

Arendt Case Law Forum

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

Key takeaways for regulated firms



Arendt House

10 July 2024

arendt.com

CONFIDENTIALITY REMINDER

This document is confidential and is intended solely for its recipient.
Do not distribute outside your organisation.





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

Your contacts/speakers



Estelle Brisson

Counsel
Banking & Financial
Services



Evelyne Lordong

Counsel
Litigation & Dispute
Resolution



Glenn Meyer

Partner
Banking & Financial
Services



Emmanuelle Mousel

Partner
Banking & Financial
Services



Agenda

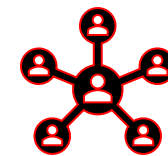
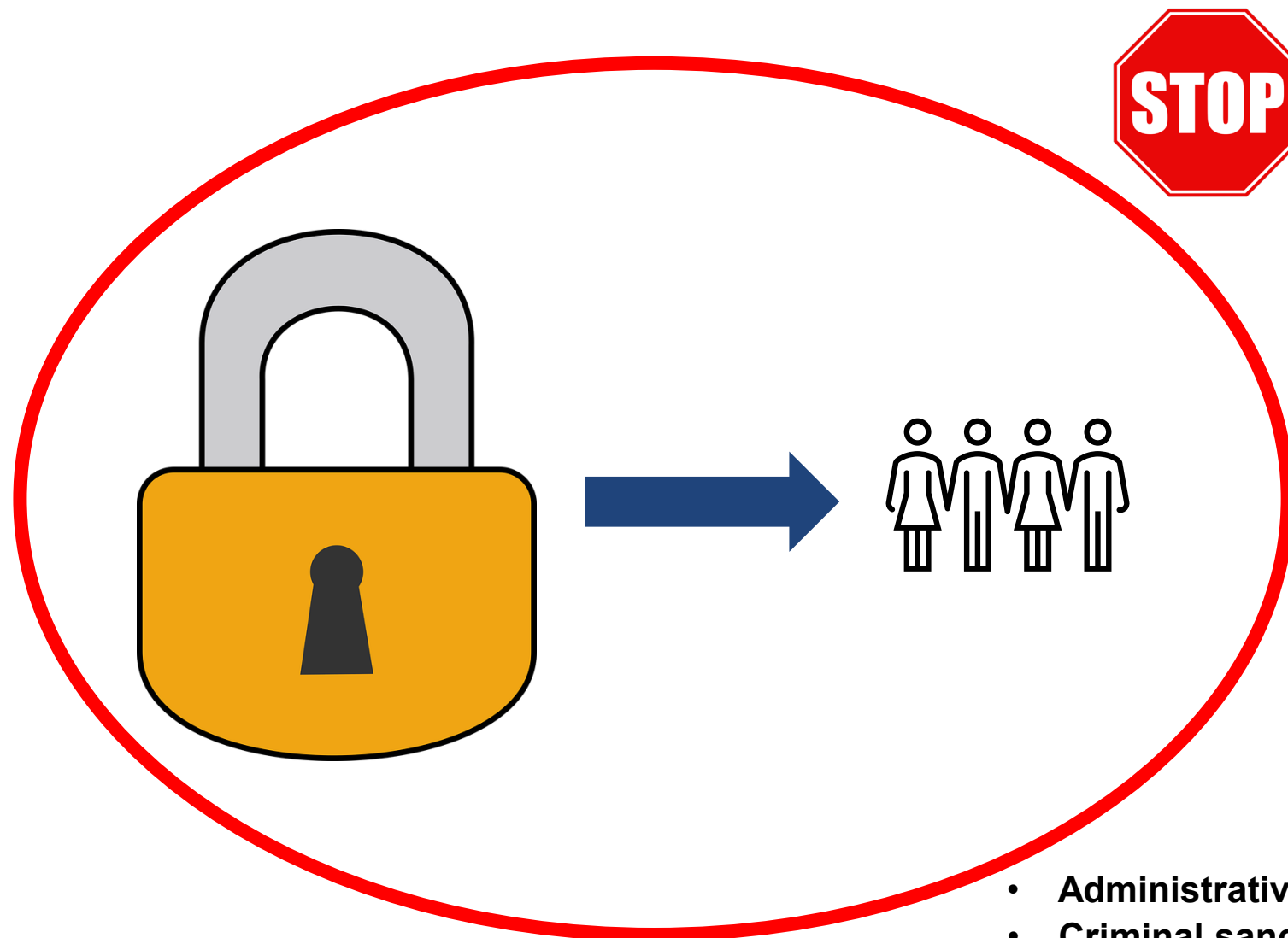
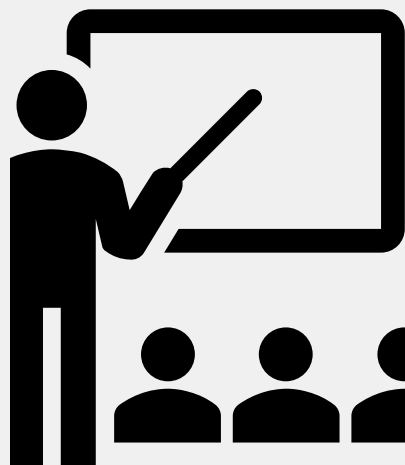
1. Professional secrecy – an abstract rule? *Arrêt n° 419/23 du 5 décembre 2023 (Not. 9487/21/CD)*
2. GTCs as the bank's protective bastion - *Jugement commercial 2023TALCH06/01305, TAL-2020-05107 du 23 novembre 2023*
3. How to avoid stress? Get everything signed! *Arrêt 32/24-VIII-CIV, n° de rôle CAL-2021-01139 du 28 mars 2024*
4. Fiduciary agreement coupled with a donation
- revocability of a third-party benefit clause *Arrêt n°78/24 IV-COM, CAL-2023-00596 du 30 avril 2024*



Professional secrecy – an abstract rule?

