UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

EXPERT DECLARATION OF PHILIPP KÄNZIG ON SWISS LAW

I, Philipp Känzig, declare the following:

A. Introduction and Assumed Facts

1. I have been asked to provide a legal opinion on certain legal issues that have arisen in the context of the class action in re *Anwar et al. v. Fairfield Greenwich Limited et al.* pending in the United States District Court for the Southern District of New York.

2. It is my understanding that the present class action claim was filed on behalf of individuals and entities (**Plaintiffs**) who have invested large amounts in four funds operated by the Fairfield Greenwich Group (so-called feeder funds). The overwhelming majority of the Plaintiffs' money was, in turn, invested in a Ponzi scheme orchestrated by Bernard Madoff. The defendants include a number of Fairfield Greenwich entities, executives, and other professional service providers, who audited, administered, or served as custodian of the funds (**Defendants**). The Plaintiffs allege that, as a result of the Defendants' conduct, the Plaintiffs lost billions of dollars. Moreover, the Plaintiffs allege that certain Defendants have wrongfully collected hundreds of millions of dollars in unearned fees based on the fictitious assets supposedly managed by, and profits supposedly generated by, Bernard Madoff for the investors of the feeder funds.

3. According to the information provided to me, two of the named Plaintiffs are domiciled in Switzerland, and there may be further unnamed members of the class domiciled in Switzerland. According to my knowledge, none of the Defendants are domiciled in Switzerland.

4. Concerning the class action system in the U.S., it is my understanding that, under the applicable U.S. federal law, it is permissible for one or more individuals to file a lawsuit on behalf of themselves and on behalf of a class of other individuals with similar alleged lawsuits. However, a class action requires certification by the competent U.S. Court pursuant to the Federal Rules of Civil Procedure. As long as the class has not been certified, only the named Plaintiffs will be bound by the outcome of the proceedings. Only if the named Plaintiffs can satisfy certain requirements set out in Rules 23(a) and 23(b)(3) of the Federal Rules on Civil Procedure, will the U.S. court certify the respective class. From then on, the proceeding will continue as a class action.

5. A class action includes all individuals corresponding to the definition of the class (**Class Members**) unless they have expressly chosen to opt-out from the class. Accordingly, the term Class Members, as used in this declaration, does not include individuals or entities that have exercised their opt-out rights.

6. For passive Class Members who have, for whatever reason, not chosen to opt out within the respective deadline for doing so, the term **Absent Class Member** is used for the purpose of this declaration. It is my understanding that Absent Class Members are not designated by name in subsequent judgment or judicial settlement of the U.S. class action proceedings.

7. From a U.S. law perspective, a class action judgment will be binding on all Class Members (therefore including Absent Class Members) provided that their rights have been adequately represented, that they have been adequately notified of the existence of the class action, and that they have been provided the right to be heard — even if they did not make actual use of this right.

C. Question

8. I have been asked to express my view under Swiss law on the following specific issue:

9. Does the principle of *res judicata* apply in Switzerland as regards Absent Class Members domiciled in Switzerland, and would a judgment on the merits, or a judgment that has been entered by approving a settlement, in the U.S. class action preclude Absent Class Members from bringing individual, duplicative actions against the Defendants in Switzerland?

D. Executive Summary

10. In general, the principle of *res judicata* is applied if an earlier judgment of another court involves the same parties and the same subject matter in a dispute. In my view, which is supported by recent publications, the traditional definition of a party as a participant in a legal procedure who has been identified and designated by name, is too narrow and leads to unsatisfying results in connection with class action judgments. I believe that there are strong arguments in favour of the view that the term "parties", as used in Articles 9 and 27 of the Swiss Private International Law Act (**SPILA**), includes Absent Class Members irrespective of their domicile, provided that they had actual knowledge, or are deemed to have had actual knowledge, of the class action proceedings, and were granted a real possibility to opt out. Therefore, a *res judicata* defence raised by the Defendants against duplicative litigation in Switzerland commenced by Absent Class Members with actual or presumed knowledge of the class action proceedings in the U.S. should in principle be admissible.

11. As will be described in more detail below, there are no specific grounds for a refusal to recognize a U.S. class action judgment in Switzerland. In particular, a class action judgment is not *per se* contrary to Swiss substantive or procedural public policy. As regards class action judgments awarding punitive damages, I support the approach taken by various scholars that the recognition of such judgments should be accepted to the extent that the damages awarded do not exceed the actual loss suffered.

