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Misselling: A Global Perspective

Turbulent economic conditions and heightened levels of media, political and regulatory interest in banks' dealings with consumers are leading investors to question and challenge the circumstances in which they were sold products to an unprecedented extent.

This briefing sets out developments in key jurisdictions, and explores the common themes which are emerging from increasing levels of misselling litigation worldwide.

Emerging trends	Strategic considerations
■ Numbers of cases based on allegations of misselling of financial products are continuing to increase, including in some jurisdictions in which such litigation has historically been less prevalent. This increase is driven in part by the increased complexity of products as banks and customers have chased higher returns. ■ It is not always necessary for investors to pursue civil litigation. In some jurisdictions, regulators are requiring banks to proactively identify and pay compensation to customers who have suffered loss from misselling. ■ Courts in many jurisdictions have to date been sympathetic to banks defending claims brought by customers. However, tighter rules governing the sale of products may bring their approach more closely into line with that of Courts where banks' obligations are more strictly construed. ■ Advisory relationships are a real area of concern. The definition of "advisory" is widening in some jurisdictions, imposing significant obligations on banks at the outset of transactions and exposing them to increasing levels of potential liability. ■ Claimants are becoming increasingly organised and well resourced.	■ Banks will often have to defend claims in the home jurisdiction of investors, but may wish to bring protective proceedings, which will often be in the UK. Where a choice of jurisdiction exists, it is worthwhile considering that some jurisdictions confer significant advantages on claimants in financial services cases. ■ Factors such as variations between media restrictions, disclosure requirements and levels of regulatory interest in different jurisdictions may inform how banks decide to defend claims. In some circumstances, settlement or arbitration may be appropriate in order to avoid adverse media attention or establishing unhelpful precedents. ■ There is significant potential for cross-fertilisation between jurisdictions. Claims, legal theories or the general climate in one jurisdiction may be relevant to or spread to others.

UK

- Courts focus on the contractual documents
- So far, Courts have favoured banks, but the legal and political climate remains challenging
- Although banks have been successful in the Courts, significant redress has been ordered by the Financial Services Authority and Financial Ombudsman Service

In the UK, Courts attach great importance to the detail of the contractual documentation between banks and their customers. Landmark decisions such as *JP Morgan Chase Bank v Springwell Navigation* ("*Springwell*")have emphasised customers' own responsibilities for their decisions under these documents. Unlike Courts in some other jurisdictions, the UK Courts do not assume any contractual obligation on the part of banks to ensure suitability or impose any onus on the bank to prove that particular products were suitable for particular customers (although banks do have onerous and increasingly strictly enforced regulatory obligations in these areas).

In most contested cases decided to date, banks have been able to defend the circumstances in which products were sold. However, conditions are becoming tougher for banks. In common with many other jurisdictions, political and media interest in banks' actions immediately prior to and during the financial crisis has steadily intensified in the UK, and has encouraged and contributed to increasing numbers of cases brought by investors disappointed at products' performance.

Investors bringing such claims are able to rely on section 150 of the Financial Services and Markets Act 2000 ("FSMA"), which provides them with a cause of action where banks have breached specific regulatory rules. Cases decided to date have been concerned with sales of products governed by rules in force prior to the implementation of the Markets in Financial Instruments Directive ("MiFID") and other significant changes to the FSA's rulebook. However, cases concerning transactions entered into after the implementation of MiFID are progressing. The overlay of banks' more onerous obligations under these rules is likely to make the defence of misselling litigation more difficult in future.

Whilst banks have been relatively successful in the UK Courts, they have incurred substantial liabilities for misselling under redress schemes ordered by the UK Financial Services Authority ("FSA") (which has now become the Financial Conduct Authority ("FCA")) and the Financial Ombudsman Service ("FOS"). The FSA has taken an increasingly interventionist stance towards consumer protection, using its statutory powers to encourage and, in some cases, compel, firms to identify, contact and compensate customers under organised schemes where it considers that misselling may have occurred. The FCA has committed itself to taking a similarly proactive stance and indeed to intervening even earlier to prevent rather than simply responding to consumer detriment. It has new statutory powers to assist it in doing so, including to restrict the promotion of particular products or product features where, in its view, they risk causing harm to consumers.

