THE PROFESSIONAL NEGLIGENCE LAW REVIEW

Third Edition

Editor
Nicholas Bird

THE LAWREVIEWS

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CONTENTS

PREFACE

This third edition of *The Professional Negligence Law Review* provides an indispensable overview of the law and practice of professional liability and regulation in 15 jurisdictions. *The Professional Negligence Law Review* contains information that is invaluable to the large number of firms, insurers, practitioners and other stakeholders who are concerned with the liability and regulatory issues of professionals across the globe. I am especially pleased this year to have a chapter on the United States. This was a significant undertaking by our colleagues at Hinshaw & Culbertson – Tom McGarry, Katherine Schnake and Michael Ruff. It has provided a vital resource and stands testament to the depth and breadth of their practice.

In all jurisdictions we now face several years of claims and regulatory issues arising out of the current economic and social turbulence. Jurisdictions and professions will be affected in different ways. In the United Kingdom we will have the further changes emerging from the expiry of the transition period following the UK's departure from the EU. The implementation of new trade arrangements and new jurisdiction and choice of laws arrangements will follow. Rapid changes such as these and economic downturns are the dry tinder for professional mistakes and wrongdoing.

This third edition is the product of the skill and knowledge of leading practitioners in 15 jurisdictions, setting out the key elements of professional conduct and obligations. Each chapter deals with the fundamental principles of professional negligence law, including obligations, fora, dispute resolution mechanisms, remedies and time bars. The chapter authors then review factors specific to the main professions and conclude with an outline of the developments of the past year and issues to look out for in the year ahead.

I would like to thank all those who have contributed to this edition. The wealth of their expertise is evident in the lucidity of their writing; there are only a limited number of firms that have the breadth of practice to cover all the major professions. The individual contributors' biographies can be found in Appendix 1. I would particularly like to thank my colleagues at Reynolds Porter Chamberlain for their input in preparing the chapter on England and Wales, and especially to Bryony Howe who has assisted in its production with great knowledge and skill. Finally, the team at Law Business Research has managed this production of this third edition with passion and great care. I am very grateful to all of them.

Nicholas Bird
Reynolds Porter Chamberlain LLP
London
June 2020

Chapter 1

AUSTRIA

Katrin Hanschitz and Sona Tsaturyan[1]

I INTRODUCTION

i Legal framework

Background – organisation of professions in Austria

Professions in Austria are, to a large extent, organised in autonomous, self-administered chambers with compulsory membership. These chambers generally not only decide on admission to the profession, they also monitor professional conduct and administer disciplinary sanctions, issue professional codes of conduct and fee guidelines, organise professional liability insurance and often also provide fora for alternative dispute resolution.

General legal framework for damages claims

The fundamental legal framework for professional liability in Austria is found in Section 1295 et seq. of the Austrian Civil Code, which are complemented by various regulatory provisions and professional codes of conduct and by the rules and due contractual performance and warranty.

The four prerequisites for damages claims under Austrian law are: (1) occurrence of damage; (2) causation; (3) wrongfulness or unlawfulness; and (4) fault.

Professional liability cases predominantly revolve around contractual liability. However, in particular in the areas of construction and malpractice, damages claims against professionals may be based on tort law. The main differences between tortious and contractual liability are:

a under tort law liability, the plaintiff is generally not able to recover pure economic losses (i.e., pecuniary damage not connected to the violation of an absolutely protected right such as life, liberty and property), whereas contractual parties are generally also liable for pure economic loss;

b agents' actions are fully attributable to the principal in contractual cases; in contrast, for tort claims, the principal is only liable for its agents' actions if he or she knowingly employed an unfit person or knowingly makes use of a dangerous person; and

c in tort law, a plaintiff must prove the defendant's fault whereas in contract law the law presumes that the defendant was at fault. It is up to the defendant to prove otherwise.

