

# EXHIBIT 5

# Recognition and Enforcement of U.S. class action judgments and settlements in Switzerland

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## I. Introduction

### 1. Scope of this article

This article looks at difficulties arising from recognition and enforcement of class action judgments or class action arbitration awards in countries other than their origin, which is most likely the U.S. or another "common law" country. A mere academic victory in a class action lawsuit is undoubtedly every plaintiff's worst-case scenario. It is only valuable if it can be enforced. Thus, winning or settling a class action law suit against a defendant from a civil law country makes little sense if the judgment cannot eventually be enforced in the domestic courts where the defendant's assets are located. According to the theory here presented, class action judgments and settlement agreements are and should be recognizable and enforceable in foreign countries, at least under certain circumstances.

Only little can be read about recognition and enforcement of class action judgments outside the U.S. In civil law countries the concept of class actions was, until recently, more or less unknown. Recently however, there was news about the introduction of a European Union (EU) class action law. In March of 2007, EU Commissioner Meglena Kinnewa, announced a EU initiative with regard to class actions.<sup>1</sup>

Leading authorities in the U.S., however, are examining the possible demise of consumer class actions in that country. In the June 2007 edition of the American Bar Association Journal, Professor (and former Dean of Tulane University Law School) Edward F. Sherman authored an article entitled "*Decline & Fall*" in which he chronicles the rise and potentially imminent fall of the U.S. class action vehicle in the U.S.<sup>2</sup>

<sup>1</sup> Media release of the German consumer agency ("Verbraucherzentrale") of March 24, 2007, [www.vzbz.de](http://www.vzbz.de); see also [www.presseportal.at](http://www.presseportal.at), media release dated March 14, 2007; BOMKERD Hess, Die Anerkennung eines Class Action Settlement in Deutschland, *Juristenzeitung*, 373, JZ 8/2000 (2000).

<sup>2</sup> Edward F. Sherman stated the following: "By 1995, the age of the consumer class action had reached its apogee. In October of that year, a *Fortune* magazine headline epitomized the fear and loathing that class actions engendered within the U.S. business community. 'Lawyers from Hell: Slip Up and Guys Like These Can Bankrupt Your Company.' However, by then the backlash had already started. Over the next decade, business organizations pursued an intensive campaign to sway public opinion, and to lobby Congress and state legislatures for changes in substantive and procedural law that would put the clamps on consumer class actions. And now, opponents of class actions have gotten much of what they were looking for, culminating in the passage by Congress of the Class Action Fairness Act of 2005 [...] Depending on one's point of view, the class action is a powerful vehicle for protecting the rights of individuals confronting powerful corporations — or a legal version of Frankenstein's monster. By allowing individuals to sue not only for themselves but also for others similarly situated, the class action can make defendants liable for a large number of individual

This article examines the recognition and enforcement of a foreign class action judgment and attempts to draw on some of the lessons of the U.S. experience.

### 2. Why is Switzerland a good example to examine recognition and enforcement of U.S. class action judgments in Europe in general?

Switzerland is a country that can perfectly be taken as a model country for the purpose of analyzing recognition and enforcement of class action judgments in a civil law jurisdiction. Although belonging mainly to the Germanic legal family, Switzerland is exposed to a substantial French influence.<sup>3</sup>

Switzerland is likely the first European country in which United States class actions have been broadly discussed. This occurs because several Holocaust-related class actions were filed against Swiss Banks in New York in 1996 on behalf of Jewish victims of the Holocaust worldwide. Additionally, further class actions were filed against Swiss insurance companies in 1997.<sup>4</sup> By June 1998, another suit was filed against the Swiss National Bank again stemming from the Holocaust. In August 1998 the parties of the class action involving the Swiss Banks settled for a sum of approximately 1.25 billion Dollars.<sup>5</sup> Finally, in July 2001, New York's Judge Edward Korman, approved payment of the first USD 43,000,000. The monies were distributed to the claims conference and to the Joint Distribution Committee.<sup>6</sup>

claims that otherwise might not have been pursued." EDWARD F. SHERMAN, *Decline & Fall*, ABA Journal (June 2007); [www.abajournal.com/magazine/decline\\_fall](http://www.abajournal.com/magazine/decline_fall).