The difference in approaches taken to misselling by Courts and regulators has been most clearly illustrated recently in cases relating to interest rate hedging products ("IRHPs") sold to individuals and small and medium sized enterprises ("SMEs").

Whilst neither the FSA nor the FCA imposed any financial penalties on any institutions in respect of the circumstances of sale of IRHPs, it has taken action which has led to findings of widespread misselling and to settlements with 11 banks. Further to these settlements, redress exercises are ongoing which will, it is estimated, result in requirements for banks to make payments amounting to billions of pounds to customers.

Similarly, the FOS has made some significant awards of compensation to customers in respect of misselling of IRHPs. Further such awards are expected as more cases where customers have already referred decisions by institutions not to compensate them are determined.

In contrast, the Courts have taken a less sympathetic approach towards customers in the few reported cases to date relating to the misselling of IRHPs (which have been based principally on claims that banks negligently misrepresented the features of IRHPs rather than claims under section 150 of FSMA), Although claimants in these cases have relied upon a different cause of action, judges have taken a line consistent with that taken in cases relating to other types of products, finding in favour of the banks involved and construing their advisory duties relatively narrowly.

Hong Kong

- Vociferous public anti-bank sentiment has led to strong regulatory action and political responses
- Courts remain broadly sympathetic to banks in claims brought by individuals

- Types of misselling claims evolving

Misselling issues have occupied the headlines for some time in Hong Kong. Investors continue to pursue claims in large numbers, although the types of investments involved are changing. Claims resulting from the misselling of Lehman Brothers Minibonds are now giving way to predominantly private banking actions based on other types of investments, particularly "accumulator" products and related equity-structured investment products.

The first trial concerning "accumulator" products (*Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA ("Kwok*")) concluded in June 2012. The case involved an investor who claimed that she was "merely an unsophisticated housewife" (albeit wealthy) to whom the bank inappropriately sold high risk products. Taking an approach consistent with that of the UK Courts in *Springwell*, the Court rejected her argument that she was an "unsophisticated investor" and found that the bank had discharged its duties to make her aware of risks, both at account opening stage and throughout its relationship with her. It attached relatively little weight to expert evidence, preferring to rely heavily on contemporaneous records, including recordings of telephone conversations, as an indication of her understanding of the risks involved in transactions.

The decision in *Kwok* followed another recent case in Hong Kong where the Courts ruled against a wealthy investor (see, *Hobbins v Royal Skandia Life Assurance Limited and another*, January 2012) and has itself been followed by further cases where judges have ruled in favour of banks and voiced disapproval at tactics, such as the inappropriate use of disclosure under regulatory provisions, employed by claimants in the course of misselling litigation (see, for example, *HSBC Private Bank (Suisse) SA v Mission Bridge Limited*). More recently, in *DBS Bank (Hong Kong) Ltd v San-Hot HK Industrial Ltd & Hao Ting*, March 2013, the Court again affirmed the position in *Kwok* by upholding the sanctity of the contractual agreement between the bank and its customer (in contrast to recent Singapore decisions (see "Singapore" section below) which have cast doubt over "non-reliance" clauses in banking documentation.

Misselling litigation continues against a backdrop of continuing public and political hostility towards banks. The Hong Kong government responded to the strength of public opinion in relation to Lehman Minibonds by setting up a Subcommittee of the Legislative Council ("the Subcommittee") to examine the circumstances in which they and associated products were sold to retail investors. The Subcommittee reported in June 2012, finding deficiencies in areas including customer due diligence, staff training and suitability assessments conducted by banks, and made recommendations aimed at strengthening the regulation of the sales process for structured products. Rule changes imposing more stringent obligations on the sale of structured products are expected. The Hong Kong regulatory authorities (the Securities and Futures Commission and Hong Kong Monetary Authority) have responded to public outcry by taking regulatory and criminal action against individuals and institutions.