Since the standard for tort claims is much more restrictive than for contractual liability, initiating a successful professional negligence claims based solely on tort can be difficult. To bridge this gap, case law has extended the rules on contractual liability to certain third

1 Katrin Hanschitz is a partner and Sona Tsaturyan is an associate at Knoetzl.

parties that are affected by the professional's performance of a contract (i.e., 'contract with protective effect to third parties');[2] this is particularly relevant for auditors and construction professionals.

Additionally, violation of 'protective laws' (i.e., laws designed to protect certain persons and assets from harm) leads to a reversal of the burden of proof outside contractual relationships and may entail liability for pure economic loss. The pertinent protective laws are generally specific to each profession, including, for example, the rules on auditing a company (protecting creditors and investors), rules on securing construction sites (protecting workers, passers-by, tenants etc.), fraud and criminal breach of fiduciary duty.

Core provisions for professional negligence

The core provision specifically governing professional liability is Section 1299 of the Civil Code, which provides that professionals are held to an increased and objective standard of diligence and care. While the general standard of care is that what is required of an average reasonable person, professionals are held to the abilities and standards of performance of their respective occupational group. Accordingly, a higher degree of diligence is required, for instance, from a specialist doctor than from a general physician.

When assessing who qualifies as a professional under Section 1299 of the Civil Code, Austrian courts take a very broad approach and include anyone acting as if they had certain qualifications, regardless of whether they are actually experts and have the respective qualification.[3] Besides actual trained experts, this also includes trainees who are not (yet) fully qualified, for example, associates in law firms.

In addition to general contractual liability, pursuant to Section 1300 of the Civil Code, bad advice given negligently 'for a consideration' leads to liability, whereas advice given as a favour establishes additional liability for pure economic loss only if it is knowingly wrong. Advice is deemed to have been given 'for a consideration' if it was provided within the framework of a special contractual or legal relationship or for any reason other than a purely altruistic reason.[4] For example, the Arbitration Board of the Medical Chamber in Austria, which offers dispute resolution services free of charge, was held liable for failing to point out a special statute of limitation in a leaflet it had published because its actions serve the interests of the medical profession, in particular by promoting trust and avoiding (criminal) court cases.[5]

Defences

Common defences against professional liability claims include time-bar, contributory negligence of the plaintiff and the failure to mitigate damages, as well as procedural objections (in particular, jurisdiction and standing) and objections regarding the value of the claim.

2 'Vertrag mit Schutzwirkung zugunsten Dritter'.

3 Austrian Supreme Court, decision of 2 December 1970, docket No. 6 Ob 282/70.

4 Austrian Supreme Court, decision of 24 January 2008, docket No. 6 Ob 104/06x.

5 Austrian Supreme Court, decision of 27 March 1995, docket No. 1 Ob 44/94.

ii Limitation

Damages claims generally become time-barred three years from the time the damage, the damaging party and the causality became known to the injured party (or would have become known to them if it had undertaken due investigations). In certain areas, specific limitation periods apply (e.g., for auditors).

The absolute limitation period is 30 years, regardless of whether the injured party had this knowledge or not. If the damage was based on a criminal action with intent that is sanctioned by a prison sentence of one year or more, the limitation period is also extended to 30 years, regardless of when the injured party obtained such knowledge. In the context of professional negligence, the most relevant crimes are fraud and criminal breach of fiduciary duties.

The claim has to be filed in court before the end of the limitation period. The limitation period may be interrupted by settlement talks. It is common for parties in settlement discussions to agree to waive the time-bar defence for the duration of the time spent in settlement talks.

iii Dispute fora and resolution

Although many of the professional chambers provide fora for dispute resolution, these are in general voluntary. To the extent damages claims are disputed and cannot be settled with the involvement of the insurance professionals, they are generally adjudicated by the civil and commercial courts. Where criminal investigations are pending, the damaged party may also request a judgment on damages claims from the criminal court in ancillary proceedings; however, in professional liability cases, criminal courts generally refer the claimants back to the civil courts for judgment on damages.

