



Insights into the latest trends
and developments in financial
case law:

Key takeaways for regulated
firms

Arendt Case Law Forum

07 June 2023

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YOUR SPEAKERS



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Evelyne Lordong



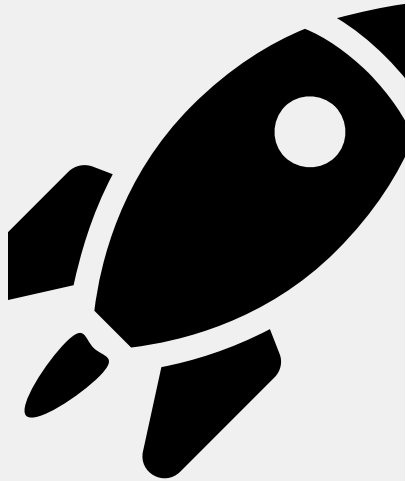
Emmanuelle Mousel



Karin Spitz



Agenda



- I. Liability for fraudulent payments under PSD 2 – what about payee banks?**

- II. Consumer protection and Lombard loans – validity of margin call clauses**

- III. Consumer protection and statute of limitation – when is a claim for the declaration of an unfair term in a contract time-barred?**

- IV. Regulatory investigations – national and international safeguards**



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Liability for fraudulent payments under PSD 2 – what about payee banks?