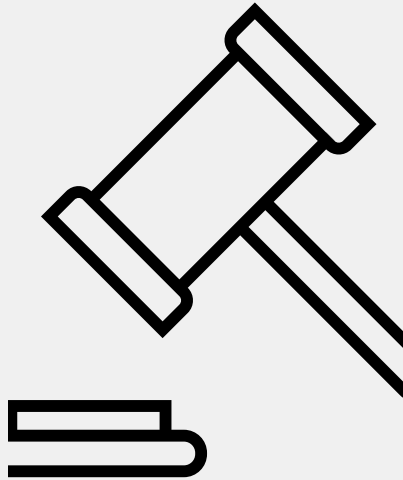
Emmanuelle Mousel

The basics



- **Administrative sanctions**
- **Criminal sanctions**
- **Civil liability**

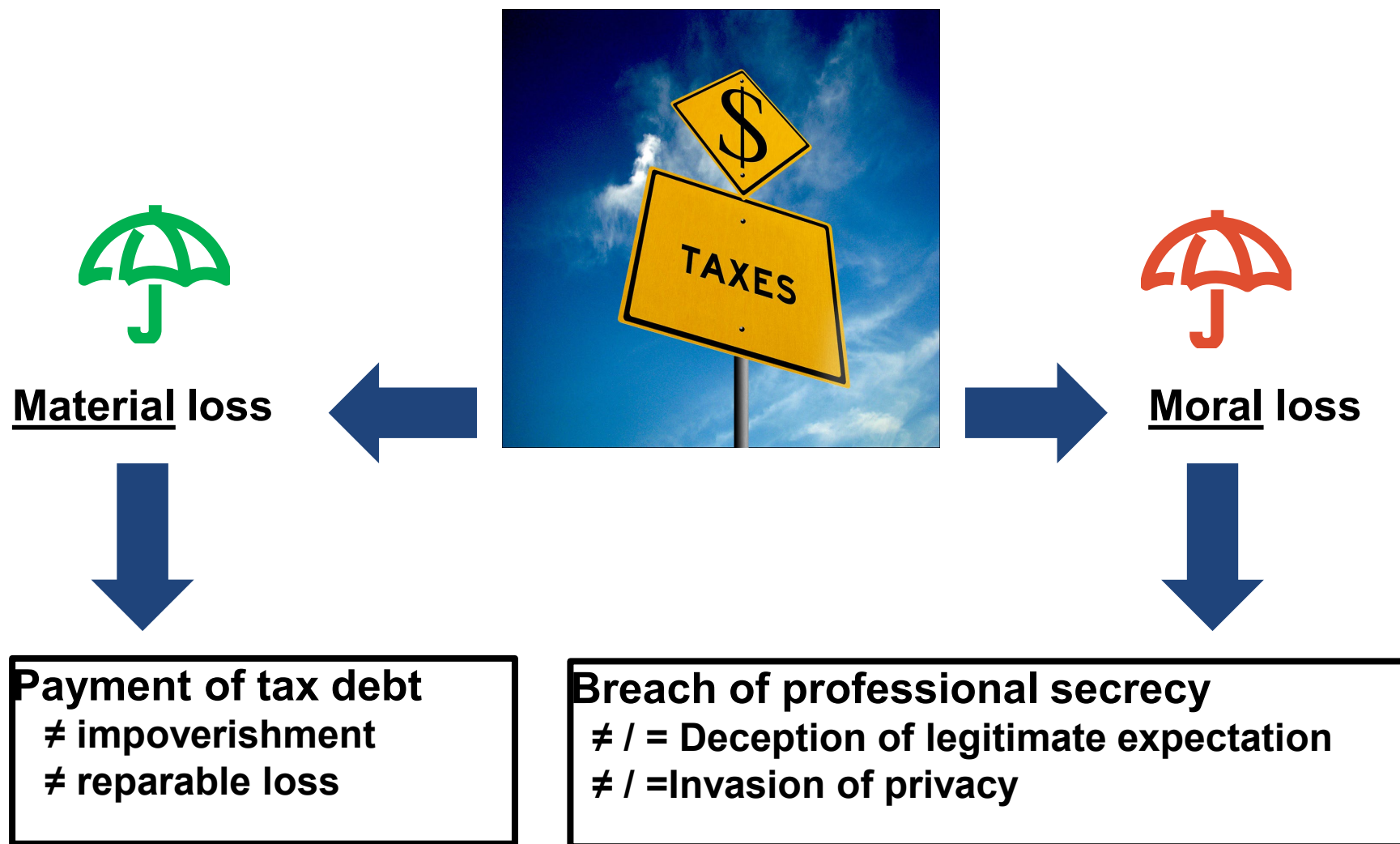
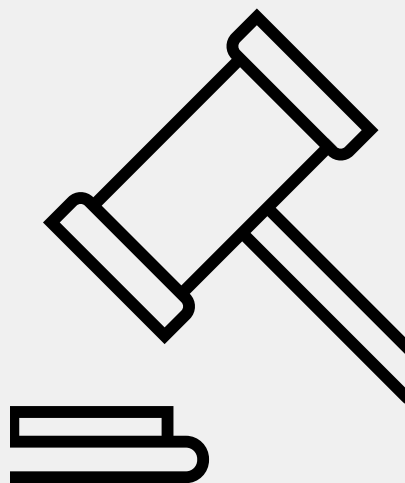
The Courts' view – the ease to prove a breach