E. Professional Background

12. I am a Swiss attorney admitted to the Zurich Bar since 1989 and have been partner of Staiger, Schwald & Partner AG since 1994.

13. I am member of various professional associations, including the Swiss Association for Debt Collection and Bankruptcy Law and the Swiss Arbitration Association.

14. I have published various books and articles on Swiss Law, and I am a co-author of the Commentary on the Swiss Federal Law on Debt Collection and Bankruptcy (Basler Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs). A copy of my professional resume is attached as Exhibit 1.

15. For the purposes of this opinion, I have reviewed the Second Consolidated Amended Complaint and the Decision and Order of Judge Victor Marrero of the United States District Court Southern District of New York, dated August 18, 2010, granting in part and denying in part the Defendants' motions to dismiss.

16. My view expressed in this opinion is strictly limited to the laws of Switzerland.

F. Legal Analysis

1. Introduction

17. I have been asked to opine on the preclusive effects of a judgment or a judicial settlement obtained in the U.S. class action litigation vis-à-vis Absent Class Members domiciled in Switzerland. Under Swiss law, this question relates to two issues which I will examine in more detail: first whether the effects of the judgment under Swiss law are different from the effects in the U.S., meaning whether the principle of *res judicata* applies to all Class Members, in particular including Absent Class Members, and secondly under which further conditions a U.S. judgment is recognisable in Switzerland.

2. Effects of Foreign Judgment in Switzerland: principle of *res judicata*

18. If Swiss courts have jurisdiction and if Defendants in a duplicate litigation initiated by Absent Class Members raise the *res judicata* defense, the Swiss judge will examine the defense first, prior to entering into the merits of the case. *Res judicata* is a procedural defense and, if successful, results in a declaration of the court that the claim is not admissible without hearing the case on the merits.

19. Under Swiss law, a defendant can only validly raise the *res judicata* defense based on a foreign judgment if that judgment is capable of recognition under Swiss law.[1]

20. With respect to the recognition of a judicial settlement, Article 30 SPILA[2] provides that the provisions of the SPILA on recognition of a foreign judgment apply, provided the judicial settlement is considered equal to a judgment in the jurisdiction the settlement was concluded. It is my understanding that class-action settlements satisfy the requirements of Article 30 SPILA and that, therefore, it is appropriate to assume for the present declaration that

[1] Cf. Stephen V. BERTI / Robert K. DÄPPEN, in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 25 n 45. With respect to the conditions for recognition of a foreign judgment under Swiss law, cf. paras. 29 et seq. below.

[2] A true and correct translation of the relevant provisions of the SPILA is appended hereto as Exhibit 2.

settlements reached in a U.S. class action proceedings can be treated equally to a foreign judgment for the purposes of recognition in Switzerland.

21. For a *res judicata* defense to be admitted, the judgment rendered by the foreign court must involve the same parties and the same subject matter. I will assume, for the purpose of this opinion, that the requirement of "same subject matter" is fulfilled. Accordingly, it has to be determined whether all members of the class, including Absent Class Members, will be considered as parties to the proceedings under the principle of *res judicata*, and consequently will be bound by the outcome of the class action proceedings. The qualification as "party" pursuant to Articles 9 and 27 SPILA[3] must be made pursuant to the *lex fori*.[4] To my knowledge, only one notable Swiss author is of the view that the determination of who is a party should be made according to the law applicable on the substance of the case or according to the law applicable to the capacity of a party.[5]

22. Traditional Swiss legal doctrine holds that a party has to be identified and designated by name. It must have the capacity to be a party and must further have procedural autonomy.[6] As a consequence, Absent Class Members would not, under this concept of "party", be bound by the U.S. class action judgment and could initiate duplicative litigation in Switzerland. This clearly leads to an unsatisfactory situation. Absent Class Members who were not satisfied with the result in the U.S. class action proceedings could be tempted to give it another try in Switzerland. A strict application of the doctrine that only named persons are to be considered as parties therefore leads to unsatisfactorily and highly questionable results.

