

BIICL Annual Conference 2013

Introduction of collective redress for financial investors in Switzerland

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Overview

- I. Panorama of collective redress mechanisms in Switzerland**
- II. Focus on the protection of financial investors**
- III. Reform discussions in Switzerland**
- IV. Conclusion**

I. Panorama of Swiss collective redress mechanisms (1/6)

- **Civil law system**
- **Group litigation** largely **unknown** → in most cases individual claims
- General **mistrust** towards **class/mass action**

I. Panorama of Swiss collective redress mechanisms (2/6)

- **2011:** Unification of the rules of civil procedure by way of the **Swiss Code of Civil Procedure** (SCCP)
 - Specific **refusal** of a mechanism of **class action**
 - ▶ Against principle of party disposition
 - ▶ “*Against European legal principles*”
 - ▶ Existing provisions for collective claims deemed sufficient

I. Panorama of Swiss collective redress mechanisms (3/6)

- N.B. Cases of **mass claims** related to **Switzerland**
 - ▶ United Nations Compensation Commission (**UNCC**)
 - ▶ Claims Resolution Tribunal for Dormant Accounts in Switzerland (**CRT-I** and **CRT-II**)

I. Panorama of Swiss collective redress mechanisms (4/6)

- **Swiss civil procedural law** is **not supportive** of redress for group claimants
 - ▶ No discovery proceedings
 - ▶ Fact-finding managed by the court
 - ▶ Remedies limited to compensatory damages actually incurred and low compensation for moral damages
 - ▶ Standards of proof very high
 - ▶ Cost-shifting and litigation funding
 - ▶ No pure contingency fees

I. Panorama of Swiss collective redress mechanisms (5/6)

Joinder Art. 15; Art. 71 SCCP	Several parties can join their claims if: (i) same set of facts; (ii) same questions of law; and (iii) same type of proceedings (i.e. under the jurisdiction of the same court)	<ul style="list-style-type: none">• One taking of evidence, reduced costs, avoidance of conflicting judgments• Each case has to be pleaded and adjudicated individually• Difficult to coordinate in practice
Group action Art. 89 SCCP	Action of organisations of national/regional importance, authorised by their articles of association to protect the interests of a certain group of individuals	<ul style="list-style-type: none">• Action in the name of the organisation• Limited to violation of the personality of the members of the group• Limited to declaratory and injunctive relief (no monetary relief)

I. Panorama of Swiss collective redress mechanisms (6/6)

Other collective actions	Investors in collective investment schemes Art. 86 Federal Act on Collective Investment Schemes	<ul style="list-style-type: none"> • Court-appointed representative may initiate a collective action • Monetary redress on behalf of the affected investors • Damages only for the investment scheme • Costs borne by the collective investment scheme
	Shareholders in a merger transaction Art. 105 Swiss Merger Act	<ul style="list-style-type: none"> • Shareholders' claim for losses due to an alleged inadequate treatment in a merger • No opt-out for shareholders in a similar situation • Costs generally borne by the company
	Nuclear accidents Nuclear Third Party Liability Act	<ul style="list-style-type: none"> • Simplification of the administration of mass claims in cases of nuclear accidents
Court procedural powers	Procedural power enabling a simplification of the proceedings	<ul style="list-style-type: none"> • Joinder Art. 125 SCCP • Stay of the proceedings Art. 126 SCCP • Referral of an action to another court seized with a related action is pending Art. 127 SCCP

II. Focus on the protection of financial investors (1/3)



II. Focus on the protection of financial investors (2/3)

- **Evolution** regarding collective redress since the **financial crisis 2008/2009**
- Several **scandals**:
 - ▶ UBS fallout
 - ▶ Lehman Brothers Holdings Inc. bankruptcy
 - ▶ Madoff fraud
 - ▶ Retrocessions taken from banks in the context of asset management services

II. Focus on the protection of financial investors (3/3)

- **Surveys** from the Swiss Financial Market Supervisory Authority (FINMA) re **Madoff fraud** and **distribution of Lehman products**
 - ▶ **Inadequate** legislation regarding **investors' protection**
 - ▶ Need for a **review** of the **supervisory and legal framework** in relation to **investment product intermediation**
 - Improving business conduct rules when marketing and distributing financial products
 - Increasing client information
 - Improving **enforcement of clients' claims**
- **Swiss Financial Services Act (SFSA)**

III. Reform discussions in Switzerland (1/3)

■ Political initiatives

- ▶ May **2010**: Parliamentary commission report regarding the UBS fallout and transfer of data to the USA
→ Action required in respect of **corporate liability** claim
- ▶ September **2011**: Parliamentary Motion Birrer-Heimo
→ Simplification of **claim enforcement** by way of collective actions
- ▶ March **2013**: Parliamentary Motion Schwab
→ Collective action for breach of **data protection** in particular on the internet

III. Reform discussions in Switzerland (2/3)

■ SFSA

- ▶ 18 February 2013: Hearing Report
- ▶ 7 March 2013: Panel
- ▶ Entry into force expected in **2015/2016**

■ **Key thrusts** regarding the **enforcement of retail clients**

- ▶ Reversal of the burden of proof regarding conduct obligations
- ▶ Expansion of the Ombudsman system
- ▶ Collective redress

III. Reform discussions in Switzerland (3/3)

- **Swiss Federal Office of Justice's** broad-based **investigation** on the suitability of introducing **collective legal enforcement** of claims relating to damages involving a **large number of aggrieved parties** with the **same or similar claims**
- Report to be approved by the Swiss government in the course of 2013
- Early stages
 - ▶ Focus on **access to justice**
 - ▶ Re **financial investments**: limitation to cases of structural breaches of duty (e.g. prospectus with erroneous information)
 - ▶ **Opt-in** system more likely

IV. Conclusion

- **Change of paradigm** in Switzerland
- Cultural scepticism but increasing need for more protection and **improvement of access to justice**
- Focus on financial **investors'** and **consumers'** protection
- Industry awareness of the trend
 - ▶ Banking industry
 - ▶ Swiss Re's report
- More changes expected in **2013** and in the **coming years**
... to be continued

Thank you

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