



Insights into the latest trends and developments in financial case law: key takeaways for regulated firms

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Agenda

- Liability regime for unauthorized digital payment transactions: quick overview of recent case law
- *Force majeure* - an effective shield against contractual liability ?
- Joint account and conflicting orders: in whose hands must the bank pay?
- Amendment of GTCs – validity of tacit consent clauses (BGH, 27 avril 2021)

Liability regime for unauthorized digital payment transactions

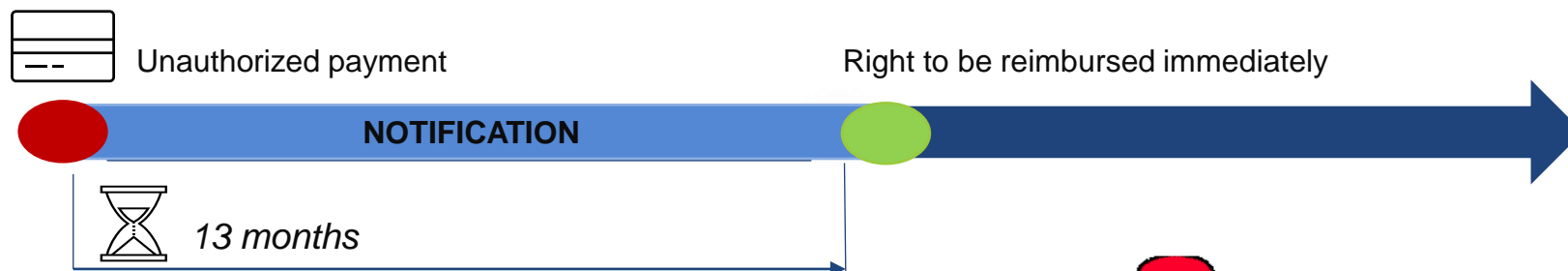
Quick overview of recent case law



Liability regime for unauthorized digital payment transactions: quick overview of recent case law (1)



Quick overview of the rules of liability regime of the Law of 2009



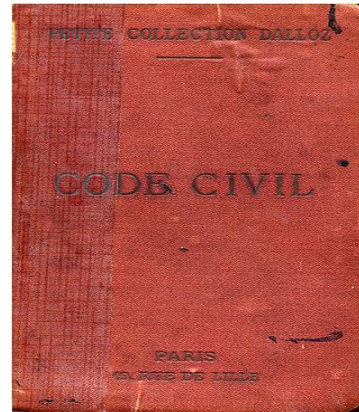
- Fraudulent act
- Intent or gross negligence



Liability regime for unauthorized digital payment transactions: quick overview of recent case law (2)



EUCJ, 2 September 2021, C-337/20



The liability regime under PSD2 (Law of 2009) is exclusive of any other liability regime

Liability regime for unauthorized digital payment transactions: quick overview of recent case law (3)

■ Example 1



→ The fact that the fraudster surprised the cardholder vigilance is not a proof of his gross negligence.

→ Has the client transmitted his security code?

Liability regime for unauthorized digital payment transactions: quick overview of recent case law (4)

■ Exemple 2



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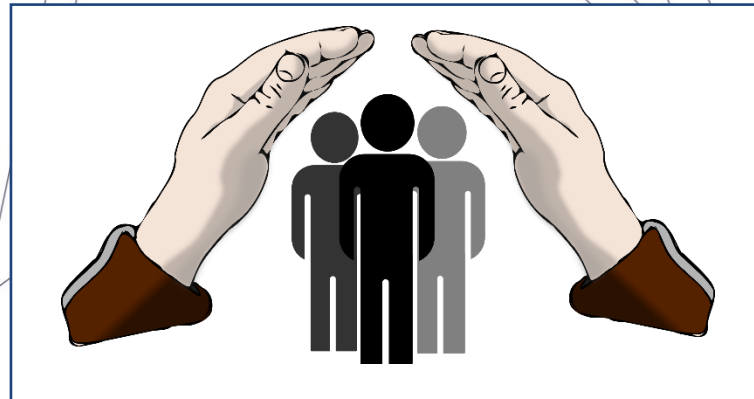


→ The mere fact that the payment instrument was used by a third party with the use of the confidential code is not a proof of the client's gross negligence.