The amount claimed and the legal nature of the claim define which type of Austrian court has jurisdiction. District courts are generally competent to hear claims of an amount up to €15,000. Claims exceeding an amount of €15,000 are generally heard by regional courts. If, broadly speaking, the dispute is commercial in nature, the commercial courts have jurisdiction rather than the general district and regional courts.

Civil proceedings are governed by the Austrian Procedural Code and are mainly oral. Witnesses are first examined by the court, with additional questions from counsel and cross-examination by opposing counsel; there are no written witness statements. Although there is no discovery, there is some – limited – scope for the court to order parties to produce documents.

Professional negligence cases often turn on expert witness opinions. These expert witnesses are appointed by the court and serve to replace the judge's lack of expertise in the relevant areas. The court will generally rely on the expert witness' opinion, unless this is seriously undermined by counsel's challenges.

The 'loser pays' principle applies, namely the defeated party bears not only its own costs, but also the costs incurred by the successful party, including legal fees pursuant to a tariff, court fees and advances paid to the court for experts and translators.

iv Remedies and loss

The basic principle of compensation is the restoration of the previous condition as if no damage ever occurred (restitutio in integrum). If, as is often the case in professional negligence cases, restoration is not possible or feasible, monetary compensation is due.

In the context of contractual liability, positive interest (performance) may be claimed for failure of due performance of a valid contract. In cases where the damaged party relied on information given by the other party, negative interest becomes due, that is, so that the damaged party is in the position it would have been if it had not relied on these disclosures (generally frustrated expenses and disadvantages caused by missing alternative opportunities).

Loss of profit is generally only due in cases of gross negligence, unless contractually otherwise agreed; the burden of proof for gross negligence lies with the plaintiff.

Benefits obtained by the damaged party as a result of the damaging occurrence, such as social security benefits, may reduce liability, depending on their nature and purpose.

Austrian civil law differentiates between material and non-material damages. Material damages can be quantified (e.g., property damages). Non-material damages, on the other hand, generally cannot and, therefore, require a quantification process. An example is compensation for pain suffered by the injured person as a result of the injury: usually, 'day rates' are used, which are classified into mild, moderate and severe pain. The number of day rates results from the duration and intensity of the pain, which are usually determined by experts.

In the context of professional negligence, damages claims are often contractually modified; restrictions for permissible limitations apply in particular in relation to consumers, to liability for physical harm and for crass gross negligence and intent.

II SPECIFIC PROFESSIONS

i Lawyers

Access to the profession and conduct of the profession is governed by the Austrian Lawyers' Act, the lawyer's professional code of conduct, the Civil Code and the lawyer's Disciplinary Statute. Membership to the respective regional bar association is compulsory.

Every lawyer is obliged to obtain and maintain liability insurance. The compulsory minimum insurance sum is €400,000 (for each insured event); for law firms in the form of an LLC or a lawyer-partnership whose sole general partner is an LLC, the compulsory minimum insurance sum is €2.4 million. The regional bar associations provide a further level of liability insurance for large-volume claims. Lawyers are permitted to limit the liability for damages to the minimum sum insured in a written agreement with their clients; limitations are, for example, provided in the template General Terms and Conditions issued by the bar association.

Lawyers are obliged to conduct mandates undertaken by them in accordance with the law and to represent the rights of their clients with loyalty and conscientiousness. They do not, however, owe the success of the proceedings, but only professional advice and representation of their clients.

The body of case law on damage claims against lawyers includes such mainstays as missed deadlines, (non-) delivery of monies or documents by lawyers acting as trustees, failure to take the interests of the counterparty into account where the counterparty has no legal representation, failure to adequately investigate facts, and the failure to warn about specific legal or factual risks. Many cases are settled by professional liability insurance without recourse to the courts.

Similar rules apply to public notaries. To the extent public notaries act as public authority (e.g., in probate proceedings), special rules apply.

ii Medical practitioners

Doctors, be they employed or in private practice, are compulsory members of the regional medical chambers and are subject to the Code of Medical Practitioners. They are required to have professional liability insurance (€2 million per occurrence, up to €10 million per year, depending on the legal form). Dentists have their own regional chambers.