A compensation scheme for investors in Minibond products was established, providing for compensation to be paid to investors by reference to a sliding scale governed by factors including age and level of sophistication. However, unlike analogous schemes established by the FSA in the UK, it is widely regarded as an additional rather than an alternative source of compensation and "top-up" litigation has been prevalent as investors have sought to improve upon the sums they have received under the scheme. In response to the Lehman Minibond fiasco, the Government also established (June 2012) a Financial Dispute Resolution Centre ("FDRC"), designed to assist customers to settle claims of up to HK$500,000 against their banks or brokers, by way of arbitration or mediation. However, the FDRC believes the relatively low maximum threshold has deterred some investors from lodging complaints, and will consider raising the maximum threshold.

United States

- No specific "misselling" cause of action
- Claims by individual investors typically filed as confidential arbitrations focusing on "suitability" self-regulatory organization rules.
- Plaintiffs have attempted to assert class actions under a variety of theories, including the federal securities laws and state deceptive practices laws.

In the United States, there is no specific cause of action for "misselling." Instead, individual investors' claims against brokerage firms and/or financial advisors are generally governed by suitability rules of self-regulatory organizations (e.g., the Financial Industry Regulatory Authority, known as "FINRA"). Suitability rules imposed by FINRA require firms or advisors to have a reasonable basis to believe that a recommended transaction or investment strategy involving securities is suitable for a customer, based on reasonable diligence to ascertain the customer's investment profile. Other related rules require a firm to use reasonable diligence with respect to opening and maintenance of every account and to retain essential facts concerning every customer.

Generally, individual civil law suits are barred because contracts between individual investors and firms or advisors typically require arbitration of suitability claims. Individual investors therefore typically initiate an arbitration by filing a claim with FINRA which is resolved by arbitrators through a confidential administrative proceeding.

While a specific misselling cause of action does not exist, Plaintiffs have filed class action lawsuits that essentially allege misselling under a variety of legal theories. For example, in *In re Charles Schwab Corporation Securities Litigation*, the plaintiffs filed a class action alleging that Charles Schwab violated federal securities laws and state law in marketing and selling the Schwab YieldPlus Fund as a stable bond fund that was a safe alternative to cash which had minimal risk of fluctuating share price, when in fact it did not. Other recent class actions have involved sale of annuity products. In *Yokoyama v. Midland National Life Insurance Co.*, senior citizens who purchased indexed annuity products sued a life insurance company that sold the products through independent brokers, alleging that the products were inherently deceptive, misleading and fraudulent under the state of Hawaii's deceptive practices act. Lawsuits based on such theories have had mixed success, and in general there is no particularly discernable trend of misselling class actions.

France

- French Courts have taken a balanced view, although relatively few significant cases decided to date
- Banks' obligations to customers have not yet been conclusively defined; key concepts of "sophisticated" and "speculative" remain to be settled
- Political response has focused largely on the decisions of local authorities to enter into transactions

In France, there are still relatively few decided misselling cases. Many individual retail investors are pursuing claims for misselling. However, the most prominent recent cases have concerned structured products taken out by local authorities either through loans, swaps or other interest rate hedging products.

These cases largely turn on their own facts and have been decided before lower Courts. As such, the definitions of key terms such as "speculative" and "sophisticated", which dictate the level of banks' obligations to customers, are not yet fully settled.

The absence of conclusive definitions of key concepts has led claimants in misselling litigation to deploy inventive arguments and strategies. For example, some French local authorities have argued that a circular issued by the Ministry of Economic and Financial Affairs in 1992, would mean that they are only able to enter into "hedging transactions" and that "speculative" transactions which they have entered into with banks should therefore be nullified. Resisting these arguments, banks have pointed to the fact that the circular does not have the force of law and to contrary provisions in legislation which give local authorities flexibility as to how to manage their finances. Banks have also argued that local authorities have not been acting in good faith by waiting to raise concerns about their capacity to enter into transactions until the performance of products has deteriorated.

Given the relative scarcity of settled domestic case law, claimants have also sought to seek to draw inferences from and parallels with sympathetic judgments from neighbouring jurisdictions, particularly Germany and Italy. In general, attempts by claimants to attach weight to non-binding circulars and decisions from other jurisdictions have been treated with caution by the French Courts.