TA 18 March 2022

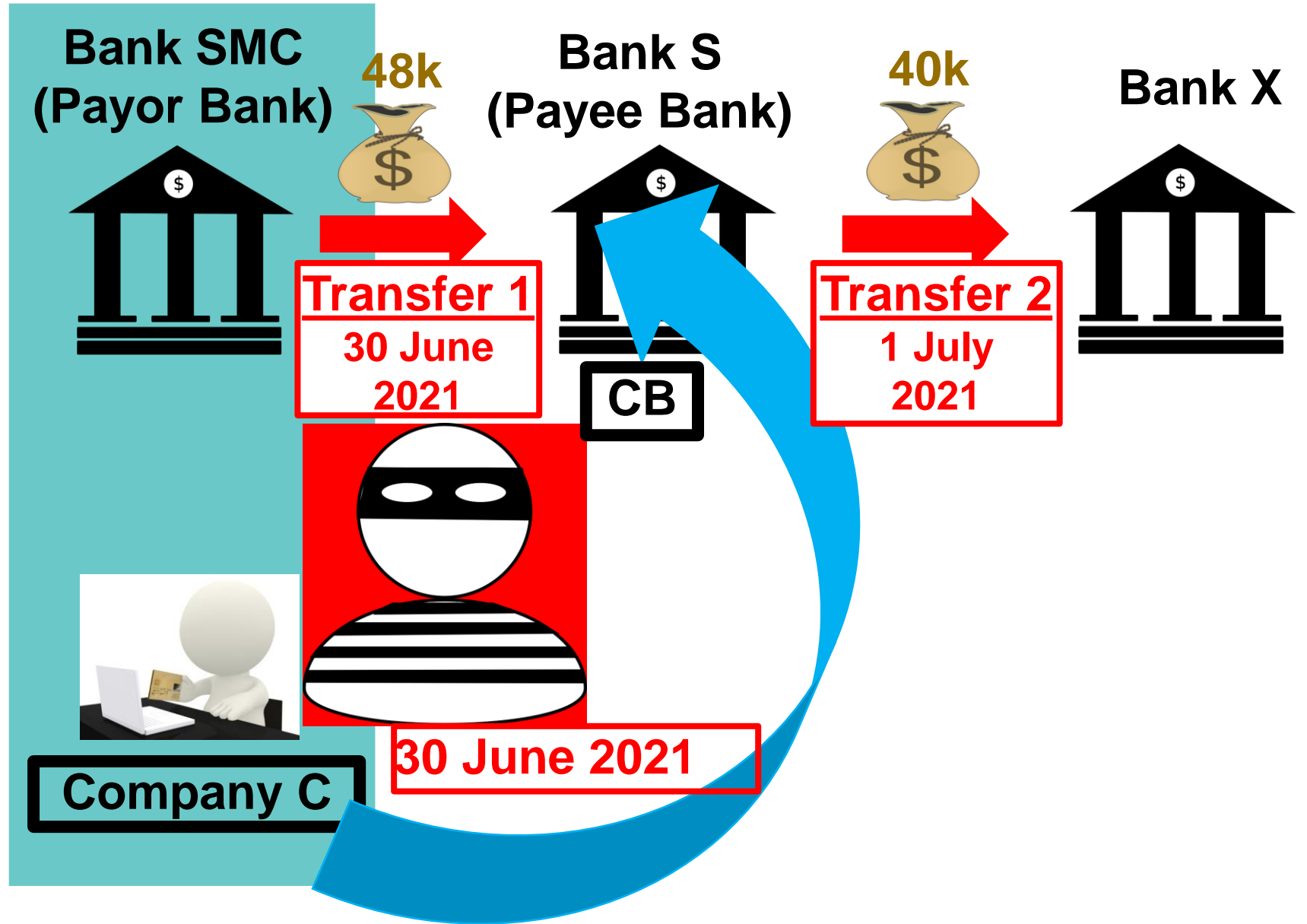
CA 07 March 2023

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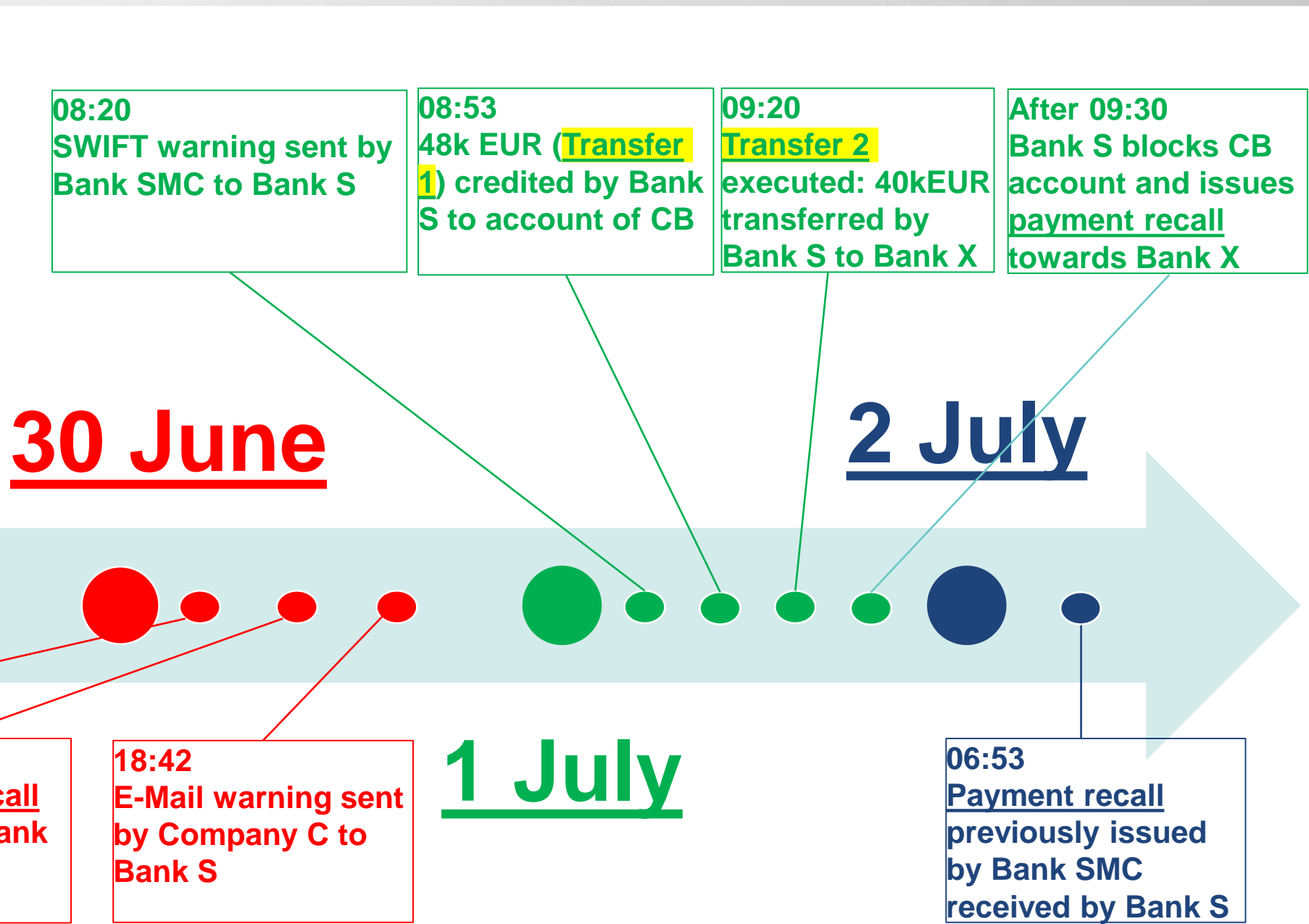
FACTS

Liability for fraudulent payments under PSD 2 – what about payee banks?



