The 'basic' *duty to inform* according to § 40 WAG includes, as stated above, a duty to warn about risks inherent to the respective type of investment product. This information is to be given to both private and professional customers. Annex No 3 of § 40 WAG[93] specifies these obligations to warn; in regard to *business customers*, a lower standard of these duties is to be applied ('level of knowledge of the client').

> The description of risks shall include, where relevant to the specific type of instrument concerned and the status and level of knowledge of the client, the following elements:
>
> (a) the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment;
> (b) the volatility of the price of such instruments and any limitations on the available market for such instruments;
> (c) the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;
> (d) any margin requirements or similar obligations, applicable to instruments of that type.

[91] Of course, the guarantor for the loan does have a contractual relationship with the bank and, therefore, is not a 'third party' in a strict sense.

[92] Unless the creditor proves that the third party would have guaranteed for its customer anyway; see Perner, Spitzer and Kodek (n 12) 630.

[93] The following citation is taken from the English version of the identical Art 31 (2) of the MiFID Implementing Directive.

The information the financial institution has to provide is defined in great detail in §§ 40, 41 WAG and annex No 1 and 2 of § 40 WAG. As stated above, standardised information about respective financial instruments is generally sufficient. The most important pieces of information which have to be provided according to these stipulations are set out below.

B. Information about the Financial Institution and its Services

This includes the name and address, communication media etc.[94] When providing the service of portfolio management, an appropriate method of evaluation such as a benchmark is to be established.[95] Furthermore, the financial institution has to inform its client where and under which legal conditions his funds may be held by a third party.[96] Moreover, the institute has to give notice if the client's funds may be held in an omnibus account by a third party and if it is not possible under the respective foreign national law to hold the client's financial instruments separately from the third party's funds.[97] Finally, before entering into securities financing transactions in relation to the client's financial instruments, the investment firm has to inform about the customer's obligations and rights.[98]

C. Duty to Refuse to Carry out Customer's Instructions

Generally, it is agreed upon that an investment firm is subject to a duty to warn if a product is not suitable/appropriate for the customer, but there is no prohibition to sell these products, if a customer insists on buying such despite any warnings. Interestingly, one author has argued that in certain cases within the scope of § 45 WAG (appropriateness test in regard to financial instruments other than portfolio management and financial advice) a financial institute must indeed *refuse to carry out the customer's instructions*. According to this opinion, the investment firm may not sell certain securities if, first, it finds that such are inappropriate and, secondly, this conclusion is based on information investigated by another financial institution.[99] This view surprises insofar as the same author agreed that, when the investment firm has investigated about clients' skills itself and subsequently considers the product as inappropriate, it is only obliged to *warn the customer* about this fact.[100]

[94] WAG, Annex No 1 of § 40.

[95] WAG, § 40 (1) Nr 1; see also the MiFID Implementing Directive, Art 30 (2).

[96] WAG, Annex No 2 of § 40; See also the MiFID Implementing Directive, Art 32 (2).

[97] WAG, Annex No 2 of § 40; See also the MiFID Implementing Directive, Art 32 (3).

[98] WAG, Annex No 2 of § 40; See also the MiFID Implementing Directive, Art 32 (7).

[99] G Graf, 'Zur Aufklärungspflicht der Bank bei Einschaltung eines weiteren Finanzdienstleisters' (2012) *ÖBA* 229; according to this opinion, the investment firm may sell the product if it informs the client so that he can understand its risks. The OGH generally assumes that one assessment of appropriateness conducted by the first entity suffices.

[100] Graf in Gruber and Raschauer WAG § 45 Mn 7 ff.

IV. Standard of Care

Generally, the standard of care expected of a person is based on the fiction of a reasonable, averagely careful person of the same profession.[101] If the tortfeasor does not act accordingly, his behaviour will be considered a culpable act, unless he proves that he did not possess the necessary abilities to act diligently.[102] Whenever the tortfeasor and the claimant are in a *contractual relationship*, the tortfeasor is assumed to have acted objectively culpably and carries the burden of proof that he has not.[103]

Furthermore, just like medical doctors, auditors, notaries etc, banks are to be seen as *experts* according to § 1299 ABGB. Under this rule, experts have to meet an especially high standard of care. Also, when considered an expert, the tortfeasor is subject to an objective standard of fault: the—already mostly theoretical[104]—possibility of proving absence of fault due to a lack of abilities precludes.[105]