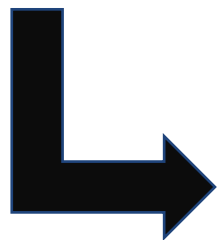
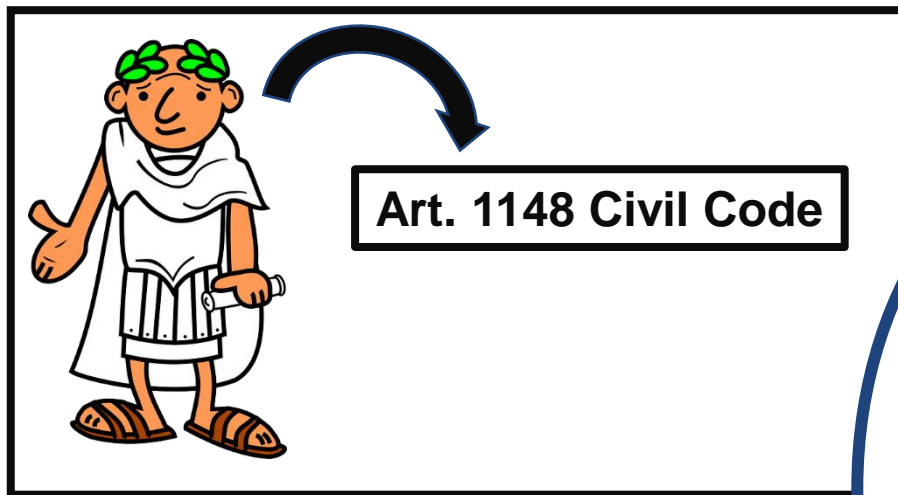


Has the transaction be authenticated, accurately recorded and entered into the bank's accounts?

***Force majeure* - an effective shield against contractual liability ?**



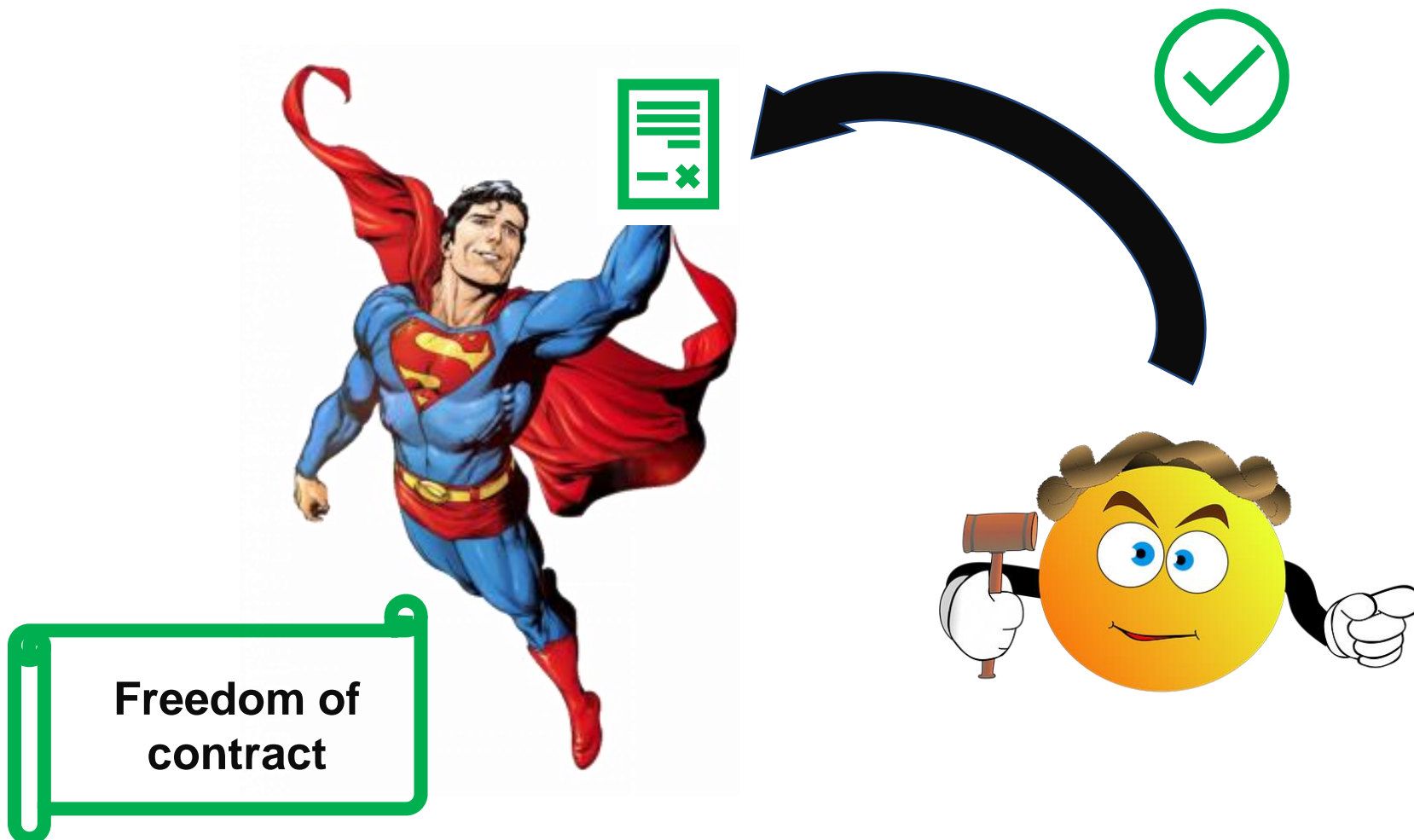
Force majeure - an effective shield against contractual liability ? (1)