TIMELINE

Liability for fraudulent payments under PSD 2 – what about payee banks?



LEGAL ARGUMENTS

Liability for fraudulent payments under PSD 2 – what about payee banks?

Legal Arguments



Company C

Theory of substituted agent (*mandataire substitué*)

Breach of AML due diligence duties

LEGAL ARGUMENTS

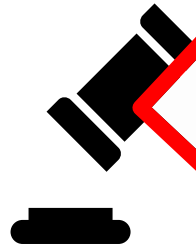
Liability for
fraudulent
payments under
PSD 2 – what about
payee banks?



TA 18 MARCH 2022

Liability for
fraudulent
payments under
PSD 2 – what about
payee banks?

TA 18 March 20



Law of 2009 does not apply

Bank S (payee bank) acted as
delegated agent (*mandataire*
of Company C

(payee bank) must
be diligent and apparent

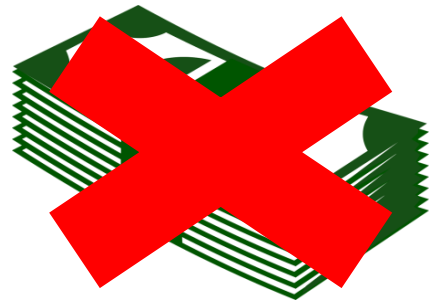
measures due
to ensure that Bank S
measures applied



CA 07 MARCH 2023

Liability for fraudulent payments under PSD 2 – what about payee banks?

CA 7 March 2023



Transfer 1	≠	Transfer 2
<input type="checkbox"/> <u>Law of 2009 applies</u> ➤ No application of theory of substituted agent ➤ No application of Law of 2004		<input type="checkbox"/> Law of 2009 <u>does not</u> apply
<input type="checkbox"/> No proof that Bank S was usefully informed of fraud before the crediting of the account of CB		<input type="checkbox"/> Rules of extra-contractual liability
<input type="checkbox"/> <u>Under Law of 2009, Company C may only act against its own PSP</u>		<input type="checkbox"/> No proof of breach under Law of 2004 since no proof of knowledge of fraud during any of the transfers

LESSONS LEARNED

Liability for fraudulent payments under PSD 2 – what about payee banks?



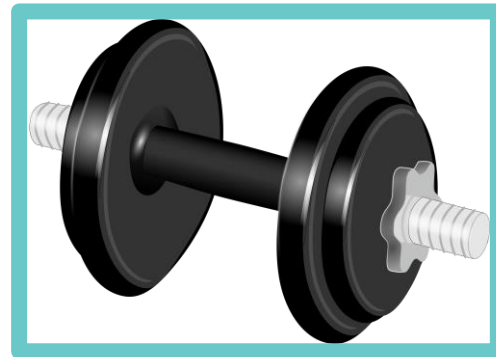
Payee Bank

1



Payor Bank

2





Consumer protection and Lombard loans – validity of margin call clauses

OLG – Schleswig-Holstein

19.09.2022



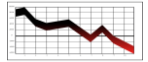


■ The facts

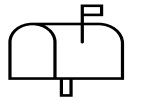
- Securities account



- Lombard loan agreement of 2 December 2017 (EUR 100.000.-)
- Pledge agreement of 2 December 2017



- End of December 2019: stock market crash



- Letter of the bank of 11 March 2020 to re-establish the coverage ratio



- Enforcement of the pledge on 23 March 2020 (EUR 75.000.-)
- Additional payment of EUR 25.000.-



- Court of first instance
 - the bank has to reinstate the client's portfolio
 - the client will save legal costs

APPEAL



■ Decision of the Appeal Court

- Breach of the pledge agreement
- The contractual term of the bank's GTC providing that:

« The bank has the right to sell the securities portfolio to restore the coverage ratio. In addition, the bank may require additional guarantees in order to re-establish the agreed coverage ratio »



is unfair.

1

A two months notice must be given when the bank unilaterally terminate the loan agreement

- ✓ Open-ended contract concluded with a consumer
- ✓ The right to sell the securities portfolio authorizes the bank to unilaterally terminate the Lombard loan



Two months notice



■ Decision of the Appeal Court

2

The clause allowing the bank to sell the securities portfolio to re-establish the coverage ratio authorises the bank to unilaterally modify the service promised.