When the tortfeasor gives *advice in return for payment*, he is liable for any damage caused by wrong or insufficient advice according to § 1300 ABGB, regardless of whether he and the claimant are in a contractual relationship or not.[106] The phrase 'in return for payment' is construed in a very broad sense and includes every legal relationship that the tortfeasor has entered into for not entirely altruistic reasons (eg commissions paid by third parties and free advice that leads to a contract concluded for pecuniary interest).[107]

V. Legal Consequences of Violation of Duties

A. Supervision Law

A violation of the duties to investigate and to warn deriving from the WAG may have legal consequences in different fields of law. The FMA[108] is responsible for monitoring the compliance of financial institutions with *supervision law* as laid down in the WAG. In order to do so, the FMA is entitled to gain access to documents of financial institutions and to take copies thereof. Violation of the rules of

[101] M Harrer in F Schwimann, *ABGP Praxiskommentar*, 3rd edn (2006) §§ 1297, 1298 Mn 11.

[102] This possibility, however, is hardly ever applied by the courts, which tend to apply objective standards of diligence; see Harrer (n 101) §§ 1297, 1298 Mn 11.

[103] See eg G Kodek in *ABGB-ON* (2010) § 1298; the further requirements (see n 21) for a claim for damages are to be proven by claimant.

[104] Harrer (n 101).

[105] Perner, Spitzer and Kodek (n 12) 306.

[106] Reischauer (n 89) § 1300 Mn 4.

[107] J Schacherreiter in *ABGB-ON* § 1299 Mn 62.

[108] Finanzmarktaufsicht.

good conduct (including duties to investigate and the duties to warn) constitutes an *administrative offence*, which, according to § 95(2) No 1 WAG, is to be sanctioned with fines up to €100,000. In cases of serious, systematic breaches of supervision law, the financial institution's licence may be withdrawn according to § 5(2) No 3 WAG.

The FMA also acts as deciding authority of first instance in cases of administrative offences laid down in the WAG. In this function, notices from private parties are seen as a valuable source of information;[109] clients, however, are not recognised as parties in such proceedings. Also, the FMA does not decide on claims by private parties, eg seeking damages etc.

B. Civil Law

As stated above, a violation of the rules of good conduct in the WAG not only causes *unlawfulness* in the field of (pre-)contractual damages, but also indicates the relevance of a mistake according to § 871(2) ABGB, which may lead to an avoidance of the contract.

Whenever damages were caused in relation to contracts over securities, the typical volatility of their value made it a challenging topic for courts as well as doctrine[110] to *assess* the respective *damages*. Closely connected to this problem is the question of *what kind of compensation* is to be granted. Thereby, the OGH established that if a security was sold that was not actually wanted by the client, the unwanted contract itself constitutes damage, regardless of the current value of the sold security.[111] Hence, primarily, the price the securities were sold at can be claimed as compensation in exchange for the respective securities, which are to be transferred back to the financial institution. If the client has sold the securities already, however, he may subsidiarily claim the difference between his current assets and the assets he would have had, had the financial institute acted rightfully.[112] As mentioned above, in any case the claimant must prove that, without the respondent's misbehaviour, he would have invested in a security that is still of value or would not have bought any securities.[113] Furthermore, it is established that declaratory actions are to be dismissed, if a claim for satisfaction is reasonable.[114] The reasoning behind this is that declaratory actions make it possible for the claimant to wait and speculate whether the securities he (unwillingly) bought turn

[109] See the website of the FMA; available at: www.fma.gv.at/de/ueber-die-fma/kompetenzen/aufgaben-der-fma.html.

[110] On this and assessment of such damages in general see G Kodek, 'Ausgewählte Fragen der Schadenshöhe bei Anlegerschäden' (2012) *ÖBA* 11.

[111] RIS-Justiz RS0120784.

[112] RIS-Justiz RS0120784.

[113] RIS-Justiz RS0106890 (T26 and 27).

[114] See explicitly in: 8 Ob 39/12m, AnwBl 2013,107 = ÖBA 2013,209 = ecolex 2013,120 = RdW 2013,136 = -ZVR 2013, 76.

out to be profitable after all. Such completely risk-free speculations at the expense of the respondent are to be refused.

