British Institute of International and Comparative Law

COLLECTIVE REDRESS SWITZERLAND

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British Institute of International and Comparative Law

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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I. Overview

Class actions as such do not exist under Swiss law.

In 2006, the Swiss legislator decided not to introduce the Anglo-American concept of class action into the new Swiss Code of Civil Procedure ("SCCP"). This procedural tool is considered generally contrary to the Swiss legal system, which rests on the fundamental principle that only the holder of a legal right can assert such right. There is also a strong suspicion against American style class actions.

In 2013 the Swiss government published two surveys, one on collective redress and another on financial services, acknowledging the general need to increase the procedural protection of financial investors, including by way of collective rights such as where a large number of financial investors in the wealth management sector have incurred losses due to the same damaging event.

In its survey on collective redress, the Swiss government noted in particular that the existing procedural tools were insufficient and inadequate to deal efficiently with mass or group monetary claims. It also identified that the current determination and allocation of litigation costs rules (in principle, the "losing party pays" rule applies) were particularly problematic for an effective access to justice in cases of mass or group claims, in particular where the separate individual claims are relatively small.

The Swiss government is currently examining various legislative measures to facilitate access to justice in cases of mass harm. Until further developments, courts and/or parties to a litigation thus deal with proceedings involving multiple parties by relying on existing procedural instruments, in particular, (A) the joinder of claims filed separately but which are, in substance, closely connected, (B) claims filed by an association on behalf of its members, (C) the use of a test case and (D) special procedural powers entrusted to courts.

A. Joinder

Under Swiss civil procedure law, collective interests are first protected by the joinder of parties. Joinder can be "compulsory" or "simple".

Compulsory joinder

Joinder is compulsory in cases where several individuals and/or entities are involved in a legal relationship for which only a decision binding for all such persons is conceivable (art. 70 SCCP). In such cases, the parties involved must sue or be sued together. Substantive law defines the requirements for a compulsory joinder. The most common examples of compulsory joinders are disputes involving community of heirs.

Simple joinder

By contrast, joinder is simple in cases where the rights and duties which are to be determined are based on similar fact or legal grounds (art. 71 SCCP). In such cases, several persons may sue or be sued together. Yet, each joint claimant remains a separate party to the proceedings and may proceed independently from the other claimants. Simple joinder can for instance be resorted to in cases of several lessees objecting to a rent increase, workers opposing a collective dismissal, or consumers who are victims of a defective product acting against the manufacturer. Simple joinder is, however, inadmissible if the various actions are not subject to the same type of procedure (ordinary, simplified, or summary).

As a rule, the claimants may seek any of the remedies available under Swiss law, such as damages and declaratory relief. Punitive damages are however not admissible, as they are alien to Swiss law. Claimants cannot claim more than the damages actually incurred. Simple joinder may seem comparable to class action but remain a substantially different procedural device, mainly because all of the litigants are separate parties to the proceedings. Accordingly, the judgement may differ for each individual party. Moreover, joint litigants cannot be forced into the proceedings but can join out of their free will.

Parties bound by a compulsory or simple joinder may appoint a joint representative, failing which separate notifications will be made to each party.

Parties may use the possibilities offered by Internet (social media) and/or advertisement through newspapers in order to join forces. In principle, Swiss lawyers are not allowed to proceed with such advertising due to their deontological rules. In particular, they may not suggest to an undetermined number of recipients to contact them in order to initiate litigation; by contrast, the Zurich Supervisory Authority for attorneys-at-law decided that "objective" information on a specific issue provided by a lawyer to a determined group of people, namely in casu at a conference, was admissible.

B. Association claim

Swiss law further provides the possibility, in specific cases, to protect collective interests by way of so-called "association claims" filed by an association on behalf of its members.

According to article 89 SCCP, "[a]ssociations and other organisations of Swiss national or regional importance that are by virtue of their bylaws authorised to safeguard the interests of particular groups can bring an action in their own name against violations of the personality rights of members of such groups." This legal avenue is rather limited as only associations of Swiss or regional importance can make use of it and only if their bylaws authorise them to safeguard the interests of the group they represent. Remedies are also limited as claimants can only request that (a) a threatened violation be prohibited, (b) an existing violation be ceased, and (c) that a violation that continues to cause nuisance be declared illegal; by contrast, claims for damages are not admissible.