23. It has been suggested Prof. ISABELLE ROMY, a notable legal authority on Swiss law, that the provisions on indirect jurisdiction (Articles 26 and 149 SPILA)[7] should be applied to all Absent Class Members. In other words, Prof. ROMY suggests that a foreign judgment should not be recognized if the foreign court had no jurisdiction from a Swiss law standpoint over the Absent Class Members and if they have not been given notice. As a result, Switzerland would only recognize Absent Class Members as parties if the foreign court had jurisdiction under the relevant Swiss provisions of law and if that Absent Class Member in question had been validly notified of the action.[8]

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[3] Cf. Exhibit 2.

[4] Isabelle ROMY, Class actions américaines et droit international privé Suisse, AJP 1999, p. 792 et seq; Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p. 122.

[5] Cf. Isaak MEIER, Internationales Zivilprozessrecht und Zwangsvollstreckungsrecht, 2nd edition, Zurich 2005m p. 61.

[6] Isabelle ROMY, Class actions américaines et droit international privé Suisse, AJP 1999, p. 792 et seq; "*dans notre ordre juridique, cette notion [de partie] implique trois éléments au moins: la partie est une personne identifiée et nommément désignée, qui a la capacité d'être partie, et qui dispose d'une autonomie procédurale*".

[7] Indirect jurisdiction meaning that the jurisdiction of the foreign authority is recognisable pursuant to a specific provision of the SPILA.

[8] Isabelle ROMY, Class action américaines et droit international privé Suisse, AJP 1999, 793.

24. Prof. ROMY's rather narrow view on the qualification of a "party" and the suggested analogy to Article 149 SPILA has not remained undisputed. In particular, a doctoral thesis[9] which was approved by Prof. Dr. Daniel GIRSBERGER of the University of Lucerne, criticizes the approach taken by Prof. ROMY and argues that an analogy of Article 149 SPILA leads to unsatisfactorily results in particular in cases where some unnamed Class Members are domiciled in different states around the world and some in Switzerland.[10]

25. Further, and as this author rightly points out, neither the wording nor the system of Article 149 SPILA supports the analogy drawn by Prof. ROMY.[11] For this reason, it is proposed that the term "party" be construed within the meaning of all parties to the proceedings on which the judgment shall have effect.[12] Leandro PERUCCHI further takes the view that the distinctive features of class action proceedings are only properly taken into account if all informed Absent Class Members are bound by the outcome of the proceedings. He suggests that the issue of Absent Class Members that have no knowledge of the proceedings should be addressed by determining whether their right to be heard was sufficiently granted or not.[13]

26. The result of Leandro PERUCCHI's approach, i.e. that the Absent Class Members that had actual knowledge of the proceedings and were granted a possibility to opt out are bound by the outcome of the proceeding, is convincing and corresponds to a decision of the Swiss Federal Supreme Court, holding that the purpose of Article 27(2)(a) SPILA is to ensure that the defendant has actual knowledge of proceedings directed against him and that if this test is satisfied by means other than those provided for under the law of his domicile, Swiss procedural public policy is not violated.[14]

27. The goals pursued, and benefits derived, from a class action both by plaintiffs and defendants should also be considered. Whereas plaintiffs can save time and money by not being forced to pursue individual claims, defendants have to defend themselves in only one proceeding, and not in several jurisdictions worldwide. A class action in the jurisdiction having the closest connection with the dispute, e.g. because of the defendants' domicile, appears to be the most efficient way to resolve a dispute between a group of plaintiffs domiciled all over the world, on the one hand, and a group of defendants on the other hand. Accordingly, it is my understanding that a class action is only certified as such by a U.S. judge provided it is considered superior to individual proceedings and provided that the judge is satisfied that the

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[9] Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008.

[10] Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, pp. 124 et seq.

[11] Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p. 126; a true and correct copy and translation is appended hereto as Exhibit 3.

[12] Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p. 126.

[13] Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p. 131.

[14] DFC (=Decision of the Federal Supreme Court) 122 III 439 para. 4 (a true a correct copy of the decision of the Federal Supreme Court is appended hereto as Exhibit 4); cf. paras. 47 et seq. below.

interests of the passive Class Members are adequately represented. Under these circumstances, I am of the opinion that it is not contrary to Swiss procedural public policy to give *res judicata* effect to judgments or judicial settlements which means that they are binding on Absent Class Members that were notified and were given the option to opt out and failed to do so.