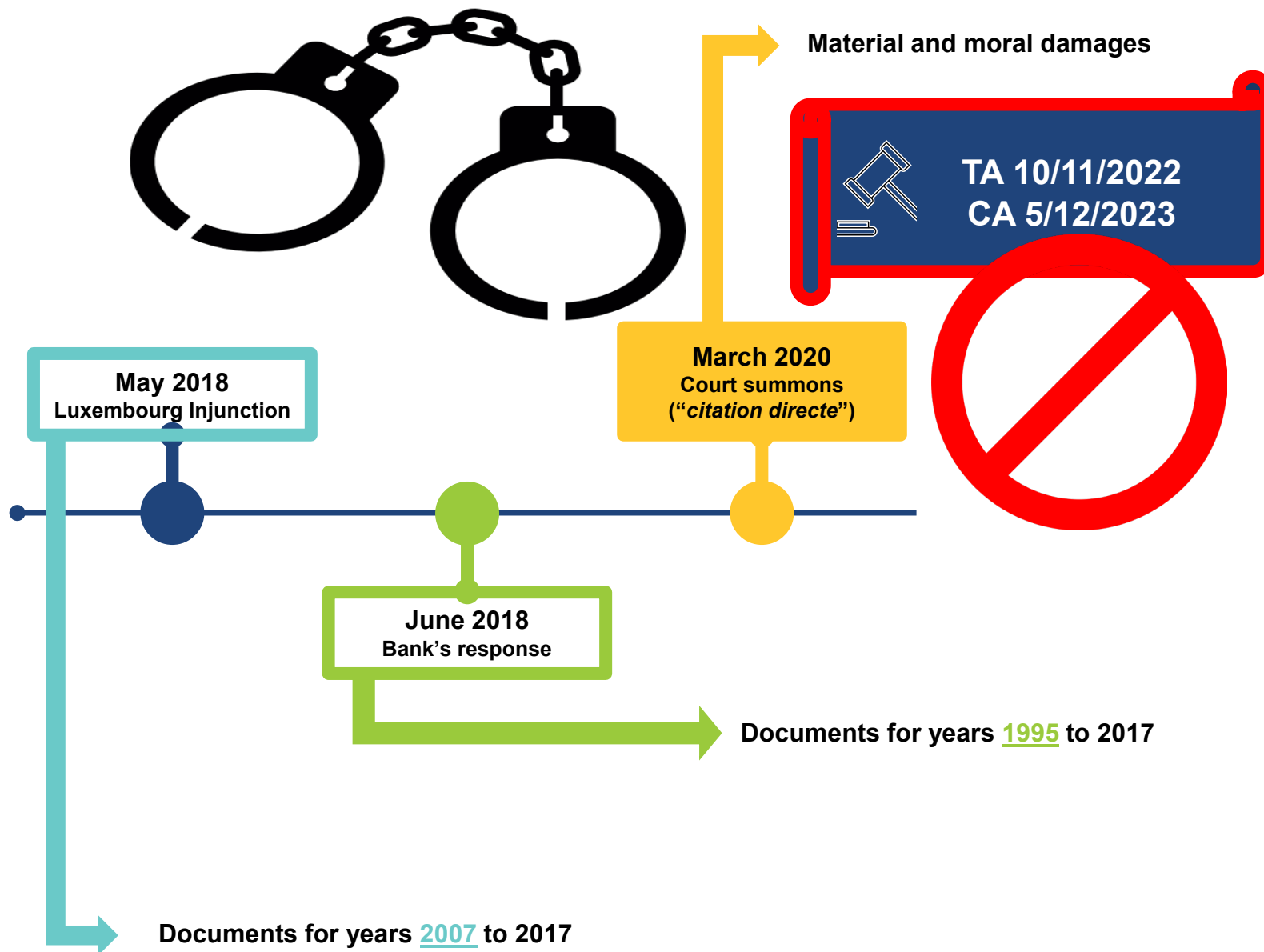
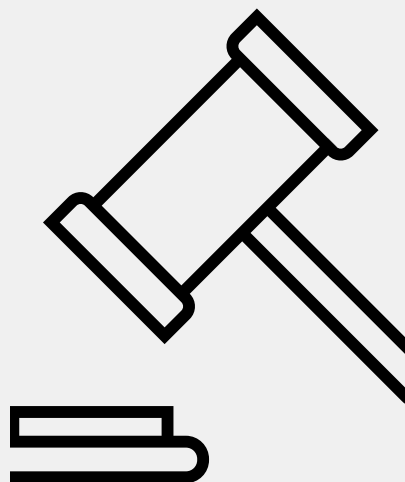
- **Public policy rule**
- **Obligation of result**