Three important judgements handed down in February 2013 in the first misselling cases to reach trial have provided more clarity in some areas. However, they are broadly favourable for banks as far as misselling issues are concerned.

The Court's agreement with the public authority involved, the département of Seine Saint Denis ("the département"), that the contractually agreed (structured) interest rate should retroactively be replaced by the French official yearly legal interest rate has attracted widespread concern amongst banks.

However, the Court was more sympathetic towards banks when ruling on the merits of the département's claim that structured loans were missold. The département, relying on the 1992 circular mentioned above, asked the Court to conclude that the loans were invalid "speculative" transactions rather than valid "hedging" transactions. The Court refused to do so, ruling that the limit between what local authorities are entitled to do or not does not lie in the nature of the product but rather in the local authority's objective. In the case at hand, it refused to nullify structured loans, because "[the département] did not seek to enter into a speculative transaction, but to subscribe to a new structured loan with optimum conditions".

The Court also examined whether the département could be considered as a sophisticated client so as to assess whether it received appropriate information or warning from the bank before subscribing for quite complex structured loans. In doing so, the Court applied the same test as for any other client, confirming that after all local authorities should not be regarded as inherently less sophisticated than any other type of client.

These decisions have been welcomed by banks as victories for common sense. However, it is too early to say that the issue of what amounts to a "speculative" transaction has been settled. In previous decisions (albeit rendered upon summary proceedings), local authorities have successfully established that transactions where the maximum levels of interest payable were not known at the time at which authorities subscribed for the products have been "speculative" and should therefore be treated as null and void.

These three decisions have been appealed.

As in many other jurisdictions, litigation to date has been pursued against a backdrop of increasing political intervention and intensifying media attention. So far, the regulatory response to public and political concerns about misselling has been limited. This may be attributable in part to the difficult challenge faced by lawmakers seeking to preventing local authorities from entering into highly speculative contracts whilst avoiding undue restrictions on local authorities' access to credit.

This said, the French Parliament is currently considering a bill aiming at clarifying the current legislation regarding financial products sold to local authorities. The French government is also working on a new bill which would introduce class actions in France. The latter, if passed, may result in more cases involving individuals who have invested in widely marketed financial products coming before the Courts.

Numbers of misselling cases are also likely to rise as losses in connection with products entered into immediately prior to and during the financial crisis continue to crystallise. For now, however, the focus remains on transactions involving public authorities. In the absence of decisions of French upper Courts on the alleged "toxicity" of financial products subscribed by local authorities, key questions remain as to the meaning of concepts such as "speculative" products and "sophisticated" clients. The answers to these questions will define how favourable the climate is for banks seeking to defend misselling litigation in France.

Germany

- Conflicts of interest remain the general underlying issue
- Courts taking a paternalistic approach and interpreting banks' duties to customers strictly
- Regulatory and political response relatively muted, but numbers of claims are continuing to increase

Most misselling cases in Germany concern claims of conflicts of interest at the time of sale of products. As in many other European jurisdictions, increasing numbers of local authorities and SMEs which have subscribed to IRHPs are pursuing claims (although there is also an emerging trend of claims being pursued by fund managers either acting as claimants or assigning claims to litigation special purpose vehicles (SPVs)). Claims are typically based on arguments that banks have sold them unsuitable products and have omitted to disclose key information in order to benefit from lucrative one-off and ongoing revenue streams. The allegedly improper disclosure of the risks of the products from a hindsight perspective is another typical complaint.

When banks act as investment advisers, in addition to their obligations to assess and advise the customer as to the suitability of the product, they have a duty to disclose payments which they stand to receive for the sale or brokerage of those products, which are known as "kick backs" or "retrocessions". German private investors traditionally dislike products or banks and brokers with transparently disclosed fees, which has led to these and other fees being hidden in products. Apart from risk disclosures, claims by investors have been concerned with both the appropriateness of advice provided and the levels of disclosure provided to investors at the time of sale about how the bank will be remunerated, both for the initial sale of the product and during the life of the product.