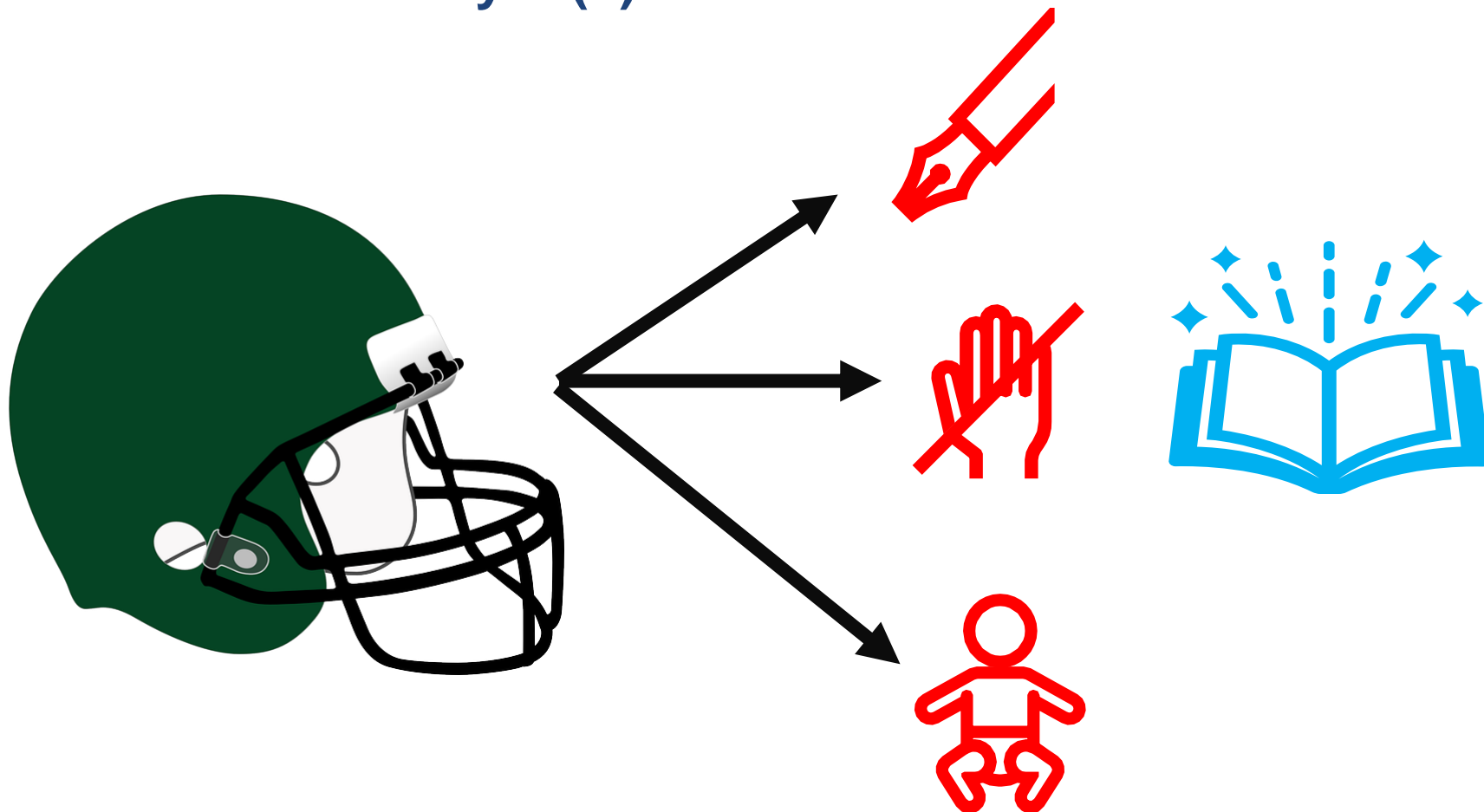
- Inevitable
- Unforeseeable
- Exterior



Force majeure - an effective shield against contractual liability ? (2)