A peculiarity of the Austrian medical system is that treatment costs are generally borne by the social security carriers. Accordingly, in malpractice cases patients will generally claim only compensation for pain and suffering as well as increased costs and loss of income. Social security carriers can, however, seek recourse from the medical practitioner for treatment costs in certain situations.

The main bases for medical liability are treatment errors (malpractice) and information errors: Malpractice is a violation of the treatment contract between the physician and the patient. A physician does not have to carry out every single treatment successfully[6] but has to act lege artis. The standard of care of the practitioner is increased and objectified in line with Section 1299 of the Civil Code (see Section I.i). Classic examples for malpractice are damages because of wrongful drug prescription, major mistakes in surgery or damage caused by infections from lack of hygiene during treatment.

Since patients generally do not have full access to their entire medical file and have insufficient expertise to assess whether malpractice occurred, case law has shifted the burden of proof to the medical practitioners by allowing prima facie proof: in order to establish causality, the patient only has to prove that the doctor's mistake increased the probability of damage occurring; the doctor, on the other hand, has to prove that the error was, with high probability, not relevant for the occurrence of the damage.[7]

Medical practitioners can also be held liable if they fail to properly inform patients about the proposed treatment.[8] A patient can only give consent effectively if he or she has been sufficiently informed about the significance of the planned medical intervention and its possible consequences.[9] Since without effective consent any violation of the physical integrity of a patient in the course of the treatment is unlawful, failure to obtain sufficient consent can entail criminal liability. There is a large body of case law on failure to duly inform patients of risks and treatment alternatives.

There are a number of fora for patients to seek redress, before turning to courts to resolve their disputes. The injured parties can turn to Patientenanwaltschaften (patient advocates) in special complaints offices. In line with Section 11e of the Hospitals and Health Institutions Act, there are independent patient representatives in each province. Their main duty is to provide a preliminary clarification of complaints.

In addition, there are arbitration and conciliation boards within the medical chambers, which are intended to facilitate out-of-court settlements.

Both fora are of a non-mandatory nature free of charge for the patient. However, if the patient appoints a lawyer, the patient shall bear the costs.

6 Austrian Supreme Court, decision of 4 July 1991, docket No. 6 Ob 558/91; see also Austrian Supreme Court, decision of 4 August 2009, docket No. 9 Ob 64/08i.

7 Austrian Supreme Court, decision of 29 January 2008, docket No. 1 Ob 138/07m.

8 Austrian Supreme Court, decision of 11 December 2007, docket No. 5 Ob 148/07m.

9 Austrian Supreme Court, decision of 30 January 1996, docket No. 4 Ob 505/96.

Many malpractice cases can be resolved efficiently and economically in these fora; as a minimum, they generally provide further information to patients at low cost, giving them a broader base to assess the potential for obtaining damages in civil proceedings.

iii Banking and finance professionals

The banking and finance sector continues to be very heavily regulated, with relevant laws including the Securities Supervision Act 2007 (currently 2018), the Banking Act and the Capital Market Act, with the Financial Market Authority and, currently, the Austrian National Bank being the main supervisory bodies.

Banking and finance experts were, historically, not organised as a 'profession' in their own professional association. In the past, most banking and finance experts were employed or mandated by banks and financial institutions, their actions generally being attributable to these institutions.

Outside of banks and financial institutions or securities services providers, the provision of independent investment advice is a 'regulated trade' under the Austrian Trade Commerce and Industry Regulation Act, requiring, inter alia, formal qualifications and a licence, as well as compulsory insurance (approximately €1.4 million per occurrence, respectively €2 million per year).