28. As a result, it is my view that the term "party" pursuant to Articles 9 and 27 SPILA should not be understood to be limited strictly to named parties, but should be construed so as to include Absent Class Members provided that they had actual knowledge of the class action, or ought to have actual knowledge of the class action, and that they were granted a real possible to opt out.[15]

3. Recognition of Foreign Judgments in Switzerland

29. As mentioned above, a class action judgment or a judicial settlement[16] can have *res judicata* effect only if it is capable of recognition in Switzerland. The recognition of foreign judgments in Switzerland is governed by the provisions of the SPILA. According to Article 25 SPILA,[17] a foreign judgment will be recognized in Switzerland if (a) the jurisdiction of the courts or authorities of the state in which the decision was rendered was established, (b) no ordinary appeal[18] is available against the decision or if the decision is final, and (c) there is no ground to refuse recognition pursuant to Article 27 SPILA (in particular breach of Swiss public policy). Without recognition, a foreign judgment has no effects whatsoever in Switzerland.

30. It should be noted that in the recognition procedure the foreign judgment is not (other than with respect to possible violations of Swiss public policy) scrutinized on the merits (Article 27 (3) SPILA).

a) Jurisdictional Requirements

31. The jurisdictional requirements of recognition pursuant to Article 25 (a) SPILA have to be established according to Article 26 SPILA.[19] Article 26 SPILA provides for recognition of the jurisdiction of the foreign authority:

(i) if it derives from a specific provision of the SPILA (see para. 32 below) or, failing such provision, if the defendant had its domicile in the state in which the decision was rendered (Art. 26 lit. a);

(ii) if in a pecuniary dispute the parties submitted to the jurisdiction of the authority that rendered the decision (Art. 26 lit. b);

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[15] Cf. also paras. 49 et seq. below.
[16] Provided that the conditions of Article 30 SPILA are met.
[17] Cf. Exhibit 2.
[18] Meaning an appeal that is part of the ordinary proceedings and that can result in an annulment or amendment of the former decision.
[19] Cf. Exhibit 2.

(iii) if the defendant in a pecuniary dispute made an appearance without reservation (Art. 26 lit. c); or

(iv) if in the event of a counterclaim the authority which rendered the decision had jurisdiction over the main action, and if there is a factual connection between the main action and the counterclaim (Art. 26 lit. d).

32. Specific provisions regarding the jurisdiction of the foreign court or authority (Art. 26 lit. a SPILA) apply for claims in tort, contractual claims, and quasi contractual claims (Article 149 SPILA).[20] According to this provision, the jurisdiction of the foreign court or authority is admitted:

(i) if it is located at the domicile or habitual residence of the defendant (Article 149 (1) SPILA);

(ii) if it is located at the place of execution of a contractual obligation (provided that the defendant did not have its domicile in Switzerland (Article 149 (2) (a) SPILA));

(iii) if it concerns claims originating from the operation of a business establishment and was rendered at such establishment's location (Article 149 (2) (d) SPILA);

(iv) if it concerns claims based on unjust enrichment and was rendered at the place where the act was committed or had its effects, provided that the defendant did not have its domicile in Switzerland (Article 149 (2) (e) SPILA);

(v) if it concerns claims based on tort and was rendered at the place where the act was committed or had its effects, provided that the defendant did not have its domicile in Switzerland (Article 149 (2) (f) SPILA).

Of course the jurisdiction of the foreign court can also be admitted in the general cases provided for in Article 26 lit. b - lit. d SPILA.[21]

33. To my knowledge, only Prof. ROMY has addressed the issue that the SPILA does not consider the reverse situation, i.e. where a Swiss plaintiff objects to a foreign judgment rendered with respect to him.[22] She argues that the recognition of a judgment against an unnamed Absent Class Member (and therefore a plaintiff) calls for the application the rules of recognition against a defendant. She concludes that a Swiss court should apply the rules on the jurisdictional requirements of recognition for the defendant by analogy.[23] However, and as set out in para. 24 above, the analogy to Article 149 SPILA with respect to unnamed Class Members is in fact used for the purposes of broadening the strict definition of a party under Swiss law.

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[20] Cf. Exhibit 2.
[21] Cf. para 31 above.
[22] Isabelle ROMY, Class action américaines et droit international privé Suisse, AJP/PJA 1999, 793.
[23] Isabelle ROMY, Class action américaines et droit international privé Suisse, AJP/PJA 1999, 793.