<sup>3</sup> CARL BAUDENBACHER, 34 *TEX. INT'L L.J.* 335 (1999).

<sup>4</sup> *In re Holocaust Victims Assets*, CV-96-4848 (E.D.N.Y.); SAKUEL P. BACHMARTNER, *Class Actions and Litigation in Switzerland*, 27 *Nov. J. Int'l L. & Bus.*, at 301, Vol. 27 (2007); Hess, *supra* note 1, at 373.

<sup>5</sup> ISABELLE ROMY, AJP 1999, 783; JENS DROLSHAMMER/HANZ SCHÄUR, *SIZ* 1986, 309, *Die Verletzung des materiellen ordne public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages-Urteils"* [The violation of substantive public policy as ground for non-recognition and enforcement of a U.S. punitive damages judgment]: the author argues that major financial assets are located in Switzerland and that, therefore, Switzerland can be described as model country for problems regarding recognition and enforcement of a foreign decision.

<sup>6</sup> Artikel NZZ "Verteilungsplan für Bankenvergleiche", [http://nzz.gbl.de/weblog/START1-A20&T1-FORMAT=5&DOCK=476629\\_NZZ\\_0&WID=41332-3450868-60363\\_6](http://nzz.gbl.de/weblog/START1-A20&T1-FORMAT=5&DOCK=476629_NZZ_0&WID=41332-3450868-60363_6); Artikel NZZ "Eerste Auszahlungen aus dem Schweizer Bankenvergleich", [http://nzz.gbl.de/weblog/START1-A20&T1-FORMAT=5&DOCK=476629\\_NZZ\\_0&WID=41332-3450868-60363\\_3](http://nzz.gbl.de/weblog/START1-A20&T1-FORMAT=5&DOCK=476629_NZZ_0&WID=41332-3450868-60363_3); a further example, the Hamburg consumer agency filed a complaint against the telecom company O2. Instead of rounding invoiced amounts when invoices were sent to its customers, O2 converted its rates (when the currency change from Deutsch Marks to Euro occurred) up front which led to a price increase of up to 17%. 400,000 customers were thereby overcharged. The European High Court held that O2 was in violation of German law, but there was no means to enforce the violation; BACHMARTNER, *supra* note 4, at 302, referring to the Swiss *Schweizerhandels* accident of

Further class action cases are being reported. The pharmaceutical company BASF, for example, reported in its financial report of 2005 a number of class actions against BASF or one of its group companies.<sup>7</sup> A class action was also filed against F. Hoffmann-La Roche Ltd. in the U.S. District Court of Columbia. BASF was one of the defendants (Empagran S.A., et al. v. F. Hoffmann-La Roche Ltd.). Plaintiffs alleged that defendants overcharged when selling vitamins. The case was ultimately rejected by the Federal Supreme Court on January 6, 2006, because plaintiffs were not in a position to prove the causal link between agreed prices outside the U.S. and the respective economic impact in the U.S. Further class actions were reported by BASF in connection with the Meridia drug. The cases were settled. Finally, BASF reported further class actions with respect to its products Poast and Poast Plus. Another case is known with respect to Pfizer's Bextra. In April 11, 2005, it was reported approximately 15 European patients supposedly complained about skin problems after having taken Bextra.<sup>8</sup>

A 40 billion dollar law suit was filed against Credit Suisse, Merrill Lynch, and Barclays Bank stemming from alleged fiduciary violations in connection with the collapse of Enron in 2001. On March 19, 2007, the U.S. 5<sup>th</sup> Circuit Court of Appeals rejected the class action suit and remanded it for further considerations by the court of appeals.<sup>9</sup> Credit Suisse allegedly made reservations of over CHF 600 million.<sup>10</sup>

If the defendants are located in Europe or do not have substantial assets abroad, the question of recognition and enforcement of a judgment will be pertinent.