Unless the possibility to unilaterally modify the service promised has been specified in the contract and expressly accepted by the consumer

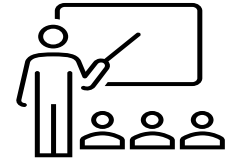
Fair



The customer must be able to foresee the conditions and scope of the possible changes of the contract



■ What lessons can we learn from this decision?



✓ Strong trend in favour of consumer protection



✓ Council directive 93/13/EEC on unfair terms in consumer contracts

✓ Art. L-224-14 of the Consumer code (does not apply to Lombard credit loans)

« Si le contrat de crédit le prévoit, le prêteur peut procéder à la résiliation type d'un contrat de crédit à durée indéterminée en donnant au consommateur un préavis d'au moins deux mois établi sur un support papier ou sur un autre support durable. »

✓ Art. 211-3 (14) of the Consumer Code

« Sont notamment à considérer comme abusives au sens de l'article précédent:

(14) Les clauses permettant au professionnel de substituer à la fourniture ou à la prestation promise une fourniture ou une prestation différente, à moins que celle-ci n'ait été spécifiée au contrat et expressément acceptée par le consommateur. »



Contracts concluded with consumers should be drafted in plain, intelligible language and any modification of the agreed terms should be **predictable for the consumer**



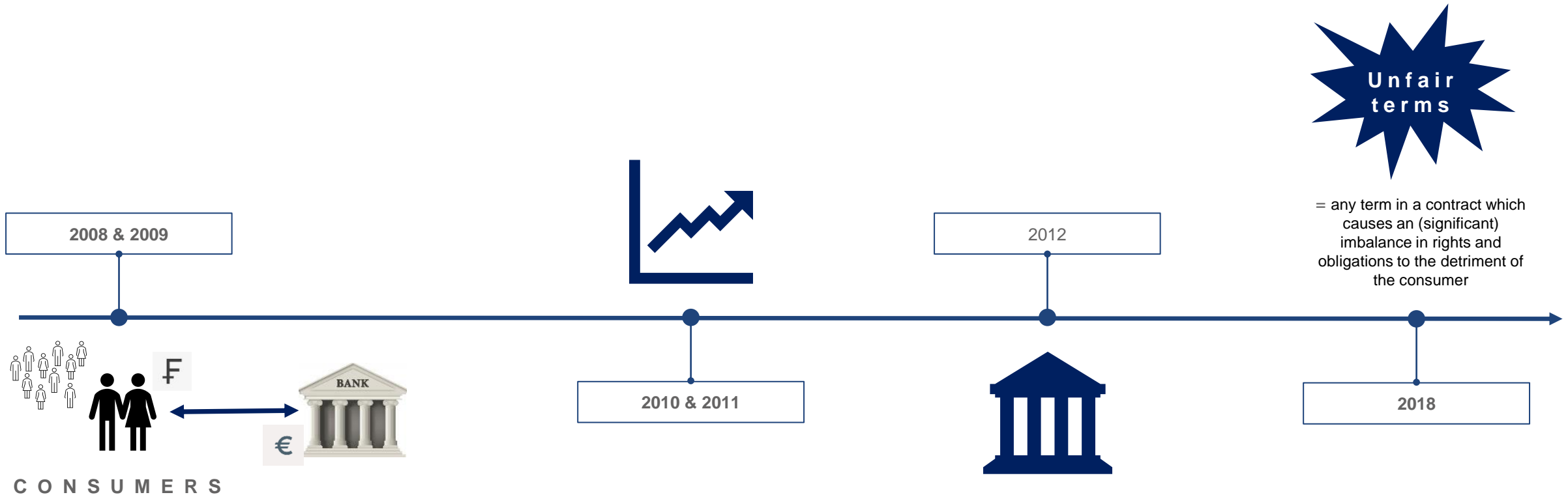
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Consumer protection and statute of limitation – when is a claim for the declaration of an unfair term in a contract time-barred?