Several other statutes reserve explicitly the possibility for representative bodies to file a collective action. For instance the Federal Act against Unfair Competition (art. 10, "FAUC") as well as the Federal Trademark Act (art. 56, "FTA") allow for collective actions of professional and trade associations if their bylaws entitle them to protect the interests of their members. Organisations of nation-wide or regional importance which are dedicated to protect the interests of the consumers are also entitled to bring collective actions under these two statutes. Another statute providing for collective actions is the Federal Act on Equality between Women and Men (art. 7, "FAEWM"). Organisations which, according to their bylaws, advocate the equal treatment of men and women or the protection of the interests of employees may file a collective action in cases of discrimination. Furthermore, associations of employers or employees are entitled to bring a collective action seeking declaratory judgment on the legality of certain behaviours (e.g., in the framework of collective layoffs or transfers of undertakings) under the Federal Act of Participation (art. 15(2), "FAP") in the context of companies of over 50 employees.

C. Test cases

A claimant may initiate proceedings, which, when adjudicated, can serve as a test case for other claimants who can rely on the "model decision" to argue specific questions of law or fact.

While it may be more difficult for a defendant to dismiss the findings made in a test case, the resulting "model decision" will not be binding for the subsequent proceedings, except where all parties involved agreed contractually to such binding effect on third parties.

The advantage of a test case is to limit the risks inherent to legal proceedings, in particular as to the issues of liability, attorney fees and court costs. The downside for the other defendants is in particular that they might have to wait several years before the "model decision" is rendered, with the risks of their action being time-barred (save where the parties agree to a time-bar interruption or if the claimant interrupts the limitation period for instance by initiating debt enforcement proceedings) and the possible loss of evidence.

D. Court procedural powers

Other procedural rules of the SCCP provide courts with the power to take certain measures to accommodate several claims having the same object. For instance, courts can simplify the proceedings by consolidating actions brought separately (art. 125 SCCP). They can also stay the proceedings if necessary, in particular where a decision depends on the outcome of other proceedings (art. 126 SCCP). Where closely connected proceedings are pending before different courts, a court subsequently seized can transfer the action to the court first seized subject to the latter's agreement (art. 127 SCCP).

II. General collective redress mechanisms

Swiss law does not provide for a general collective redress mechanism, see the Overview Section.

III. Sectoral collective redress mechanisms

A. Consumer law

There is no special mechanism for collective action in Swiss consumer law. The general above-described procedural rules apply.

B. Competition law

There is no special mechanism for collective action in Swiss competition law either (save for the possibility of an association claim, as prescribed by art. 10 FAUC, see above Section IB). The general procedural rules apply.

C. Collective investment

The Swiss Collective Investment Schemes Act ("CISA") governs the distribution of foreign collective investment schemes in Switzerland. Pursuant to article 7 CISA, collective investment schemes are assets raised from investors for the purpose of collective investment and managed for the account of such investors.

The CISA offers a collective mechanism for investors claiming reimbursement for the unlawful withholding of entitlements or benefits (art. 85 and 86 CISA). Such collective action is possible only in the framework of "open-ended" collective investment schemes (art. 8(1) CISA), namely investment funds which are either in the form of a contractual fund or an investment company with variable capital ("SICAV").

While the defendant is the individual or company having caused the damages (fund management company, the SICAV's corporate body, custodian bank, third parties, etc.), the proceedings can only be made in favour of the investment fund, which is thus the sole direct beneficiary of a successful action (the investors benefitting only indirectly from the latter).

