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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**  | Several parties can join their claims if:  
| Art. 15; Art. 71 SCCP | (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) |  
| | • 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**  | Action of organisations of national/regional importance, authorised by their articles of association to protect the interests of a certain group of individuals |  
| Art. 89 SCCP | • 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 | • 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 | • 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 | • Simplification of the administration of mass claims in cases of nuclear accidents  
| Court procedural powers | Procedural power enabling a simplification of the proceedings | • **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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