The last decade has seen the development of a large body of case law regarding liability to customers and investors, with a strong focus on disclosure obligations. Austrian courts tend to protect those who want to invest but do not have access to necessary information before making a decision.[10]

In addition to general damages rules, Section 11 of Capital Market Act establishes a specific prospectus liability to compensate investors for disadvantages suffered in reliance on incorrect or incomplete information in a prospectus. The liability established by the Capital Market Act does not require an existing contract as it is based on the same principles as *culpa in contrahendo*, giving rise to pre-contractual obligations. In parallel, case law has developed 'civil-law prospectus liability' for incorrect or misleading information in marketing materials.

iv Computer and information technology professionals

In the field of computer and information technology professionals, the general rules laid out in Section I.i apply.

v Real property surveyors

Austrian law does not separately classify 'real property surveyors' as a profession. Technical surveyors are classed as civil engineers (see Section II.vi), whereas real estate evaluation is undertaken by a variety of experts, including property managers and real estate trustees.

vi Construction professionals

Technical construction professionals – including architects and chartered engineering consultants – are compulsory members of the regional chambers of architects and chartered engineering consultants. The conduct of the profession is governed by the Civil Engineers Law and Civil Engineers Chambers Law. Regional disciplinary boards monitor the practice of the profession.

10 Austrian Supreme Court, decision of 26 November 1996, docket No. 10 Ob 2299/96b.

Civil engineers are not required to have professional liability insurance. However, since in practice every contractor requires professional liability insurance, almost all civil engineers offer this insurance, with support from their regional chambers.[11] Moreover, self-employed engineering consultants are required to provide a professional liability insurance when tendering for public contracts.

The primary areas of activity for architects that lead to disputes are negligence in planning, tendering and local project management (construction supervisor). Case law in this area predominantly involves planning activities, with courts clarifying that architects have to provide comprehensive advice, also taking economic aspects (financial possibilities of client, cost-effective planning) into account.[12] With regard to project management activities of architects, the Supreme Court has clarified that the supervisor does not always have to be present on site, and in general, random checks are considered sufficient.[13]

Disputes in this area are generally made more complex by the multitude of professionals and subcontractors involved, with numerous contractual and quasi-contractual relationships leading to complex issues regarding recourse and attribution of (contributory) negligence.

vii Accountants and auditors

The Austrian Auditors/Chartered Accountants and Tax Advisers' Act governs the practice of auditors and tax accountants, who are required to be members of the chamber of auditors or chartered accountants and tax advisers and to maintain a mandatory insurance (minimum €72,673 per occurrence).[14] Similarly to lawyers, chartered accountants and tax advisers are subject to the chambers' disciplinary statutes.

The scope of auditors' liability is regulated in the Austrian Corporate Code (UGB). Auditors are obliged to conduct a conscientious and impartial audit and to adhere to strict rules on conflict of interest. Different maximum liability limits apply depending on the degree of fault and size of the company.

According to case law, the contract between the audited company and the auditor has a protective effect for the benefit of third parties, in particular investors and creditors,[15] which establishes the auditor's liability to these third parties. The exact grounds for liability are disputed; in recent case law, the Supreme Court clarified that this liability to third parties is based on an objective statutory obligation, so that liability limitations agreed between the audited company and the auditor have no effect on such protected third parties. An auditor's failure to meet his or her obligations can also lead to criminal liability pursuant to Section 163b of the Criminal Code, which as a 'protective law' provides a broader basis for damages claims – including for pure economic loss – of persons relying on the auditors' certificate.

Claims arising from the auditor's liability towards audited companies, as well as, injured third parties[16] become statute-barred after five years, irrespective of knowledge of the damage and the injuring party.[17]

11 See more at https://wien.arching.at/service/versicherungsservice/berufshaftpflichtversicherung.html.

12 Austrian Supreme Court, decision of 26 January 2010, docket No. 9 Ob 98/09s.

13 Austrian Supreme Court, decision of 14 October 1997, docket No. 1 Ob 2409/96p.

14 See Section 11 of the the Austrian Auditors/Chartered Accountants and Tax Advisers' Act.

15 Austrian Supreme Court, decision of 27 November 2001, docket No. 5 Ob 262/01t.

16 Austrian Supreme Court, decision of 23 January 2013, docket No. 3 Ob 230/12p.

17 Section 275(5) of UGB.

In contrast to auditors' liability, tax accountants are regularly not liable to outside third parties for the accuracy of their annual accounts.[18]

viii Insurance professionals

Insurance professionals can be divided into two groups: insurance brokers and insurance agents.