Since the claimant must prove that, first, if he had been advised correctly, he would not have bought the respective high-risk securities[115] and, secondly, he would have invested in (lower-risk) securities which are still of value now, cases of hardship might occur. In particular, the secondly-mentioned aspect typically causes difficulties for the claimant: if there are multiple alternative investment products matching the client's risk profile, it is very hard for the claimant to furnish evidence supporting the fact that he would have bought the profitable ones amongst them.

In order to solve this problem, some authors suggest that in such cases courts may *estimate* the damage according to § 273 ZPO.[116] When applied, this rule provides that the claimant does not have to prove that he would have invested in a specific compound of certain products and, therefore, has suffered a certain amount of damage. The average value of the investment alternatives may rather be granted.[117] Some authors, however, argue that this provision may only be applied by courts if the claimant can prove that all investment alternatives are at least more profitable than the unwanted high-risk products.[118] So far, the OGH has explicitly agreed that § 273 ZPO may be used by courts in such cases but has left open which exact requirements have to be met.[119]

In cases where *many clients* were affected by the same misconduct of a certain financial institution, a legal construction often referred to as 'Austrian class action' has been facilitated,[120] which—though not used for the first time[121]—has caused lively discussion.[122] Such class action is not specifically provided for in statutory law, but simply describes the fact that many claims are transferred to one party—like the abovementioned VKI—which subsequently sues the respondent. Different

[115] On the standard of proof see text at n 49 et seq.

[116] M Trenker, 'Die hypothetische Alternativveranlagung' (2013) *ÖJZ* 5; See also C Völkl, 'Anlegerschutz: OGH macht's einfach(er)' (2011) *wbl* 474; Kodek, 'Ausgewählte Fragen der Schadenshöhe bei Anlegerschäden' (n 110) 11.

[117] The chance of each alternative to be chosen is also to be taken into consideration; see P Leupold and M Ramharter, 'Anlegerschaden und Kausalitätsbeweis bei risikoträchtiger hypothetischer Alternativanalge' (2010) *ÖBA* 718 (726).

[118] ibid.

[119] 9 Ob 44/13f; 9 Ob 85/09d ÖBA 2010, 533 = ecolex 2010, 749 = ZFR 2010, 179 = EvBl 2010, 914 = RZ 2010, 237 = JBl 2010, 713 (*Bydlinski*) = RdW 2010, 573 = ZIK 2011, 35 = ZVR 2011, 75 (Danzl) = SZ 2010/53.

[120] 6 Ob 224/12b Zak 2013, 119 = ZFR 2013, 147 = RdW 2013, 268 = AnwBl 2013, 331 = EvBl-LS 2013/94 = ecolex 2013, 533 = ÖBA 2013, 682.

[121] See 4 Ob 116/05w ÖBA 2011/1705 = ZFR 2011, 89 = ÖBl-LS 2011/51 = ecolex 2011, 343 (*Horak*) = RdW 2011, 219.

[122] eg P Oberhammer, '"Österreichische Sammelkage" und § 227 ZPO' (2010) *Jahrbuch Zivilverfahrensrecht* 247; A Klauser, 'Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage' (2013) 5 *VbR*; G Kodek and O Jaindl, 'Sammelklage stammt nicht aus DDR—Sommergespräch' *Wirtschaftsblatt* (25 July 2013); with further references: A Klauser, 'Sammelklagen von Verbraucherorganisationen' in M Reiffenstein and B Blaschek (Hrsg), *Konsumentenpolitisches Jahrbuch 2009—2010* (2011).

from class actions in the American legal culture, here, courts decide over singular, although bundled, claims independently. Also, persons who decide not to transfer their claim will formally not be affected by the judgment.[123] Generally, however, the same principles of *assessment of damages* as mentioned above apply here as well as in cases of only one claimant.