1. Procedures

a. Standing

One or several investors of the open-ended collective scheme at stake may request that the Swiss competent court appoints a representative to bring a claim for damages in favour of the said scheme (art. 86(1) CISA). To this end, they need to demonstrate a prima facie cause of action, i.e. that at least one of their claims is likely to be well-founded. A full proof thereof is however not required and a "mere" likelihood is sufficient. Once the representative has been designated, the court will give notice of the appointment in the media of publication of the open-ended collective investment scheme (art. 86(2) CISA). Furthermore, the representative has the same procedural rights as an individual investor, in particular the right to obtain information regarding financial data and/or specific business transactions in relation to the collective investment scheme concerned (art. 84 and 86(3) CISA).

b. Opt-in/opt-out procedure

Once the representative has filed an action for damages in favour of the collective investment scheme, individual investors may no longer exercise their individual right to file such an action and they are bound by the outcome of the judgment. In other words, the latter represents all investors (no need to opt-in) and there is no possibility for individual investors to opt-out.

c. Competent court

The action shall be brought before the ordinary (state) civil courts where the licence holder of the investment scheme has its seat.

d. Certification criteria

There is no certification procedure.

e. Main procedural rules

The ordinary Swiss civil procedural rules apply.

f. Evidence/ discovery

There is no procedure for discovery under Swiss law. All the relevant facts must be proven by the plaintiff, who cannot make general unsubstantiated allegations to be supported at a later stage through information to be obtained from the defendant. Evidence proceedings are strictly managed by the court - not by the parties - and evidence is limited to what the court deems relevant.

g. Participation of foreign plaintiffs

Foreign plaintiffs are not excluded. As long as they qualify as investors of a collective investment scheme, they will have the same rights (described above) as Swiss investors.

2. Available remedies

Under Swiss law, there are no punitive or exemplary damages and remedies are limited to restitution and compensatory damages. The economic damage has to be specifically determined and only in exceptional circumstances can it be assessed by judicial discretion. These principles also apply to the collective action under scrutiny.

As mentioned, the aim of the CISA collective action for "open-ended" collective investment schemes is to obtain redress for damages caused to the collective investment scheme, which is the sole direct beneficiary of a successful lawsuit, the investors benefiting only indirectly from the latter.

3. Costs & funding

Under Swiss law, court fees and compensation for attorney's fees in the context of a litigation are allocated according to the "loser pays" principle and depend on the amount in dispute. However this reimbursement does not generally cover the full costs incurred by the prevailing party. These principles also apply to the costs ensuing from the collective action initiated by the representative.

Furthermore, according to article 86(5) CISA, unless the court decides otherwise, the expenses incurred by the representative are paid by the investment fund, in particular court costs. By contrast, the advance on costs for the nomination of the representative by the competent court in the first place is to be borne by the investor(s) requesting said nomination.

4. Number of claims

To our knowledge, there has been so far no collective action initiated on the basis of article 86 CISA, i.e. through the nomination of a representative. This might be due to the relative complexity of the proceedings and to the fact that damages by hypothesis awarded are granted to the collective fund as a whole, which means that the investor(s) who initiated the whole process (request to the court for the nomination of a representative, who will sue on behalf of the fund) will only benefit indirectly from a successful action to the same extent as investors who did not intervene.

D. Legislative consultations and reform proposals

1. 2013: first proposal

In 2013 the Swiss government published two surveys, one on collective redress and another on financial services, acknowledging the general need to increase the procedural protection of financial investors, including by way of collective rights such as where a large number of financial investors in the wealth management sector have incurred losses due to the same damaging event.

In its survey on collective redress, the Swiss government noted in particular that the existing procedural tools were insufficient and inadequate to deal efficiently with mass or group monetary claims. It also identified that the current determination and allocation of litigation costs rules were particularly problematic for an effective access to justice in cases of mass or group claims, in particular where the separate individual claims are relatively small.

In an attempt to remedy the shortcomings of the Swiss judicial system, the Swiss government envisaged various legislative measures to facilitate access to justice in cases of mass harm largely inspired from collective redress mechanisms developed successfully abroad. Two main approaches were considered, namely the improvement of existing procedural tools on the one hand and the introduction of collective redress mechanisms with a general scope of application on the other hand.