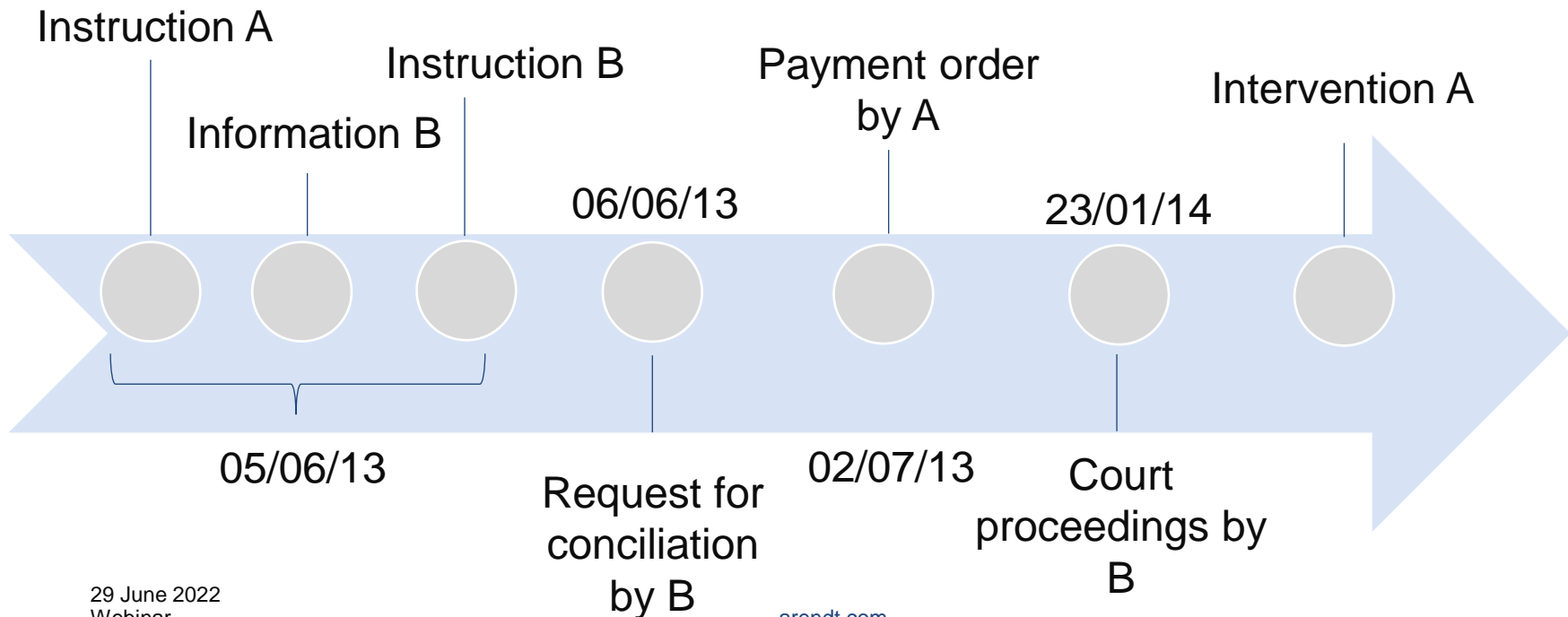
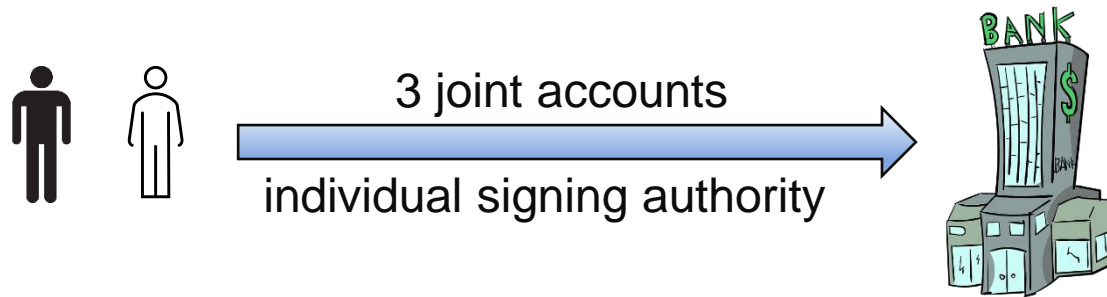
Force majeure - an effective shield against contractual liability ? (3)