34. The application of Article 149 SPILA to Absent Class Members by way of analogy is, in my view, not persuasive for two reasons. First, it is contrary to the clear wording and system of Article 149 SPILA. Second, unlike a defendant, Absent Class Members in a class action proceeding in the U.S. are granted an opportunity to opt out.[24]

35. Therefore, in my opinion, although the class action as such must meet the requirements of Art. 26 SPILA (respectively of Art. 149 SPILA), these provisions must not, in addition, be applied by analogy to the plaintiffs.

b) Finality of the Judgment

36. Pursuant to Art. 25 (b) SPILA, the decision must be final on the merits in the state where it was rendered, and not be subject to an ordinary appeal.[25]

c) Grounds for Denying Recognition

37. If the jurisdictional and further prerequisites are met as set out in paras. 31 et seq. and 36 above, the requirements of Article 27 SPILA[26] must also be satisfied. Article 27 SPILA provides for four grounds for non-recognition of a foreign judgment:

(i) A foreign decision is not recognized in Switzerland if its recognition would be manifestly incompatible with Swiss public policy (Article 27 (1) SPILA);

(ii) A foreign decision is also not recognized if a party proves the following (Art. 27 (2) SPILA):

(a) that he or she was not duly summoned according to the law of his or her domicile or ordinary residence unless this party made an appearance in the proceedings without any reservation;

(b) that the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular, the party was denied the right to be heard;

(c) that proceedings involving the same parties and the same subject matter were commenced in Switzerland or first adjudicated in Switzerland or it was earlier adjudicated in a third state and that this decision is recognizable in Switzerland (Article 27 (2) (c)).

aa) Violation of Substantive Public Policy

38. Article 27 (1) SPILA provides that the recognition will be denied if the decision is manifestly contrary to Switzerland's substantive public policy. Non-recognition of a foreign judgment on

[24] Cf. also paras. 27 et seq.
[25] Stephen V. BERTI / Robert K. DÄPPEN, in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 25 n 31; Paul VOLKEN, in: Zürcher Kommentar zum IPRG, 2nd edition, Zurich 2004, Art. 25 N 42; cf. also FN 18 above.
[26] Cf. Exhibit 2.

the ground of substantive public policy should only be applied very restrictively and only if a serious violation of fundamental principles of Swiss law occurred.[27]

39. The standard for the application of Swiss public policy varies depending on how close the parties are related to Switzerland. The closer the link to Switzerland, the less severe the violation of Swiss public policy must be in order to justify the refusal of recognition under Article 27(1) SPILA because Switzerland's interest to protect Swiss public policy is at stake.[28] On the other hand, it is also argued that the public policy test does not require a specific link between the case and Switzerland, since such a link is already given by the fact that recognition of such a judgment is sought in Switzerland.[29]

40. An infringement of Swiss public policy must be considered by the Swiss courts *sua sponte*.[30] In particular, decisions with penalizing character, such as punitive or treble damages may cause problems under Article 27(1) SPILA. Under Swiss law, any compensation for damages should, as a matter of principle, not exceed the actual loss suffered by a party and should not include a penalty.

41. The situation in Switzerland regarding the recognition of U.S. judgments awarding punitive damages is not clearly settled and the question has not yet been decided by the Federal Supreme Court. However, the prevailing view is that the recognition of such decisions should be accepted to the extent that the damages awarded correspond to the actual loss suffered.[31]

bb) Due Service of Summons

42. According to Article 27(2)(a) SPILA, a foreign decision will not be recognized in Switzerland if one of the parties can prove that he or she was not duly summoned according to the law of his or her domicile or ordinary residence.

43. Both Switzerland and the United States of America are parties to the Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Under Swiss law, which is in this respect similar to most other European laws, the Hague Convention has exclusive character, meaning that the service of summons according to the Hague Convention is the only admissible means of cross-border

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[27] Cf. Daniele FAVALLI / Joseph M. MATTHEWS, Recognition and Enforcement of U.S. class action judgment and settlements in Switzerland, SRIEL 2007, p. 620 (a true and correct copy is appended hereto as Exhibit 5); Adrian DÖRIG, Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz, St. Gall 1998, pp. 353 - 354; Paul VOLKEN in: Zürcher Kommentar zum IPRG, 2nd edition, Zurich 2004, Art. 27 n 38; Stephen V. BERTI / Robert K. DÄPPEN in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 27 n 5.