Firstly, the Swiss government recommended the setting up of a specific regime for court costs, as well as the development of the Swiss market for third-party funding of lawsuits. Such measures would enable an effective and collective enforcement of rights, not only by way of a simple joinder but also of a combination of claims. In addition, financial and organisational measures were envisaged to foster the creation of representative bodies capable of conducting large-scale trials, similarly to the Austrian VKI - the Austria Consumers Association. Another envisaged improvement was to extend the scope of application of the representative action to allow for compensation to be claimed by a representative entity for violations other than of personality rights of the members of the group. The Swiss government specified that such an extension would be useful, in particular where the separate individual claims are relatively small.

Three types of general collective redress mechanisms were contemplated: (i) a model or test case procedure, (ii) a collective action, and (iii) a group settlement procedure.

The test case procedure outlined in the Report was largely based on the German Kapitalanleger-Musterverfahren provided for under the Kapitalanleger-Musterverfahrensgesetz (KapMuG). In this respect, the Report specified that the German model should be adapted so as to comply with the Swiss principles of procedure, including the right to be heard of the aggrieved persons - most of whom will not be a party to the test case procedure. Indeed, the outcome of the test procedure would be binding under all subsequent individual proceedings as regards all factual and legal common issues.

The Swiss government also considered the introduction of a collective action in Switzerland. The envisaged collective action would depart to a large extent from the US class action provided for under Rule 23 of the US Federal Rules of Civil Procedure, which is specifically rejected. Many of the US class action components, such as the opt-out mechanism, punitive damages and contingency fees, are considered foreign to Swiss - and more generally European - legal tradition. The Swiss government recommended the adoption of a procedure with an opt-in basis to stay in line with the European legal tradition and avoid potential difficulties at the enforcement stage. In addition, the Swiss government recommended the implementation of an adequate regime for the determination and allocation of costs, as well as for the funding of such collective procedures.

As a last alternative, the Swiss government considered the implementation of a collective settlement mechanism similar to the Dutch collective settlement procedure provided for under the Dutch Act on the Collective Settlement of Mass Damage Claims, also known as the WCAM. However, unlike the Dutch model, the Swiss procedure would have an opt-in basis, thus limiting possible difficulties at the enforcement stage.

In 2013, a parliamentary motion gave a specific mandate to the Swiss government to implement collective redress mechanisms in Swiss law. Initially, the Swiss government intended to consider the introduction of collective redress mechanisms on a sectorial basis. The first sector reviewed in this perspective was the financial sector. In this context, the Swiss government made concrete proposals to include a collective redress mechanism for investors in the upcoming Federal Act on Financial Services. However, faced with a strong opposition from the banking sector, this novelty was left out of the final draft which will be approved in 2015/2016 and it was decided to consider the introduction of a group settlement mechanism and to develop collective redress mechanisms in the SCCP.

2. December 2021: new draft proposal to extend collective redress instruments

In May 2022, Switzerland's Committee on Legal Affairs of the National Council began to work on the revision of the Swiss Code of Civil Procedure to broaden the existing collective redress instruments.

The draft proposal was adopted by the Federal Council last December and aims at strengthening the protection of collective interests. The Federal Office of Justice noted that under the existing Swiss legislation, when a damage affects a large number of people in a similar way, each of them must in principle brings their claims individually. The result is that many parties do not exercise their rights, especially when the damage is limited.

The proposal would reform the existing association claim instrument provided by Art. 89 of the Swiss Code of Civil Procedure (CPC). Currently, associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality of the members of such group. They may request the court: (a) to prohibit an imminent violation; (b) to put an end to an ongoing violation; (c) to establish the unlawful character of a violation if the latter continues to have a disturbing effect. The current representative action is thus limited to violation of personality rights, and the remedy is solely injunctive.

Under the new proposal, the current limitation to personality rights is dropped. The scope of the representative action is extended to all types of unlawful violations. A broad range of areas could thus be covered by the new action, including consumer claims, financial services, antitrust, unfair competition, data protection, product liability or environment protection. In that respect, the scope of the Swiss proposal goes further than the EU Directive which applies solely to consumer claims.