Cass.fr. 30 March 2022

CJUE 10 June 2023

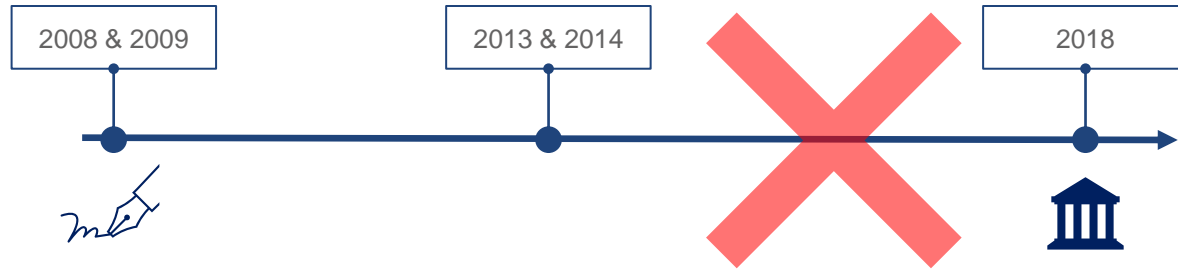






Paris Court of appeal
17.04.2019

1 Limitation period



*“[...] the action brought by Mr and Mrs X to have terms declared unwritten as unfair is governed by **ordinary contract law** and is therefore subject [...] to the **five-year limitation period**”*

2 Obligation of information and advice



The borrowers have been clearly, precisely and expressly informed of the risk of exchange rate fluctuations and their impact on the duration of the loan and therefore on the total cost of repaying the loan



Court of cassation
30.03.2022

1 Limitation period



"[...] an application to have an unfair term deemed unwritten on the basis of the aforementioned article L. 132-1 [Consumer Code] is **not subject to the five-year limitation period**"

2 Obligation of information and advice



"In so deciding, without investigating whether the bank had provided the borrowers with **sufficient and accurate information enabling them to understand the specific operation of the financial mechanism** in question and thus to assess the risk of potentially significant negative economic consequences [...] the court of appeal did not provide a legal basis for its decision."