Insurance brokers are governed by the Austrian Trade Commerce and Industry Regulation Act, pursuant to which insurance brokers must be entered into the Insurance and Credit Mediation Register and require compulsory insurance (€1.25 million per occurrence, respectively €1.85 million per year).[19] Pursuant to Section 26(1) of the Brokers Act (MaklerG), a broker mediates insurance contracts on a commercial basis, namely arranges transactions with a third party on the basis of an agreement under private law (brokerage contract) for a client without being permanently entrusted with this duty.

Brokers are obliged to arrange the best possible insurance cover according to the circumstances of the individual case (i.e., 'best advice') and must carry out successful risk management for their clients with the most favourable cover possible in each individual case. It is also their contractual obligation to explain to the insurer the specific insurance cover they are seeking for their customers, with specific duties of results in duties of protection, care and advice for the latter. As experts within the meaning of Section 1299 of the Civil Code, they are also liable for identifying relevant problems and providing correct information.

Insurance agents, in contrast, who are constantly entrusted by an insurer to close insurance contracts for the insurer, are subject to the Insurance Contract Act. Liability claims arising from negligent acts of these agents are generally (also) directed against the insurer, who will generally be held liable for the actions of an insurance agent under Section 1313a of the Civil Code.

III YEAR IN REVIEW

i General developments

The Austrian Supreme Court continues to develop its case law on the boundaries of quasi-contractual liability of professionals for pecuniary damages to third parties who relied on their expertise (see case law developments in the construction and medical industries below).

The General Data Protection Regulation (GDPR) came into force on 25 May 2018. Professionals dealing with sensitive data – particularly doctors – are now subject to stricter requirements when it comes to controlling, storing and processing this data. As already discussed, Section 1299 of the Civil Code requires an objective standard of diligence from a professional. The GDPR adds another layer of obligations, thus widening the scope of the objective standard of diligence. The first Supreme Court decision on the GPDR has been issued (see below, case law in banking and finance), with at least one further significant case expected to reach the Supreme Court in the course of 2020.

18 Austrian Supreme Court, decision of 29 November 2005, docket No. 10 Ob 57/03k.

19 See Section 137(c) of the Austrian Trade Commerce and Industry Regulation Act (GewO).

ii Profession-specific developments

Publishing professionals – case law developments

In January 2020, the Austrian Supreme Court referred a case[20] to the ECJ that is relevant for publishing professionals. An Austrian tabloid had published a 'home remedy' to relieve rheumatic pain in its 'Healthy Living' column that involved placing freshly grated horseradish on the affected area and leaving it on for 'two to five hours', instead of (correctly), 'two to five minutes'. The claimant left the compression on for three hours, resulting in an extremely painful toxic contact reaction. In the case against the media owner, negligence could not be determined, so – in a creative approach – no-fault product liability for the defective advice was argued. The question referred to the ECJ was whether only defects in corporal products can give rise to product liability claims or whether product liability claims can also be based on defective intellectual 'products' or ideas that are embodied in the form of paper (i.e., for newspapers, books). In the ongoing debate on this topic, some argue that product liability only applies if the corporal product itself inherently dangerous (i.e., toxic ink). Others argue that readers do not buy the newspapers and books because they want a stack of printed paper, but because they are interested in the contents. If the ECJ follows this latter line of argument, professionals in all sectors may find publishing guidelines and reviews become rather more stringent than to date.