VI. Client's Contributory Negligence

It is disputed whether negligence on the side of the claimant may lead to a preclusion of the right to avoid a contract based on *mistake*. Negligence in that context means that the claimant would not have been mistaken if he had acted diligently (by carefully reading the prospectus, for example). While some argue that at least gross negligence must make the respondent more worthy of legal protection than the claimant,[124] others claim that fault is simply not part of the law of mistake and, therefore, may not be taken into consideration.[125] The OGH differentiates between two situations: in (extraordinary) cases in which it must have been 'entirely obvious' to the claimant that the respondent has communicated wrong or insufficient information and the claimant has had the possibility to validate the given information, no avoidance of the contract is to be granted. This is owing to the fact that the contract is to be seen as concluded based on correct and sufficient information. In any other case, the OGH agrees that fault is no parameter of the law of mistake; therefore, the contract may be avoided, regardless of the claimant's fault. The OGH, however, stated obiter that the claim for the price of the investment products may be reduced or even precluded on basis of the doctrine of *culpa in contrahendo* (see next paragraph).[126]

According to § 1304 ABGB, *contributory negligence* reduces—in extreme cases even precludes—a claim based on (pre-)contractual damages or tort law. Since a client may trust the expertise of a financial institute, courts tend to be reluctant in granting such reductions in context with wrong advice.[127] If, for example, after investigating information about the skills, goals etc of a client, a financial institution advises its client to buy a certain security which, in fact, is not suitable for him,

[123] For these differences and Austrian class action in general, see G E Kodek, 'Die "Sammelklage" nach österreichischem Recht, Ein neues prozeßrechtliches Institut auf dem Prüfstand' (2004) *ÖBA* 615.

[124] Krejci, 'Zur Anfechtung von Wertpapierkäufen wegen irreführender Werbung und Beratung' (n 30) 58.

[125] A Vonkilch, 'Rechtsfragen der Irrtumsanfechtung von Wertpapierkäufen—Zugleich ein Beitrag zum Irrtumsrecht des ABGB' (2010) *ÖBA* 579.

[126] 8Ob25/10z Zak 2010, 377 = EvBl 2011, 31 = JBl 2011, 32 = ecolex 2010, 1039 (Wilhelm) = ZFR 2011, 25 (Pletzer) = ZIK 2011, 34 = Riedler, ecolex 2011, 194 = Oppitz, ÖBA 2011, 534 = RZ 2011, 46 EÜ49 = MietSlg 62.091 = SZ 2010/113.

[127] S Dullinger, 'Aktuelle Fragen der Haftung wegen Beratungsfehlern bei der Vermögensanlage' (2011) *JBl* 693.

ignoring written warnings will not reduce the client's claim for damages.[128] In cases in which a client with profound financial knowledge must have noticed that the respective advice is not correct, however, the OGH assumed such negligence on the claimant's side.[129]

Also based on § 1304 ABGB is the victim's *duty to minimise damages*. This has been of relevance for the question of how long a client, who was advised wrongly, has to keep the respective securities: selling such papers too early (before their value rises) or keeping them too long (until after their value has dropped) may constitute a violation of this duty causing a reduction of the claim for damages. In this context, the OGH has also assumed that such reduction is only to be granted in exceptional cases, since it is hard—even for experienced investors—to determine the best moment to sell.[130] According to general principles, the burden of proving such negligence lies upon the respondent.[131]

VII. Conclusion

The increase of claims against banks and other financial institutions in the last years has given doctrine and jurisdiction reason to focus on civil law problems in various fields ranging from tort law (eg concerning the assessment of damages, causation, contributory negligence, vicarious agency etc), contract law (eg concerning the law of mistake, the 'aliud' problem), company law (eg concerning the prohibition of investment reimbursement) to civil procedure (eg concerning rules of burden of proof, the so-called 'Austrian class actions' and the relationship between declaratory actions and claims for satisfaction). While in some of these topics, a broad consensus seems to have been reached, other questions are still left open by courts and are disputed in doctrine. Above all, the relationship between the WAG (respectively the MiFID) and civil law will continue to give rise to discussion.

[128] Most recently: 7 Ob 178/11v ÖBA 2013, 526 = ZFR 2013, 183.
[129] RIS-Justiz RS0102779.
[130] RIS-Justiz RS0120785; the OGH has rejected this argument in more recent cases: 4 Ob 62/11p, 1 Ob 188/12x, 2 Ob 74/12i.
[131] Explicitly so in: 1 Ob 188/12x ecolex 2013, 320 (Wilhelm) = RdW 2013, 199.