[28] Cf. Daniele FAVALLI / Joseph M. MATTHEWS, Recognition and Enforcement of U.S. class action judgment and settlements in Switzerland, SRIEL 2007, p. 621 (Exhibit 5); Adrian DÖRIG, Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz, St. Gall 1998, pp. 353 - 354; Paul VOLKEN in: Zürcher Kommentar zum IPRG, 2nd edition, Zurich 2004, Art. 27 n 38.

[29] Stephen V. BERTI / Robert K. DÄPPEN in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 27 n 7.

[30] DCF 122 III 351.

[31] Cf. Stephen V. BERTI / Robert K. DÄPPEN in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 27 n 27; Leandro Perucchi, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p 66 and 67.

service within the scope of the Convention. However, it has been argued that the procedural law of the country of the requesting state determines whether services abroad is required at all and that the Hague Convention solely determines the admissible means of such service.[32] Also, it appears questionable whether the Hague Convention is applicable at all in relation to the notification of a plaintiff instead of a defendant.[33]

44. The rule is further softened by the fact that Article 27(2)(a) SPILA clearly only intends to protect a domestic defendant (and not plaintiffs) from being prosecuted and convicted abroad without having had an opportunity to defend itself. That being said, the Swiss Federal Supreme Court ruled that Article 27(2)(A) SPILA should not be considered to prevent the recognition of a judgment in the event the defendant had knowledge of the proceedings and was provided with an opportunity to defend its case. The Swiss Federal Supreme Court also held that a denial of recognition based on failure of strict proof of service would be considered as excessively formalistic since it was clear in the case at hand that the defendant had knowledge of the proceedings and that he was granted the possibility to defend himself.[34]

45. It is my understanding that, in order to be certified as a class action, all members of the class must be notified as best practicable, including individual notice to all members of the class which can be identified through reasonable efforts. In my opinion and taking into account the ruling of the Swiss Federal Supreme Court,[35] the *res judicata* effect of a class action judgment should not be denied based on Art. 27(2)(a) SPILA if it can be proven that the Class Member in question was given clear notice (i) of the class action, (ii) of the possibility to opt out of the class action, and (iii) of the consequences of not opting out of the class action. In cases where clear notice was given, the judge will, in my view, most likely apply the test of whether the intended recipient of the notice had, or must have had, knowledge of the notice. In determining whether a party knows or must know something, a Swiss judge is likely to consider all specific circumstances and not only whether there is strict proof of service. If the intended recipient, in exercising normal care, must have had knowledge of a class action, absolute proof of knowledge will not necessarily be required and the recipient can be deemed to have had knowledge.[36] The judge will presumably set a lower threshold for such "deemed knowledge" in the case of a financial institution than in the case of an individual person domiciled in Switzerland, and will most likely be satisfied if an individual notice was sent by registered mail to the registered address of the intended recipient. However, a Class Member who was not notified at all and did not have the opportunity to opt out of the procedure can successfully challenge a *res judicata* defense raised by a defendant in the class action.

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[32] Cf. Thomas BISCHOF, Die Zustellung im internationalen Rechtsverkehr in Zivil- und Handelssachen, Zurich 1997, p. 251 et seq.; Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p 86.

[33] Cf. Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p 87.

[34] DFC 122 III 447 (cf. Exhibit 4).

[35] DFC 122 III 447 (cf. Exhibit 4).

[36] Cf. the ruling of the Federal Supreme Court in DFC 122 III 447, where the Federal Supreme Court concluded that to apply the strict proof of service would be clearly considered as formalistic (cf. Exhibit 4).