Legal practitioners – case law developments

A recent judgment of the Austrian Supreme Court involved conflict of interest issues in the legal profession: Section 10(1) of the Lawyers' Disciplinary Statute prohibits lawyers from acting for the party on the other side of a dispute in any related matter. This includes, besides legal representation, all forms of legal advice and legal activity, regardless of whether they are undertaken against consideration or free of charge and regardless of whether power of attorney is granted. However, as clarified by the Supreme Court in this most recent case, free general advice given in a purely private conversation – here between the lawyer and the husband of the wife; the wife was subsequently represented by the same lawyer in divorce proceedings – does not trigger a conflict of interest.[21]

Construction practitioners – case law developments

The Austrian Supreme Court recently clarified the limits of the legal notion of 'contracts with protective effect for third parties' (see Section I.i). In 2006, the defendant, an inspection engineer, had prepared construction plans for an attic conversion and treated the rafters. In 2009, after finalising the conversion, he had certified compliance with the building approval and building regulations. The plaintiffs acquired the property some five years later, and continued work on the attic. It turned out the attic had unsound rafters, blight and fungus and insect infestations, leading to renovation costs of €182,991. The case turned on whether the engineer was contractually liable to the buyer – with whom he had no contract – based on 'contract with protective effect for third parties' (i.e., whether the buyer qualifies as such third party within the protective scope of the initial contract with the seller, in which case he can claim pecuniary damages). The Austrian Supreme Court clarified that the contract between the seller and the engineer did not protect the pecuniary interests of someone who

20 Austrian Supreme Court decision of 21 January 2020, docket No. 1 Ob 163/19f.

21 Austrian Supreme Court, decision of 5 March 2019, docket No. 1 Ob 30/19x.

bought the property five years later. If a buyer discovers that, owing to existing defects of the property, he or she bought the property for too high a price, he or she ought to address claims to his or her contractual partner (i.e., the seller). Moreover, although the building regulations, infringed by the defendant, are 'protective laws' whose infringement could, in principle, lead to liability, these are only designed to protect against severe risks to the building and injury, not against mere pecuniary loss of subsequent owners.[22]

Medical practitioners – case law developments

In a 2019 case, the Supreme Court was again asked to determine the boundaries of quasi-contractual liability of professionals. The defendant, a veterinarian, had drawn up a 'purchase report' on the instructions of the owner in which he certified the health of a horse and recommended purchase.[23] The plaintiff purchased the horse – via interim purchasers – relying on the defendant's expert opinion. He later discovered that the horse had suffered a splint bone fracture, which the defendant should have detected and which made the horse unsuited for riding. The purchaser successfully sued the seller for reversal of the purchase contract. In the case at hand, he also sued the veterinarian for compensation of stabling and medical costs, arguing inter alia that he had suffered these damages because he had – justifiably – relied on the defendant's opinion. The Supreme Court clarified that, while an expert has an objective legal duty of care in favour of a third party if he or she should expect that his or her expert opinion will serve as the third party's basis for decision, the decisive factor is how an informed recipient of information is allowed to understand the expert opinion. In this case, the defendant had explicitly stipulated in the report that the owner was not entitled to pass on the report to third parties and that third parties could not derive any rights from it. Since the report accordingly contained no basis for reliance by such third party, the defendant, as issuer, was not held liable to the subsequent purchaser who had – unjustifiably – relied on the report, and the claimant lost its case against the vet. The Supreme Court also rejected liability in tort claims based on infringement of a section of the Austrian Veterinary Act that regulates the duties of care when preparing an expert opinion, since this law is not designed to protect third party's pecuniary interests.

Banking and finance professionals – statutory amendments and case law

The most recent legislative amendment affecting professional negligence in the area of banking and finance is the Fifth Money Laundering Directive (Directive (EU) 2018/843), which was implemented in Austria in the Financial Market Money Laundering Act (FM-GwG). Under this law, digital currencies will be included in the European regime for the prevention of money laundering and terrorist financing. From 10 January 2020, providers of digital currencies will have to comply with the same due diligence and reporting obligations for the prevention of money laundering and terrorist financing that already apply to credit and financial institutions. The rules cover providers of financial services for the issue and sale of virtual currencies, service providers for the transfer of virtual currencies, exchange and trading platforms for virtual currencies as well as providers of electronic purses.