Banks acquire onerous obligations in these areas relatively easily. For example, the Courts have, in some cases, held that a simple recommendation or a bank's response to a customer's implied request for such recommendation is enough to constitute "investment advice", and that it is not necessary for the bank to be remunerated in order for it to be considered to be giving advice.

The Courts have emphasised that banks, having overcome this relatively low threshold, must describe the material risks, likely returns and other properties of products to customers completely and accurately and in a way which applies those factors to the customer's particular situation. In some cases, Courts have descended into detail as to the areas in which banks must make disclosure, prescribing that disclosure must include all elements of the formula used for variable interest rates, any disparities between the levels of risk it and the customer are assuming and any intention on the bank's part to sell the contract for hedging purposes. In addition, Courts have clearly stated that advice must not merely set out theoretical risk, but must be tailored to the customer's particular circumstances, and that banks must ascertain the level of risk which a customer wishes to take in each particular instance, even if the customer is known to the bank.

The latitude which the Courts have been prepared to grant to customers in this area has been illustrated in one case where the Chief Financial Officer of the investor was an ex-banker with a degree in economics, who had entered into similar transactions on behalf of the bank's client company in the past. The Court decided that the bank concerned still could not assume that the client understood the product, stating that "not everybody who knows how to read a poem necessarily understands it".

In relation to kick backs, the position is less clear. Ambiguities remain as to what amounts to a kick back, as distinct, for example, from an internal commission (which only needs to be disclosed if it amounts to more than 15 per cent of the amount invested).

In a very recent decision, the German Federal Supreme Court has extended liability to execution-only banks, requiring them to inform their customers of apparent breaches of advisory duties by third-party financial advisors of which they have become aware.

Although there has been public and political dismay at the circumstances in which products have historically been sold to German investors, misselling cases have been pursued against a less overtly politicised background than in some other jurisdictions. The German financial regulatory authority ("BaFin") has taken enforcement action against institutions for breaches of applicable rules by misselling of products to retail and SME investors, but has not implemented schemes aimed at securing compensation for those investors.

However, the litigation process in misselling cases favours investors to a greater degree than in jurisdictions where such schemes have been put in place. In common with some other European jurisdictions, once a claimant has adduced prima facie evidence of a bank falling below required standards, the burden of proof shifts from the investor to the bank, which must show that full enquiry was made of and/or disclosure made to the investor at the time of the sale of the products in question.

This requirement, in effect, requires banks, in cases involving alleged kick backs, to prove that the customer would have made the same investment had he or she been informed of the kick back the bank was receiving. Claimants have recognised that this is a difficult argument for banks to win. Claims based on alleged non-disclosure of kick backs have become widely regarded as providing a relatively simple means for investors to seek nullification without having to pursue more complex arguments based on product features or suitability.

Investors have also been assisted by the simplification of procedural requirements for bringing claims in misselling cases. Courts have been given new case management powers in misselling cases such as the power to allow the aggregation of issues, and model proceedings have been drawn up, which are enabling investors to bring claims more easily, and for the Courts to deal with them more efficiently.

Italy

- Strong regulatory and political responses to misselling
- Legal system confers significant benefits on investors pursuing claims, but the Italian Courts have taken an even-handed approach

Misselling cases have assumed a particularly high profile in Italy over the last decade. A succession of well publicised cases since 2001 have generated increasing levels of social alarm and encouraged the proliferation of claims by investors.

The main issue commonly at stake in cases concerning the pre-MiFID regime is the validity of the "self certification" of retail customers as qualified investors. Prior to the implementation of MiFID, any corporate entity could be treated as a qualified investor simply by signing a "self certification", which was usually included as a standard clause in contracts for the provision of investment services. This waived a significant protection for investors and meant that small and comparatively unsophisticated investors could be treated the same as financial institutions or listed companies.

Under MiFID, rules in this area have been significantly tightened. Retail investors may now only be treated as professional investors if the investment firm involved in a transaction objectively evaluates factors including the investor's previous transactions, portfolio value and actual experience. Firms are also required to specifically advise the investor in relation to the consequences of being treated as a professional investor, and ensure that investors' requests to be treated as professional investors are recorded in written correspondence.