Joint account and conflicting orders: in whose hands must the bank pay?

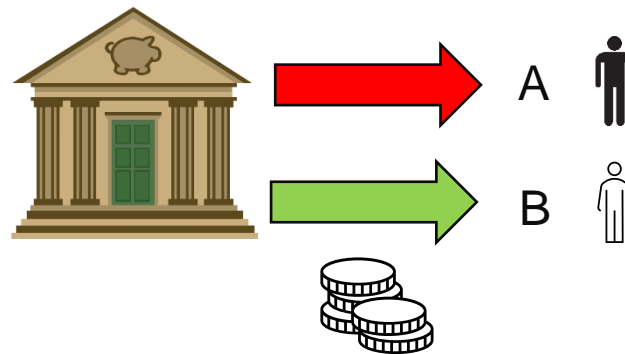
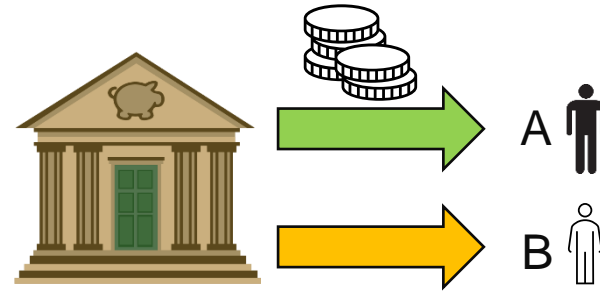


Joint account and conflicting orders: in whose hands must the bank pay?





"First come, first served"



Article 150 Swiss Federal law supplementing the Civil Code

“1 There is joint and several liability of several creditors where the debtor declares that he gives each of them the right to demand payment in full of the claim, and where such joint and several liability is provided for by law.”

« 1 Il y a solidarité entre plusieurs créanciers, lorsque le débiteur déclare conférer à chacun d’eux le droit de demander le paiement intégral de la créance, et lorsque cette solidarité est prévue par la loi. »

“2 Payment to one of the joint and several creditors discharges the debtor in respect of all of them.”