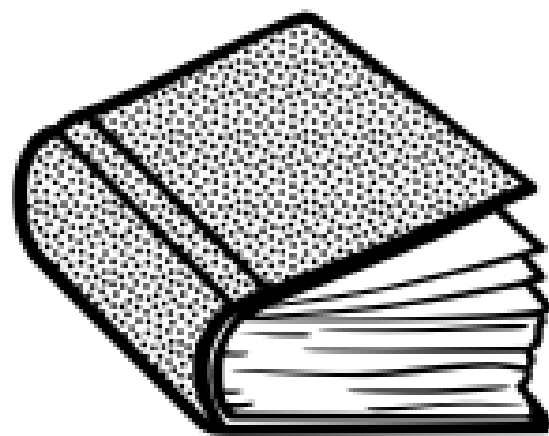
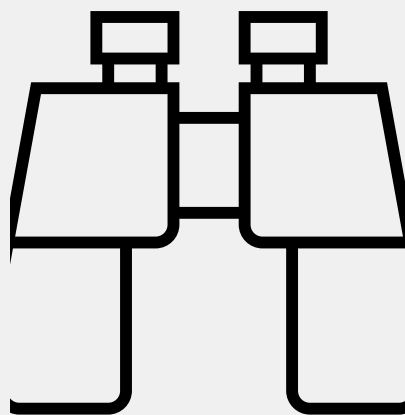
The Courts' view –
the difficulty to
prove a reparable
loss (1)



The Courts' view – the difficulty to prove a reparable loss (2)