The implementation of MiFID has also introduced obligations on investment firms to assess the appropriateness of an investment for a customer in every case (subject to some limited exceptions for execution only business), whether or not the firm has assumed an advisory role. If an investment firm also assumes an advisory role, a stricter adequacy test aimed at evaluating factors including the customer's investment objectives is also required to be performed.

The Italian Courts have taken a balanced approach to misselling issues. The Courts have been concerned, in the relatively few cases decided since the implementation of MiFID, to emphasise banks' obligations to provide information and advice in a tailored manner and in some cases have stated that, even in cases in which Italian regulatory rules allow them to do so, the use of standard forms by intermediaries does not allow them to avoid civil liability to investors for misselling.

A particular theme arising from misselling cases has been the importance of the valid execution of a master agreement for the provision of investment services. The Courts have indicated that this is regarded as more than simply a formality. Indeed, investors have successfully argued in a number of cases that the lack of an investor's signature has been found to render contracts null and void.

Investors pursuing misselling claims in Italy are assisted by the reversal of the burden of proof in financial services cases similar to that in some other European jurisdictions (see, for example, Germany above). This requires investment firms, in order to avoid liability for damages, to establish that they acted with due diligence in ensuring that products sold to investors were suitable. However, in a number of cases, investors have placed excessive reliance on this feature of the Italian procedural rules, and have pursued claims based on poorly particularised and unsubstantiated allegations, which have been rejected by the Courts.

Investors are placed at an advantage in more serious cases where criminal proceedings are pursued in respect of misselling. In those cases, investors have been able to register their interest in the proceedings pursued by public prosecutors, and to obtain significant levels of disclosure of relevant documents and file claims for damages without needing to assume the risk of pursuing proceedings themselves.

No equivalent to the organised schemes to provide redress to UK and Hong Kong investors exists in Italy. However, the involvement of the Italian financial services regulator ("CONSOB") is increasing. Mediation involving representatives of CONSOB as intermediaries between the parties is an optional way to seek an out of Court settlement in all disputes involving financial services contracts although, in the relatively small number of disputes dealt with under this system to date, parties' differences have rarely been successfully settled and it has not as yet impacted upon the growing numbers of cases coming before the Italian Courts.

Netherlands

- Increasingly stringent responsibilities imposed on banks to gather information and assess suitability
- Often, the Dutch Courts have construed these in customers' favour
- Increasing numbers of collective actions are pursued against banks

Recent years have seen significant activity in the Netherlands in relation to the misselling of financial products. Regulators and legislators have significantly tightened the regulatory framework.

Under specific financial laws and regulations such as the Dutch Financial Supervision Act ("Wft"), banks are required to gather information and to assess whether a product or service is appropriate for the customer in question.

The recent introduction of a number of provisions focusing on the circumstances in which financial products are sold, has significantly increased the potential for banks to become the subjects of regulatory action by the competent regulatory authority, the Netherlands Authority for the Financial Markets ("AFM"). For instance, from 1 January 2013, financial institutions have been banned from paying commissions to independent financial advisors and intermediaries in connection with complex financial products, and bankers have been obliged to take an oath which includes a commitment to putting their clients' interests first.

This intensification of regulatory activity in relation to misselling continues. It is envisaged that, as of 1 January 2014, banks' duty of care will be explicitly laid down in the Financial Supervision Act.

In addition to their regulatory obligations, under the Dutch civil law, banks owe a special duty of care resulting from their social position and expert knowledge. This duty of care is developed in civil case law on the basis of the principles of reasonableness and fairness and the concept of wrongful act (*onrechtmatige daad*). The scope of the special duty depends on the specific circumstances of each case, in particular by factors including the nature of the relationship between the bank and the client, the level of expertise of the client, the income and assets position of the client, the risks involved in the relevant product and the extent to which the client is aware of them and has accepted such risks, and the applicable financial regulatory provisions that aim to protect the client.