Requirements apply as to standing. To be able to bring the claim, organisations must (a) be non-profit making, (b) have been in existence for at least twelve months at the time the action is brought (the proposal thus eliminates the possibility for ah-hoc organisations to bring the claim), (c) be entitled to defend the rights and interests of that group of persons by virtue of their articles of association or memorandum of association, (d) be independent and not influenced by the defendant (similarly to Article 4.3 (e) of the EU Directive).

As to remedy, similarly to the existing legislation, the organization may request the court (a) to prohibit an unlawful infringement if it is imminent; (b) to put an end to it if it is still continuing; (c) to establish that it is unlawful. The parties may also request that the decision be communicated to third parties or that it be published.

In addition to strengthening the existing association claim mechanism, the proposal introduces a collective compensatory claim. Under Art. 307b of the proposal, associations and other organisations may act in their own name to assert a right to compensation if the following conditions are met: (a) they are authorised to bring an action under Article 89(1) CPC or a special legal provision; (b) they are empowered to act by at least ten persons concerned, (c) and the claims raised are based on similar facts or legal grounds. The opt-in mechanism applies, with a minimum of three months from the date of entry in the register for interested parties to express their wish to join the action (Art. 307b).

The proposal also introduces a new collective settlement procedure. The parties may at any time submit a joint application to the court to declare a collective settlement binding on all persons affected by the infringement who have joined the organisation's action (Art. 307h of the proposal). The opt-in principle applies, however the opt-out principle can apply under specific circumstances. The parties may submit a request to the court to

extend the binding effect of a collective settlement to all persons affected by the infringement who are domiciled or based in Switzerland and who have not joined the organisation's action, if they have not declared their intention to withdraw from the settlement within a period of at least three months set by the court, if the claim of an individual affected person is for such a small amount that it does not justify individual action, and if a significant proportion of the affected persons have not joined the action.

Switzerland is thus keeping up with the developments in the European Union in terms of collective redress. The broad scope of the proposal, along with the possibility for compensatory remedy and the availability of a collective settlement procedure with an opt-out mechanism, are certainly strengthening the protection of collective interests in Switzerland. Political opposition is however to be expected, and it remains to be seen how the proposal will be ultimately enacted.

E.Legislation

A. General

Art. 70 and 71 SCCP regarding, respectively, compulsory and simple joinders (see above Section I, A).

Art. 89 SCCP - association claim, in general (see above Section I, B).

B. Sectoral

1. Association claim

Art. 10 of the Federal Act against Unfair Competition.

Art. 56 of the Federal Trademark Act.

Art. 7 of the Federal Act on Equality between Women and Men.

2. Collective Investment Schemes Act (CISA)

Art. 86 CISA - action in favour of an open-ended collective investment schemes (see above Section III, C).

F. Case law

We have listed hereafter a few examples of relevant Swiss case-law in relation to the existing procedural instruments described above under Section I:

(i) Joinder: a spectator to an amateur hockey match lost vision in one eye after having been knocked by one of the players during a scrum; she successfully sues 10 players, the guest hockey-club and the organiser of the game (Decision of the Swiss Federal Court ("DSFC") 79 II 66);

(ii) Association claim: a professional union, whose bylaws included the right to defend the economic interests of its members, had legal standing to file an action based on an alleged violation of the Federal Act against Unfair Competition (DSFC 125 III 82, # 4);

(iii) Test case: in a dispute between two Swiss telephone providers, the Communication Commission seized examined the principle of one operator's obligation to ensure that it provides interconnection (test case limited to this aspect), leaving the issue of liability for subsequent proceedings (DSFC 131 II 13, # 2.4; see also DSFC 132 II 257).

(iv) Court procedural powers: 17 tenants of a building each filed a separate claim against their landlord on the same basis namely for repair works and a rent reduction; further to a settlement reached with the landlord, there remained a dispute on the sole question of the possible indemnification of the landlord for his attorney's fees; the Court consolidated the different proceedings into one matter before taking a decision (Decision of the Fribourg Cantonal Court no 102 2014 32 dated 3 November 2014, # 1 let. e).

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