Conclusion



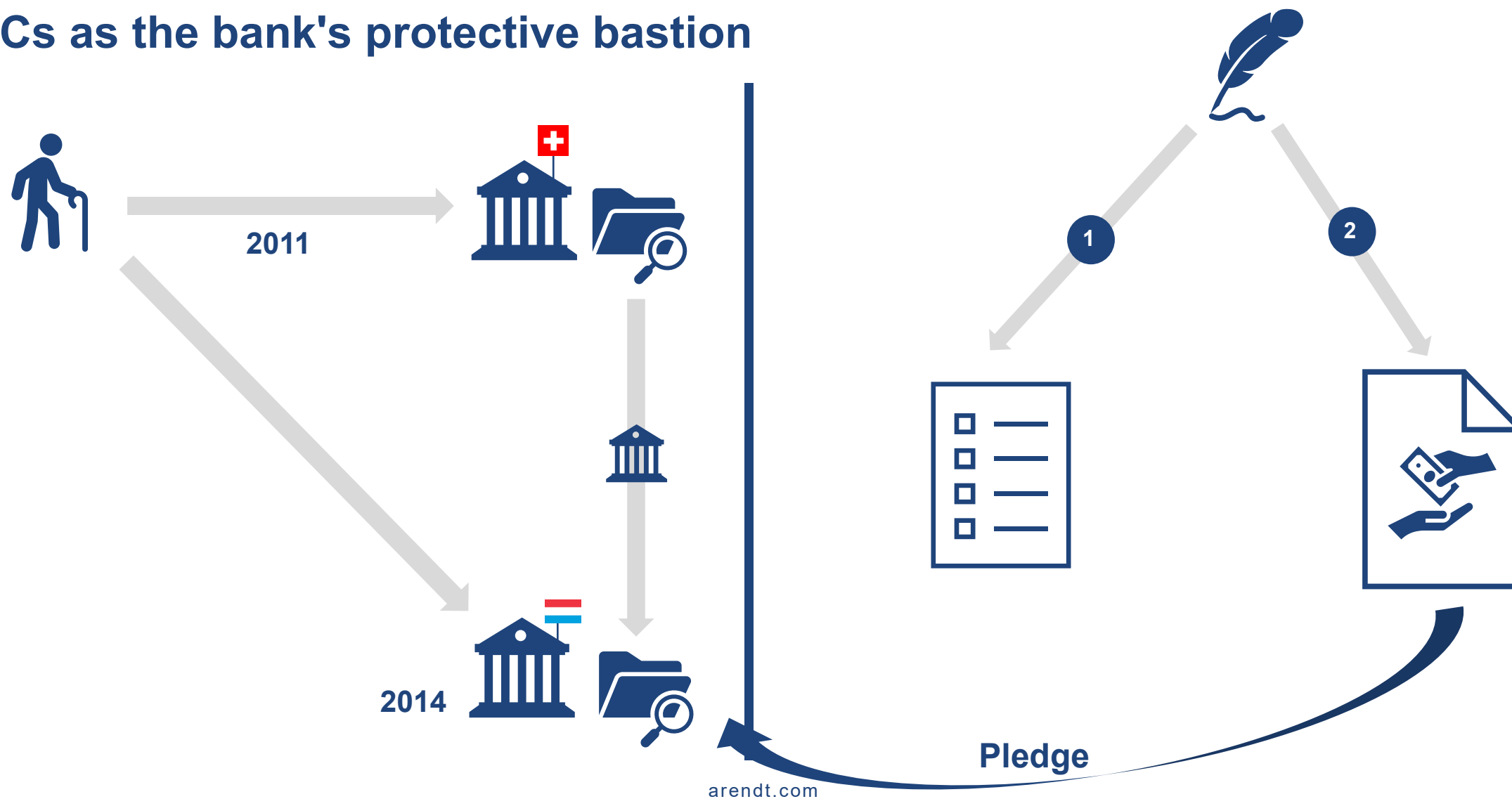


GTCs as the bank's protective bastion

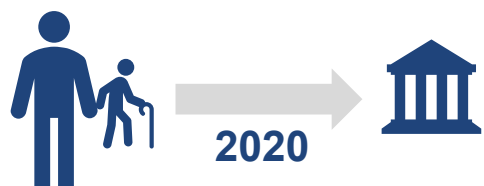
Evelyne Lordong

arendt.com

GTCs as the bank's protective bastion



GTCs as the bank's protective bastion



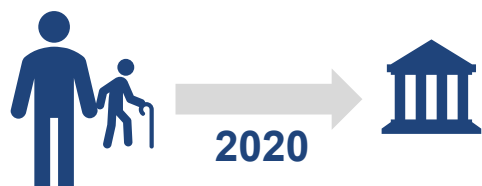
1



Art. 1324 Civil Code: “If the party **disavows his handwriting or signature** [...] **verification shall be ordered by the court.**”



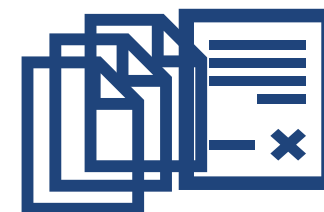
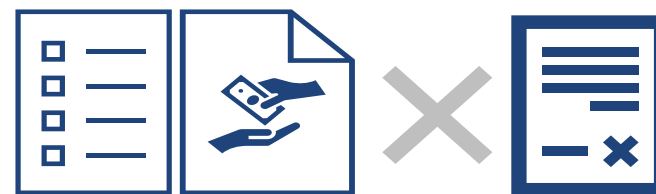
GTCs as the bank's protective bastion



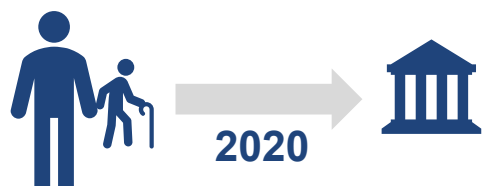
2



Art. 1134-1 Civil Code: “The general terms and conditions of a contract pre-established by one of the parties are only binding on the other party if the latter was in a **position to be aware of them when the contract was signed** and if, depending on the circumstances, **it must be considered to have accepted them.**”



GTCs as the bank's protective bastion



3



2 years



10 years



Art. L. 211-3 (1) Consumer Code: “(1) *In contracts concluded between a professional and a consumer, any term or combination of terms which causes an **imbalance in the contractual rights and obligations to the detriment of the consumer** shall be unfair and, as such, deemed null and void.*”