### 3. How a party from a civil law jurisdiction can be involved in a class action

Parties from civil law countries may be involved in a class action brought in the U.S. in the following ways:<sup>11</sup>

<sup>7</sup> 1988 where water contaminated with agricultural chemicals drained from a Sandoz plant into the Rhine River.

<sup>8</sup> BASF-Finanzbericht 2005, S. 154 ss; [http://berichte.basf.de/basfi/cspfiles/de/2005/finanzbericht/13630\\_BASF\\_Finanzbericht\\_2005.pdf?aufrk="](http://berichte.basf.de/basfi/cspfiles/de/2005/finanzbericht/13630_BASF_Finanzbericht_2005.pdf?aufrk=) pdf.

<sup>9</sup> [http://www.welt.de/print\\_weld/article632465/Auwallt\\_Wini\\_bereitet\\_sammelklage\\_fuer\\_Bextra\\_Opfec\\_vor.html](http://www.welt.de/print_weld/article632465/Auwallt_Wini_bereitet_sammelklage_fuer_Bextra_Opfec_vor.html).

<sup>10</sup> News.ch, Artikel "Enron: Keine Sammelklage gegen CS", <http://www.news.ch/enron+Keine+Samm>

<sup>11</sup> [www.swissinfo.org/ger/swissinfo.html?siteSection=882&aid=7636687](http://www.swissinfo.org/ger/swissinfo.html?siteSection=882&aid=7636687).

<sup>12</sup> Rowy, supra note 5, at 784; BAUMGAERTNER, supra note 4, at 301; HESS, supra note 1, at 373.

- a. *As a plaintiff (i.e., a member of a class)*: class members may be either domiciled in a civil law jurisdiction or have citizenship of a civil law country, but qualify as members of the U.S. proceedings (for example in a dispute against a U.S. producer of breast implants if such implants were used either in a civil law jurisdiction or used in the U.S. but implanted to a citizen of such a jurisdiction);<sup>12</sup>
- b. *As a defendant*: the defendant is a civil law jurisdiction company involved in a class action in the U.S. where a court has personal and subject matter jurisdiction over the defendant (e.g., Holocaust class actions against Swiss banks);
- c. *Enforceable assets in a civil law jurisdiction*: the defendant has not a domicile but assets in a civil law jurisdiction; the plaintiff enforces the decision where the assets are located (e.g., class action against former Philippines President Marcos);<sup>13</sup>

These three examples present differing due process issues. In alternatives b and c the due process rights of the class members (i.e., no class member is domiciled in a civil law jurisdiction) are not implicated with regard to recognition and enforcement in civil law courts. Due process rights do not have to be examined by the courts because it is not within the scope of the courts to protect due process rights of foreign class members. Assuming that no "civil law" class members are involved in those cases, any due process violation has to be reviewed under U.S. law or by the laws of the nation, in which the class member is domiciled. The defendant, however, may argue that recognition and enforcement of a decision violating due process rights of class members would pose an inherent risk of future claims and the resultant risk that the defendant would have to pay twice for an identical constellation of claims brought by individual absent class members. The entry of a class judgment, whether by decision of the court or settlement and subsequent approval by the court, is in fact intended to serve as *res judicata* as to the rights of absent class members who received adequate notice of the claims and an opportunity to either opt out or be heard to

<sup>12</sup> On April 22, 2005, the United States District Court for the Northern District of California, San Jose Division (C-04-4156) approved a German "lead plaintiff" in a case of a German investor against Infineon who claimed to have incurred a damage in the amount of USD 892,143.94; the court ordered that all buyouts of infineon shares in the period between March 13, 2005, and September 15, 2005, would belong to the same class. See [www.frip.de/110\\_980.html](http://www.frip.de/110_980.html); HESS, supra note 1, at 373, footnote 5.