In several rulings the Supreme Court of the Netherlands considered that the aim of the special duty of care is to protect the client against its own frivolousness, emotions and lack of understanding. Also, it has ruled that this special duty of care owed by banks can extend beyond their statutory duties, both in terms of whose interests banks must take into account and in terms of the steps which they must take to protect them. First of all, the Supreme Court considered that the special duty of care may not only relate to its customers but also to third parties, such as a client's customers and potential investors. In addition, the Supreme Court has found that the special duty of care may, in some circumstances, require banks to intrusively warn the client of particular risks of a product and of the fact that the client's envisaged purchase is not compatible with its financial objectives, risk appetite or expertise. In a pre-MiFID case the Supreme Court considered that completion by a client of a statement stating that it is fully aware of the risks, was not sufficient.

The cases in which the scope of this duty of care has been determined have concerned a wide variety of types of financial products and services. The first important cases in this area to come before the Supreme Court (in the late 1990s) concerned options trading. Since then, the scope of this duty of care has further developed as the result of rulings in various collective actions against banks in areas including asset management, securities leasing, and prospectus liability.

The case relating to securities leasing regarded the suitability of products for clients and formed the basis for the current duty to warn clients. The Supreme Court considered that the bank had to substantiate in sufficient detail its claim that a client would also have entered into the agreement if the bank had (fully) complied with its duty of care. Otherwise, the causal relation was assumed to be in place.

The prospectus liability ruling regarded public statements made prior to and during a flotation. Although the banks involved did not issue misleading statements, according to the Supreme Court, under the circumstances they had a duty towards investors to prevent any misrepresentation by the issuer as much as possible. The Supreme Court assumed that the required causal relation between the misleading statements and the investment decision of the investors was present and so it was up to the banks to argue and prove otherwise.

Collective actions can be a (preliminary) part of class settlement proceedings under the Dutch Act on the collective settlement of mass claims ("WCAM"), which are unique in Europe. Such collective settlement agreements can be declared binding by the Amsterdam Court of Appeal, which means that it binds all relevant persons, except for those who expressly elect to opt out. For instance, in the securities leasing case referred to above, an agreement was concluded between parties, the so-called Duisenberg agreement, as a result of which most of the individual claims have now been settled.

For the time being, the misselling cases before the Dutch Supreme Court have related to private or retail clients. The Supreme Court has not ruled on any misselling claims brought by professional clients against banks. However, following the derivatives-related losses recently reported by (semi)public entities in the Netherlands, including social housing associations, discussions are ongoing as to whether or not such entities should be considered professional clients and to what extent banks owe a duty of care towards such clients.

Singapore

- A revisiting of non-reliance clauses
- The "linguistic and financial literacy" of banking customers may be relevant in determining whether non-reliance clauses may be relied on

- Potential trend of an increasingly conservative and sympathetic judicial attitude towards unsophisticated customers

The traditional view taken by the Courts in Singapore towards accusations of misselling was that customers were bound by the terms and conditions which they had entered into. This view is supported by two cases from 2007 and 2011. The first case involved the managing director of a BVI investment company (*Orient Centre Investments Ltd and another v Societe Generale and another* [2007] SGCA 24). In this case, the Singapore Court of Appeal held that the non-reliance clause and risk disclosure contained in the account opening terms were an "insuperable obstacle" to any claim made by Orient or its managing director Mr Teo based on the alleged breach of misrepresentation.

The second case is in relation to whether a bank is required to advise that a certain investment or the holding of an investment portfolio was imprudent (*Go Dante Yap v Bank Austria Creditanstalt AG* [2011] SGCA 39). As with the above case, this involved a customer who was deemed to be sophisticated and experienced. The Singapore Court of Appeal held that as Mr Yap was sufficiently savvy, the bank had discharged its duty of care towards him by having monthly meetings where the performance of his investments was discussed.

As with other major financial centres, the misselling of financial products is back under the spotlight in Singapore. In two recent cases, both the power of non-reliance clauses and the duties owed to customers have been re-examined.