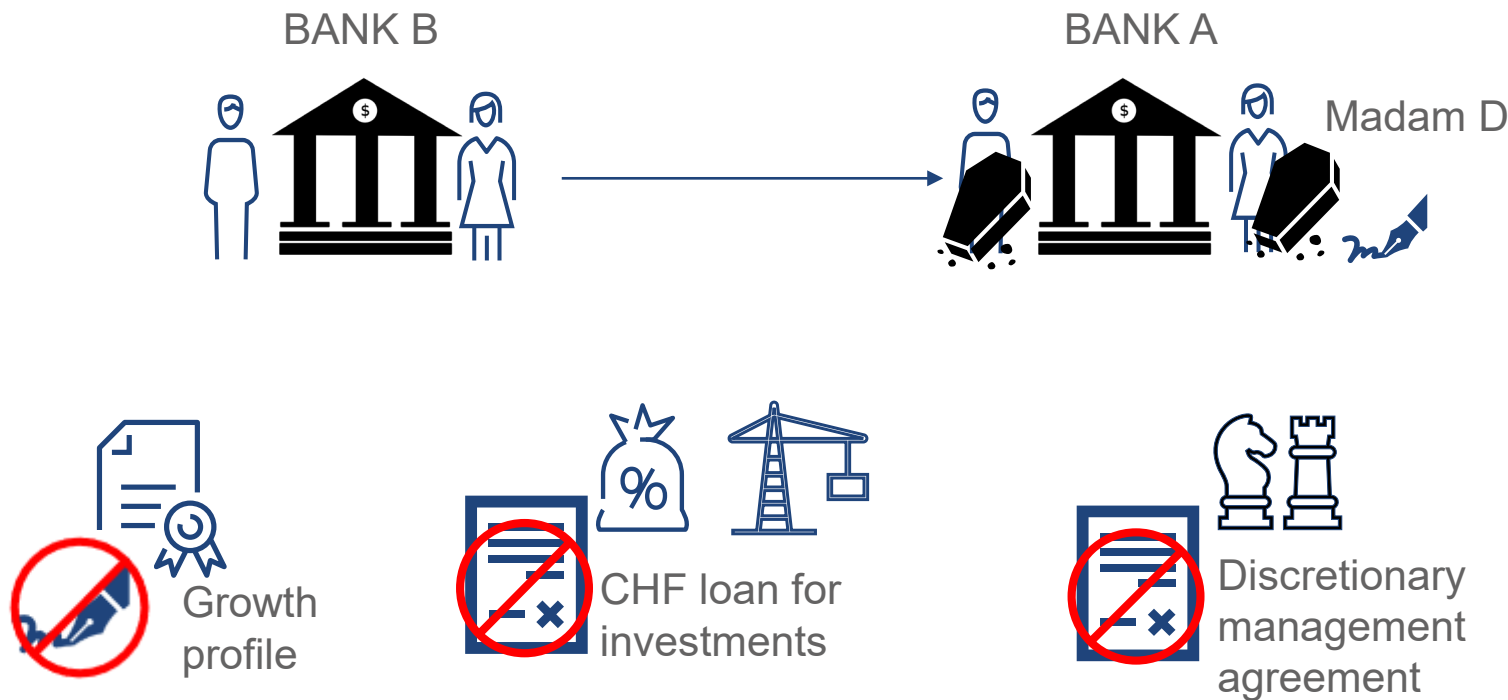


How to avoid stress? Get everything signed!

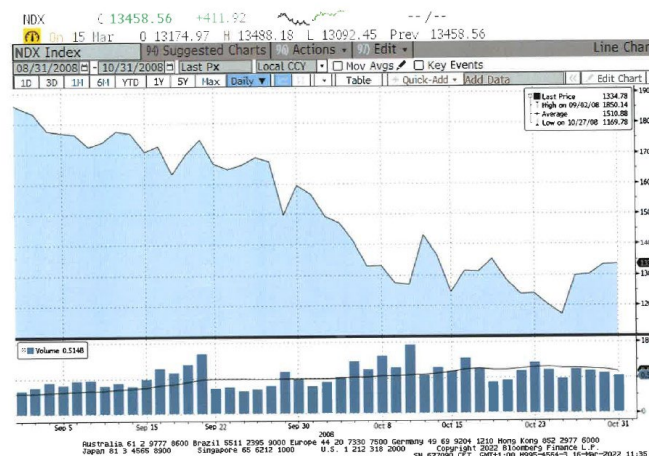
Estelle Brisson

arendt.com

FACTS



September 2008



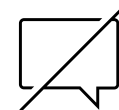
Assessment of the Court



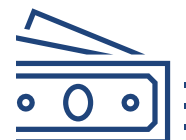
Profile of D



Validly established and could serve
as a basis for the investments
made and advice given



Growth profile



Portfolio
transferred

Assessment of the Court



Compliance of
the Bank with
applicable laws
& regulations

Is only to be assessed:



against the laws & regulations
applicable at the time (2006/2007)



without taking into account
guidelines such as ESMA and EBA



such guidelines go beyond
interpretation (provides for
additional standards of behaviours
in respect of existing texts) and
cannot have any retroactive effect

Assessment of the Court



Validity of the
CHF loan



Operations validated by D



Loan agreement consists in
reality of series of
borrowing and repayment
operations



Poste
restante
services

No challenge of the
statements within a month

Assessment of the Court



Source of liability only if in conjunction with another fault which causally contributed to the occurrence of a damage which the leverage effect would have amplified



Agreement of D as to the use of the leverage effect



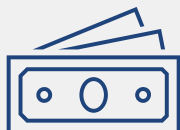
Duty to inform on the risks



Duty to monthly inform on the past operations

Assessment of the Court

4



Faults in the
management of
assets



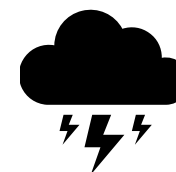
Agreement of D re oral discretionary
management agreement



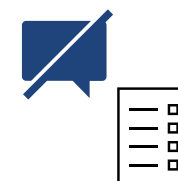
Obligation of means (not of result)



Client has to provide evidence of
wrongful or negligent behaviour
on the part of the manager >
incur liability in the event of fault

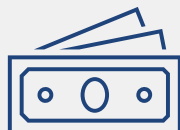


cannot be held responsible for the
fluctuations of the stock market,
which are unforeseeable for a
normally competent and well-
informed professional



Principle: ratification covers the
nature of operations
Exception: this does not validate
the manager's faults

Assessment of the Court



Assessment necessarily made ex post by the court must be limited to a marginal assessment, which should only consider as fault :

a behaviour that denotes manifest negligence

OR

refusal to take into account an important fact

It is not the unfortunate investment that is sanctioned, but abnormal risk-taking:

- a failure to exercise the prudence stipulated in the mandate
- the execution of an abnormal transaction or a transaction contrary to market practice or rules, or
- a manifest discrepancy with the results obtained by other managers placed in the same circumstances