« 2 Le paiement fait à l’un des créanciers solidaires libère le débiteur envers tous. »

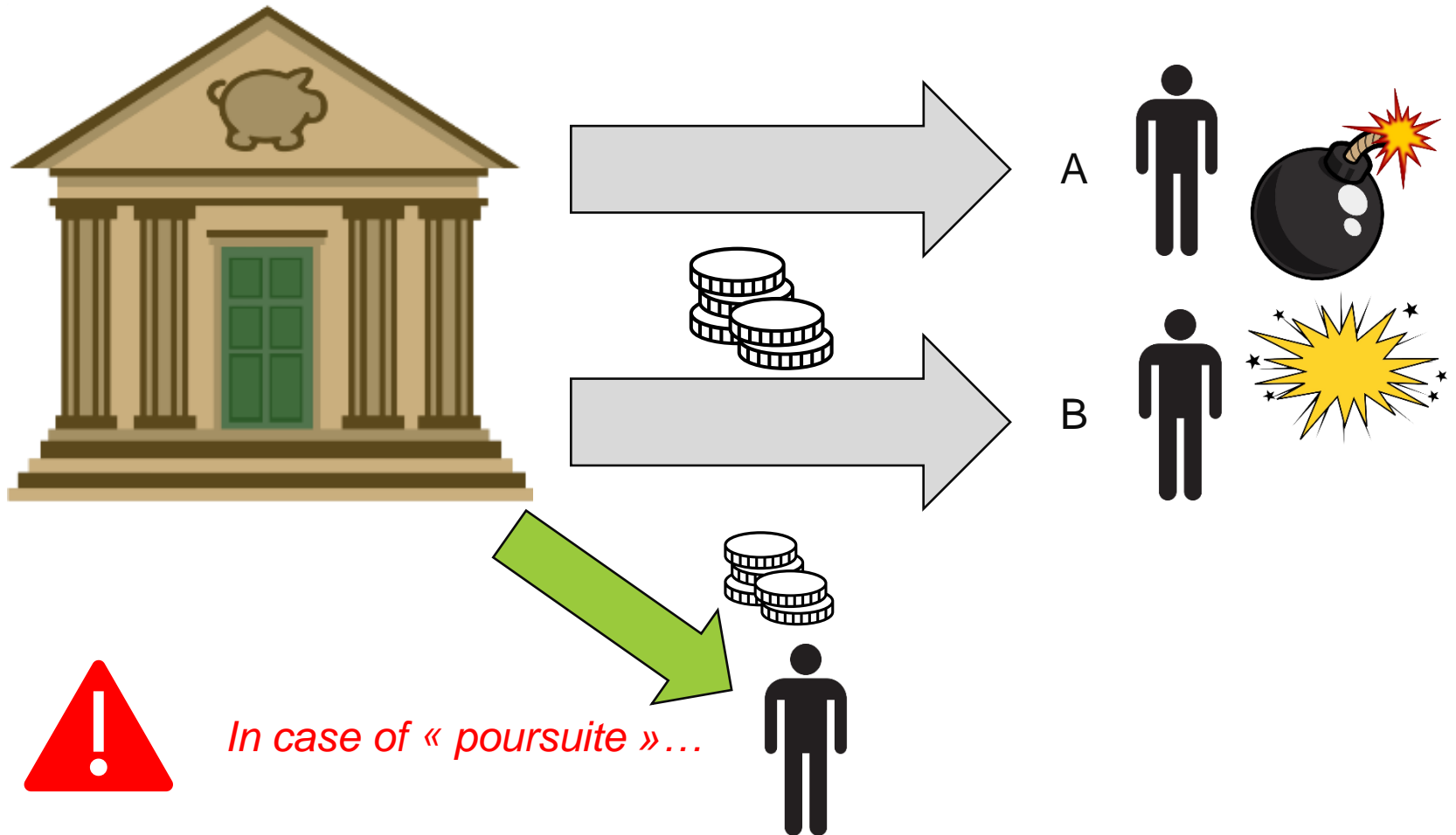
“3 The debtor has the option of paying to one or the other, so long as he has not been warned by the proceedings initiated by one of them.”

« 3 Le débiteur a le choix de payer à l’un ou à l’autre, tant qu’il n’a pas été prévenu par les poursuites de l’un d’eux. »



Active solidarity of creditors

What to do in case of contradictory orders?



Article 1198 of the Luxembourg Civil Code

“It is at the option of the debtor to pay to one or other of the joint and several creditors, as long as he has not been warned by the proceedings of one of them.”