In *Als Memasa and another v UBS AG* [2012] SGCA 43, an account was opened at the bank by a wealthy Indonesian businessman aged 95 and his daughter in her 60s. A number of transactions were entered into including large purchases in Russian bonds which subsequently lost considerable value. The Singapore Court of Appeal allowed the claimants' appeal and refused to strike out their claim, although the bank had argued that the contract entered into contained a non-reliance clause. The Court commented that it may be desirable for the Singapore Courts to reconsider whether, notwithstanding the existence of such clauses, financial institutions should be accorded full immunity from liability arising from investment losses of their customers, particularly in the case of unsophisticated customers. It was also discussed that "linguistic and financial illiteracy" should be taken into consideration when analysing if a financial institution can rely on such clauses.

The Court also raised the issue of whether non-reliance clauses contravened the Unfair Contract Terms Act (Cap 396) ("UCTA"). Under section 4(1) of the UCTA, a consumer cannot be made to indemnify another party from liability arising out of the other party's own negligence or breach of contract unless it satisfies the requirements of reasonableness.

The second case was between Deutsche Bank and Dr Chang, who had recently received a substantial windfall due to the sale of his company (*Deutsche Bank AG v Chang Wen Tse* [2012] SGHC 248). At the time that the account was opened, Dr Chang informed the bank of his lack of experience and was assured that the bank would be able to provide a customised investment, estate and wealth planning service to suit him. Following Dr Chang's entry into a number of structured products and Dr Chang's transformation from being given a low experience profile to a high one, Dr Chang's account made substantial losses and was in deficit. Dr Chang counterclaimed for damages arising from misrepresentation and breaches of duties. The Singapore High Court held that the bank knew that Dr Chang was inexperienced and could have foreseen the loss if it breached its duty to advise Dr Chang on managing his wealth. Interestingly, however, the Court recognised that the outcome may have been different if the bank had told Dr Chang that he could not rely on the bank to advise him on managing his wealth.

Following the *Dr Chang* and *Als Memasa* cases, it will be interesting if this more conservative and sympathetic judicial attitude towards unsophisticated customers is continued. The full trial in the *Als Memasa* case is yet to occur, and the decision in *Dr Chang* may be appealed.

Misselling claims and complaints of up to SGD 100,000 may be lodged at The Financial Industry Disputes Resolution Centre Ltd (FIDReC). FIDReC is an independent and impartial institution specialising in the resolution of disputes between financial institutions and consumers, and had handled various Lehman Minibond Notes claims. FIDReC is known to provide an affordable and accessible one-stop avenue for banking customers to resolve their disputes with financial institutions.

Authors

Helen Carty
Partner, London

E: helen.carty
@cliffordchance.com

Ian Moulding
Partner, London

E: ian.moulding
@cliffordchance.com

Chris Stott
Senior Associate, London

E: chris.stott
@cliffordchance.com

Jean-Pierre Grandjean
Partner, Paris

E: jean-pierre.grandjean
@cliffordchance.com

Laurence Wynaendts
Counsel, Paris

E: laurence.wynaendts
@cliffordchance.com

Burkhard Schneider
Partner, Frankfurt

E: burkhard.schneider
@cliffordchance.com

Heiko Heppner
Senior Associate, Frankfurt

E: heiko.heppner
@cliffordchance.com

Fabio Guastadisegni
Partner, Milan

E: fabio.guastadisegni
@cliffordchance.com

Anna Dalla Valle
Senior Associate, Milan

E: anna.dallavalle
@cliffordchance.com

Polly Snyder
Counsel, Washington

E: polly.snyder
@cliffordchance.com

Nish Shetty
Partner, Singapore

E: nish.shetty
@cliffordchance.com

Donna Wacker
Partner, Hong Kong

E: donna.wacker
@cliffordchance.com

Edward Johnson
Senior Associate, Hong Kong

E: edward.johnson
@cliffordchance.com

Jeroen Ouwehand
Partner, Amsterdam

E: jeroen.ouwehand
@cliffordchance.com

Simone Peek
Senior Associate, Amsterdam

E: simone.peek
@cliffordchance.com