Loss of value does not mean liability

Assessment of the Court

5



Conflicts of interests in relation to the investment of in-house products in the portfolio



the breach of a prudential rule may be invoked by the customer of the financial institution as grounds for a claim for damages



Only require:

- financial institutions to detect conflicts of interest
- take the necessary measures to ensure that the conflict detected does not adversely affect the customer's interests
- if this is not possible, to inform the customer of the existence of the conflict of interest



Did not demonstrate that investment was made in the context of a conflict of interest, and above all, that the existence of such a conflict of interest could have harmed the interests of Madam D



Fiduciary agreement coupled with a donation

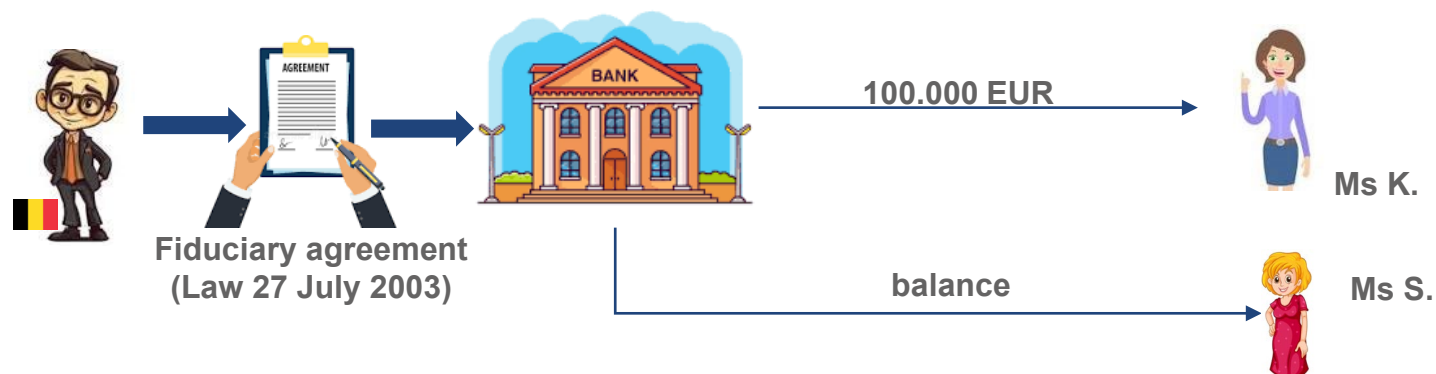
- revocability of a third-party benefit clause