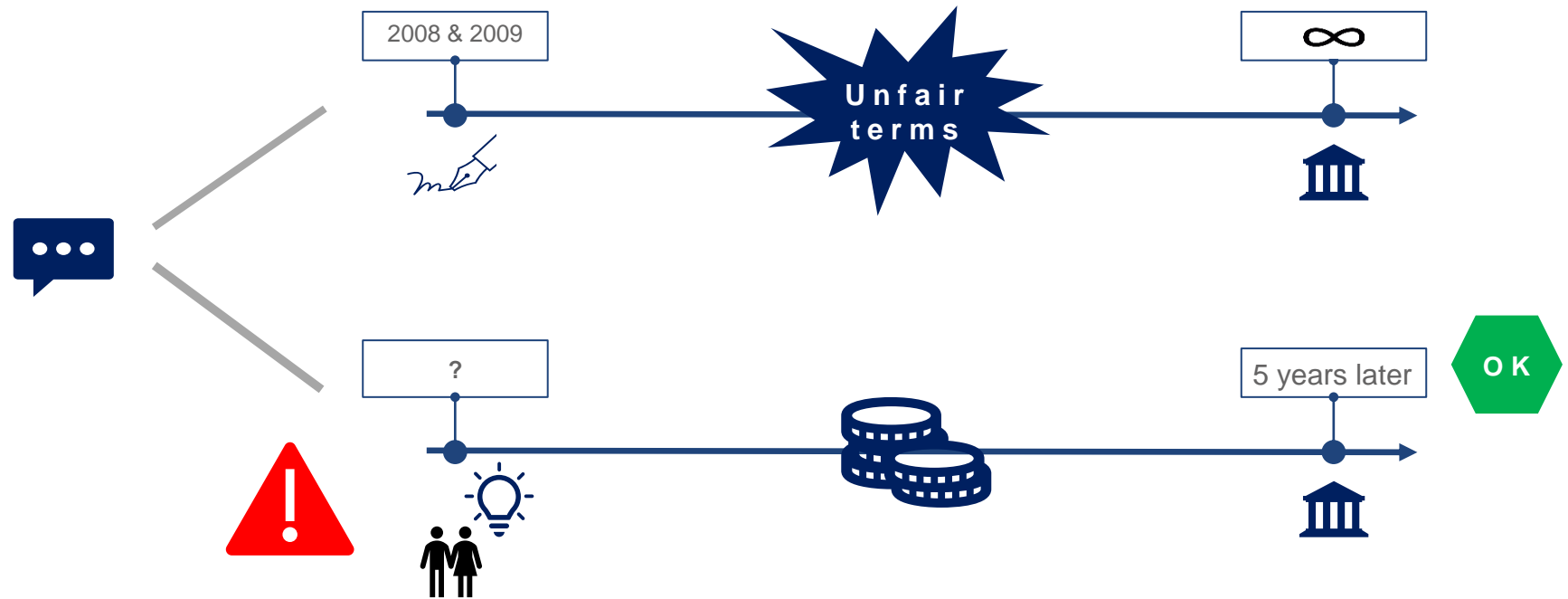
1 Limitation period

 Principle of effectiveness

 Limitation periods not generally forbidden



Court of Justice of the EU
10.06.2021



2 Obligation of information and advice



Transparency requirement



Court of Justice of the EU
10.06.2021



*“[...] that requirement must be understood as requiring not only that the term in question must be formally and grammatically intelligible to the consumer, but also that an **average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position to understand** the specific functioning of that term and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term for his or her financial obligations”*

The image features two skydivers in freefall against a background of white clouds. The skydivers are wearing full gear, including helmets and parachutes. The background is split into a white cloud-filled area on the left and a dark blue area on the right with a white geometric pattern of overlapping triangles. The text 'Regulatory investigations – national and international safeguards' is written in white on the blue background.

Regulatory investigations – national and international safeguards

The Arendt logo consists of the word 'arendt' in a lowercase, sans-serif font, enclosed within a blue square frame that has a small gap at the top and bottom.

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Investigations by Administrative Authorities

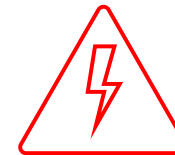
- **CSSF / CAA: duty to cooperate**
- **sanctions in case of failure to cooperate**
 - monetary sanctions
 - aggravating factor



- **criminal law risk (Article 23 (2) CPP)**



- **tension cooperation >< sanction risk**



National Safeguards

- **PANC (*Procédure administrative non contentieuse*)**

- règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes
- applicable to CSSF / CAA

- **protections**

- right to a lawyer
- access to information
- right to react prior to a decision
 - motivated warning by the authority (*lettre de griefs*)
 - right to present a defense brief
 - right to be heard
- right of judicial recourse



- **Administrative Court of Appeal 2 May 2022**

- the authority must specifically draw the attention to the right to be heard
- a mere reference to the relevant legal provision providing for such right is insufficient



PANC – (*Procédure administrative non contentieuse*)

“The [PANC] has remained unchanged to this day and excels in its general and impersonal wording which, over the decades, has not lost any of its topicality and, on the contrary, continues to regulate in full the relations between the administration, generally the strong party, with rights exorbitant from general rules of law, such as to be able to act in the general interest, and the constituent, generally the weaker party (...).

It is the task of the administrative judge to create the balance that is essential if we are to live together as adequately as possible, taking into account the requirements of the rule of law (...) taking into account the development of administrative action over the decades (...) if only because of all-round technical progress.

In that general context, the Court is bound to hold that the provisions of Article 9 are not properly complied with by an administrative authority’s (...) adding a mere reference to Article 9 (right to be heard), as the CSSF did (...) in the present case, but that it is imperative, in the face of this development, which is a priori difficult to reverse, of the dehumanisation of relations between the administration and the public, that the administration should have made the constituent concerned specifically aware of his possibility of requesting to be heard in person (...).”

International Safeguards

- **European Convention on Human Rights (“ECHR”) as applied by:**
 - the European Court of Human Rights
 - the Court of Justice of the European Union

- **CJEU 2 February 2021, *Consob* (C-481/9)**
 - sanctioned duty to cooperate >< right to remain silent to avoid self-incrimination
 - The ECHR applies to administrative sanctions if they are “criminal in nature”:
 - legal classification of the offense under national law;
 - the intrinsic nature of the offense;
 - the degree of severity of the penalty a person may occur
 - Right to silence prevails if the investigated offense can give rise to administrative sanctions of a criminal nature or criminal liability
 - some duty to cooperate → e.g. must appear at a hearing
 - the right to silence is not confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but also covers information on questions of fact which may subsequently be used in support of the prosecution



Right to silence – applicable to legal persons?



- no case law in financial matters

- **competition law : ECJ Orkem vs Commission (347/87):**

“The rights of the defence, as a fundamental principle, must be observed, not only in administrative procedures which may lead to the imposition of penalties, but also during preliminary inquiry procedures, such as requests for information. [...]

Accordingly, whilst the Commission is entitled, in the course of a request for information [...], to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of the defence.

Although an undertaking cannot be said to have the right not to give evidence against itself, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.”

- **European Court of Human Rights – broader view?**

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