« Il est au choix du débiteur de payer à l'un ou à l'autre des créanciers solidaires, tant qu'il n'a pas été prévenu par les poursuites de l'un d'eux. »

“However, a remittance made by only one of the joint and several creditors discharges the debtor only for the share of that creditor.”

« Néanmoins la remise qui n'est faite que par l'un des créanciers solidaires, ne libère le débiteur que pour la part de ce créancier. »



Suppletive provision

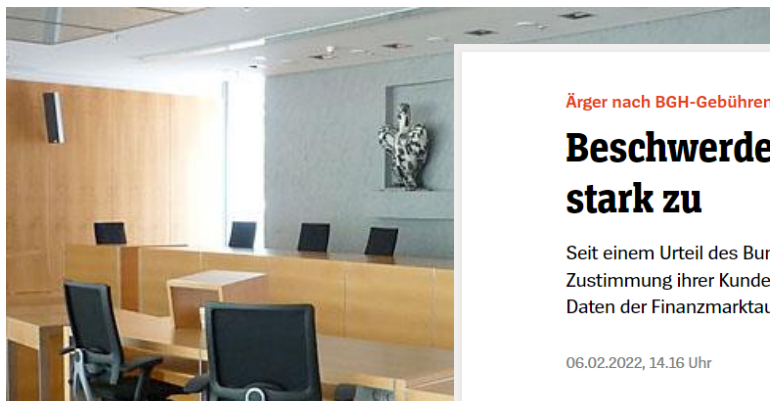
Amendment of GTCs – validity of tacit consent clauses

BGH, 27 April 2021



Amendment of GTCs – validity of tacit consent clauses (1)

- On 27 April 2021, the BGH ruled that a tacit consent clause in case of amendments to GTCs is to be considered null and void (unfair term).
 - *Clause in the GTCs provides for a tacit acceptance mechanism in case of changes proposed and communicated by the bank.*
 - *The customer is deemed to have accepted them if he does not object.*



Ärger nach BGH-Gebührenurteil

Beschwerden von Bankkunden nehmen stark zu

Seit einem Urteil des Bundesgerichtshofs müssen Banken für höhere Gebühren die Zustimmung ihrer Kunden einholen. Nun mehrte sich Kritik an den Finanzinstituten, zeigen Daten der Finanzaufsicht.

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Amendment of GTCs – validity of tacit consent clauses (2)

- According to the BGH, this clause creates an *inappropriate disadvantage* to the consumer, contrary to the requirement of *good faith*, and is to be declared void for being an unfair term (*clause abusive*).
- In essence, the clause in question gives too much power to the bank.



Amendment of GTCs – validity of tacit consent clauses (3)



- CJEU, 11 November 2020, Denizbank
 - Validity in principle of tacit consent clauses for GTCs amendments (i.e. framework contract for payment services), without prejudice to other applicable law requirements.
 - However, national court may review unfairness of such a clause where the payment service user is a consumer.

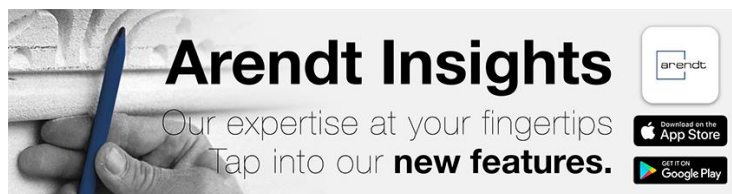
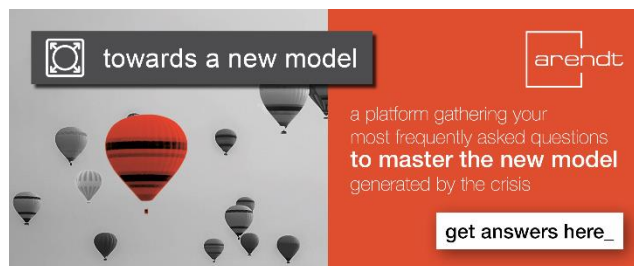
Amendment of GTCs – validity of tacit consent clauses (4)

- CJUE has validated in principle such clauses.
- But national court can review unfairness if customer is a consumer.
- Luxembourg consumer law contains similar provisions than in Germany - impact?





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