46. In principle, only a conscious choice not to opt out can be deemed as a conclusive consent to be bound by the class action judgment.[37] In my view, which is not as yet supported by judicial precedence, a Swiss judge is likely to assume that such conscious choice was made even if the party in question denies having had knowledge but, taking into consideration all circumstances, must have had knowledge of the class action and the possibility to opt out.

cc) Violation of Procedural Public Policy

47. A foreign decision will not be recognized in Switzerland if it was rendered in violation of fundamental principles of Swiss procedural law; in particular, if the right to be heard was denied. A violation of the procedural public policy is only considered by the court if a respective defense is brought forward.[38]

48. It has been argued that the concept of class action litigation should be regarded as inconsistent with the Swiss idea of civil litigation since the Swiss concept of procedural law is governed by the principle that each individual or holder of a right is entitled to decide whether he or she wants to initiate and/or become part of a lawsuit on the plaintiff side (so-called *Dispositionsmaxime*).[39]

49. For two reasons, however, class actions do not, in my opinion, infringe the fundamental principles of Swiss procedural policy in this respect:

50. First, Swiss civil procedure has already developed modern concepts of multi-party litigation which basically result in exceptions to the principle of party disposition, e.g. action in one's own name but on another's behalf. An example is Article 260 of the Swiss Dept. Enforcement and Bankruptcy Code,[40] which entitles each creditor to a bankruptcy estate to request the assignment of rights of the bankrupt estate which all creditors collectively decline to pursue.

51. Second, the class action mechanism provides for an opportunity for Class Members to opt out of the proceedings. Accordingly, the right of Class Members to decide whether they intend to file a claim is not violated. It has been argued that Swiss law provides that the power to act for someone before a court shall be expressed and not implied (Article 396 (3) CO)[41] and that this poses a problem with respect to silent members of the class which did not appear in the

[37] Cf. Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p. 80.
[38] Cf. Stephen V. BERTI / Robert K. DÄPPEN in: Basler Kommentar - Internationales Privatrecht, 2nd edition, Basle 2007, Art. 27 n 29 and 30; Paul VOLKEN in: Zürcher Kommentar zum IPRG, 2nd edition, Zurich 2004, Art. 27 n 70; Leandro PERUCCHI, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz, Schulthess 2008, p 77.
[39] Cf. Adrian DÖRIG, Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz, St. Gall 1998, p. 444.
[40] A true and correct copy and translation of Article 260 Swiss Dept Enforcement and Bankruptcy Code is appended hereto as Exhibit 6.
[41] A true and correct copy and translation of Article 396 CO is appended hereto as Exhibit 7.

class action proceedings.[42] However, no reason has been given why the lack of explicit consent on its own should be contrary to the fundamental procedural principles of Swiss law.

52. It should also not be forgotten that there are also situations under Swiss law in which a person who is not the holder of a right is nevertheless entitled to file a claim without express power. *E.g.* the testamentary executor, the official estate administrator, or the official representative of the community of heirs, have the power to act on behalf of the community of the heirs without the heirs' explicit consent. As a result, lack of explicit consent should not be considered contrary to Swiss procedural public policy where the party opposing the recognition of the foreign judgment was given a real opportunity to opt out of the proceedings based upon the information provided to him.

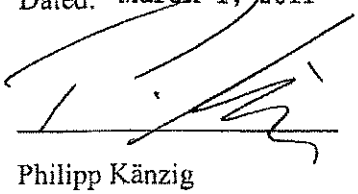
53. It must further be analyzed whether the American rule, under which the right of Absent Class Members to be heard is sufficiently respected as their interests are represented by the lead plaintiffs, meets the requirements of the right to be heard according to Article 27(2)(b) SPILA. According to common understanding and case law, it is under Swiss law sufficient if the parties had the possibility to present their case irrespective of whether they actually did so.[43] If a Class Member does not actively participate, he or she will be represented by the lead plaintiffs. It is also my understanding that, by certifying the class, the US judge assesses the adequate representation of the Class Members by the court-appointed lead plaintiffs. Accordingly, there should be no reasons why a Swiss judge would draw the conclusion that an Absent Class Member's right to be heard has been violated.

54. Of course, such conclusion cannot apply to Absent Class Members which had absolutely no knowledge of the class action proceedings taking place in the U.S. Such Absent Class Members can, in my view, rightly assert not only a violation of Art. 27(2)(a) SPILA, but also a violation of their right to be heard.

* * * *

I declare that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: March 1, 2011



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[42] Cf. Isabelle ROMY, Class action américaines et droit international privé Suisse, AJP/PJA 1999, 797.
[43] Cf. Isabelle ROMY, Class action américaines et droit international privé Suisse, AJP/PJA 1999, 798; DFC 116 II 625 para. 4.