22 Austrian Supreme Court, decision of 25 April 2019, docket No. 4 Ob 245/18k.

23 Austrian Supreme Court, decision of 25 October 2019, docket No. 8 Ob 96/19d.

In 2019, the Supreme Court had occasion to make its first GDPR ruling in the context of the financial sector.[24] The plaintiff claimed damages under Article 82 GPDR because a credit enquiry agency had passed incorrect credit information to the plaintiff's bank, allegedly resulting in his loan application being rejected. The unlawfulness of the defendant's action was not in question: under existing case law, forwarding a negative credit rating to an enquiring party is, in principle, unlawful if the data subject has not been informed and given the opportunity to correct any incorrect information. Moreover, basing negative credit ratings on an insufficient basis has been held to be unlawful by the Austrian Data Protection Agency. The issue at stake in this case was whether Article 82 GPPR has led to a shift of the burden of proof. According to the Supreme Court, the burden of proof for damages and causality remains with the plaintiff, as has always been the case under Austrian substantive law. Lacking the proof that the replacement loan was more expensive than the initial one applied for as well as the proof that the credit rating was the reason the initial loan was rejected, no damages could be awarded.

IV OUTLOOK AND FUTURE DEVELOPMENTS

Another notable GDPR case is expected to reach the Supreme Court in the course of 2020, which turns on the question of whether, under Article 82 GPDR, the damages incurred by the injured party must pass a 'materiality threshold', that is, whether it is sufficient to assert psychological discomfort at the loss of data, or whether compensation claims only result under Article 82 GDPR if a certain minimum degree of emotional impairment over and above the negative feelings usually asserted with unlawful behaviour is asserted and proved.[25]

The outbreak of covid-19 is causing disturbances in most sectors and industries, the long-term consequences of which are not yet clear. One consequence to be expected is the development of case law on the statutory effects of 'force majeure' on contracts where no contractual provision for such circumstances was made. The current body of case law on this topic is minimal. This leaves a myriad of unresolved questions for professionals. Accordingly, a rash of professional liability claims seems an unfortunate, but likely, result. Potential cases may include compensation claims against lawyers who fail to include detailed force majeure clauses in contracts or fail to correctly anticipate the Supreme Court case law on the consequences of the pandemic, claims against financial advisers for failing to warn against the risk of a pandemic, liability claims against medical professionals and so on.

Further, the covid-19 restrictions on the courts mean that there will be a significant backlog of cases once courts resume operation, with corresponding delays. Additionally, in the future a change in the way hearings are conducted can be expected, with much greater use being made of the procedural provisions permitting remote witness testimonies.

24 Austrian Supreme Court, decision of 27 November 2019, docket No. 6 Ob 217/19h.

25 Upper Regional Court of Innsbruck on 13 February 2020, docket No. 1 R 182/19b.

Appendix 1

ABOUT THE AUTHORS

KATRIN HANSCHITZ

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Before joining Knoetzl, Katrin Hanschitz practised law in a senior capacity with a large, multinational law firm covering the CEE and SEE, both as a corporate and banking lawyer and then as a litigator. This experience serves to enrich her own dispute resolution practice at Knoetzl, where she focuses on international civil and commercial litigation. She regularly represents and advises mainly multinational clients from a variety of industries and has been particularly active in advocating on behalf of the life sciences, including Austrian and multinational pharmaceuticals. She is also experienced in complex, disputed matters in advertising and financing and continues to litigate corporate disputes of all kinds. Katrin is a member of the steering committee of the International Litigation Committee of the American Bar Association and member of the Vienna chapter of the ABA SIL.

SONA TSATURYAN

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Sona Tsaturyan, a very talented business law student, supports both the arbitration and litigation team at Knoetzl and has already made a name for herself for in-depth and thoughtful research and legal writing. Her language skills – besides excellent Armenian, German and English, she also speaks Russian and Italian – as well as her commercial flair and training with one of the big four tax firms combine to make her a highly valued member of Knoetzl's dispute resolution team.

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