Glenn Meyer

arendt.com

Facts

02.2011



03.2012



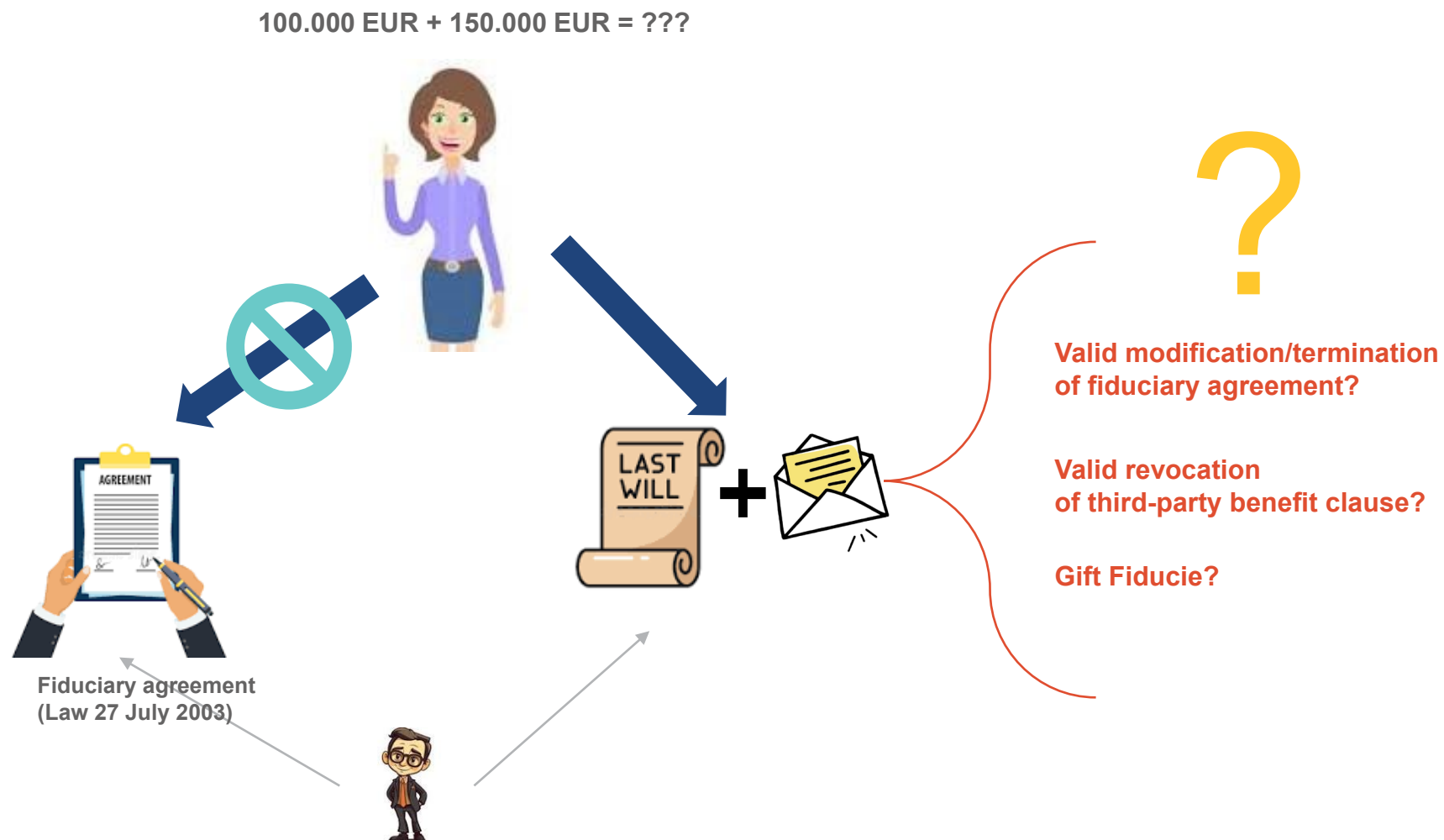
06.2012



08.2012

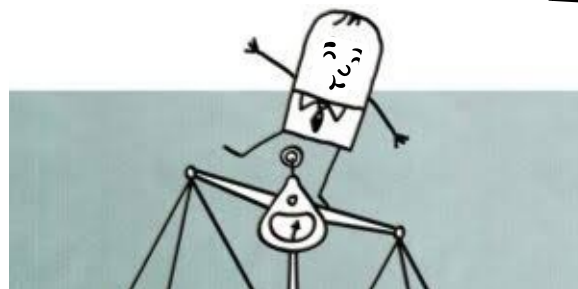


What is it about?

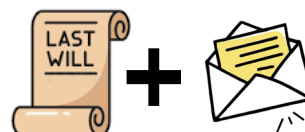


Court's view

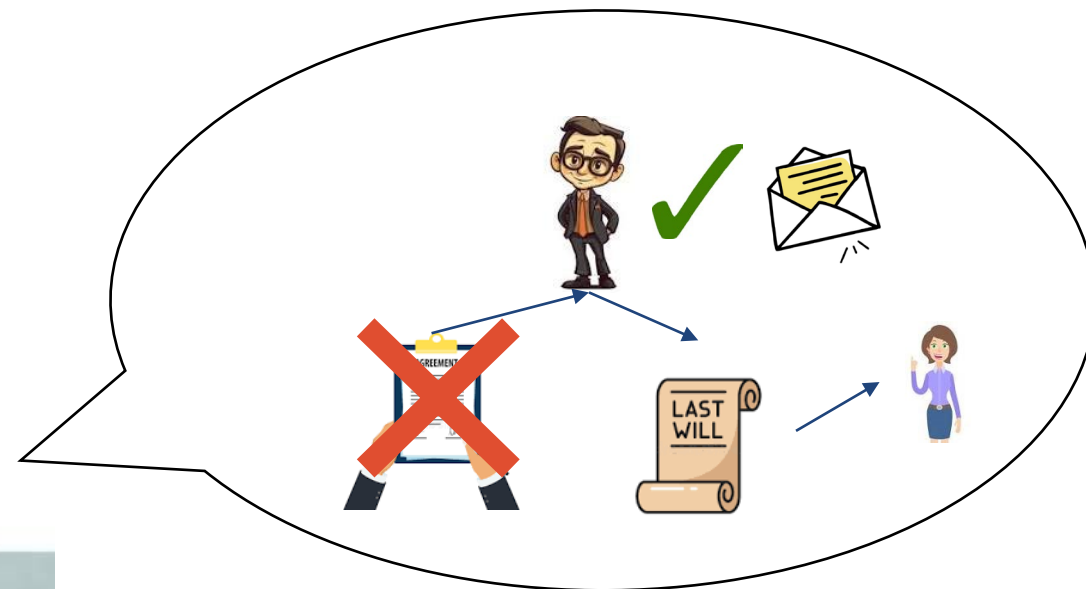
TAL-2018-04297
and CAL-2023-00596



Fiduciary
agreement



Specific
bequest



Fiduciary agreement not terminated/amended!
BUT: Third-party benefit clause validly revocable
as long as not accepted!

Q & A



Your contacts/speakers



Estelle Brisson

Counsel
Banking & Financial Services
estelle.brisson@arendt.com
+352 40 78 78 5062



Evelyne Lordong

Counsel
Litigation & Dispute Resolution
evelyne.lordong@arendt.com
+352 40 78 78 252



Glenn Meyer

Partner
Banking & Financial Services
glenn.meyer@arendt.com
+352 40 78 78 352



Emmanuelle Mousel

Partner
Banking & Financial Services
emmanuelle.mousel@arendt.com
+352 40 78 78 5643