<sup>13</sup> 910 F.Supp. 1470 (D.Hawaii 1995), see the decision of the Swiss Federal Court in BGE I 23 II 595 (decision of June 25, 1997). In this case, the District Court of Hawaii awarded the plaintiffs 1.2 billion Dollars of exemplary damages as well as 766 million Dollars of compensatory interest damages. The amount of 320 millions Dollars had been deposited by Marcos on his bank accounts in Switzerland.

object to the terms of the settlement.<sup>14</sup> In practice, what happens is a role reversal. When the plaintiff files suit, the lawyer often argues that the putative class is very large, because that raises the risks for the defendant(s) and the defendant argues the putative class is small. When parties begin to have serious settlement discussions, plaintiffs change direction and may argue that the class should actually be smaller whereas the defendant argues that it should include everyone world-wide to get maximum *res judicata* effect. Defendants, however, cannot be assured that *res judicata* will bar all future claims. In other words, a class action decision does not necessarily protect a defendant from further actions. In alternative *a*, *res judicata* aspects of Swiss plaintiffs, here in the form of a class member, have to be considered by a Swiss judge when it comes to recognition and enforcement.

## II. Recognition and Enforcement of foreign judgments under Swiss international private law

### 1. Standards for recognition and enforcement of judgments or settlements in Switzerland

In 1989, the Swiss federal legislature enacted rules on recognition and enforcement of foreign judgments and created Federal international civil procedure i.e., the Swiss private international law Statute ("PIL Statute").<sup>15</sup> The PIL Statute is, therefore, applicable in the scenario here presented.<sup>16</sup>

Article 25 PIL Statute reads as follows:<sup>17</sup>

A foreign decision is recognized in Switzerland:

(a) if jurisdiction lay with the judicial or administrative authorities of the country in which the decision was rendered;

<sup>14</sup> *Couper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation); *Baumgartner*, supra note 4, at 302.

<sup>15</sup> The relations to foreign countries have always been considered an important issue of federal public interest. Contrary to the United States, Conflict of Laws rules are federal.

<sup>16</sup> The United States filed a preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters with the Hague Conference on Private International Law. The draft has been adopted by a Special Commission on October 30, 1999, *Jus Krieger*, *Europäisches Zivilprozessrecht* (European Civil Procedure), 6<sup>th</sup> edition, Heidelberg 1998, at 93. There is the notion that under the regime of the Lugano Convention the treaty may apply under certain circumstances even though one party of the dispute.

<sup>17</sup> *PIERRE A. KANAR/KARL W. ARNOLD/PAOLO MICHELE PROCOPI, Switzerland's Private International Law, Deventer, The Netherlands and Zurich (1994)*, at 52.

- (b) if no ordinary judicial remedy can any longer be brought against the decision or if the decision is final<sup>18</sup>, and
- (c) if no ground for non-recognition under article 27 exists.

The first two sections are not highly debated. The Swiss judge must rely on what foreign laws set forth with regard to jurisdiction of the foreign courts and the possibilities of ordinary appeals in the foreign judicial system.

### 2. Limits of recognition and enforcement under Article 27 PIL Statute: no review on the merits

The PIL Statute sets liberal standards for the recognition and enforcement of foreign judgments. Grounds for non-recognition are determined in Article 27 PIL Statute.<sup>19</sup>

1. A foreign decision is not recognized in Switzerland if its recognition would be clearly incompatible with Swiss public policy.
2. A foreign decision is also not recognized if a party proves:
  - (a) that neither according to the law of its domicile nor according to the law of its habitual residence was the party properly served with process, unless the party entered an unconditional appearance in the proceedings;
  - (b) that the judgment was rendered in violation of essential principles of Swiss procedural law, especially, the party was denied the right to be heard;
  - (c) that a lawsuit between the same parties concerning the same case was first commenced or decided in Switzerland, or was first decided in a third country, provided that the prerequisites for the recognition of that decision are met.
3. In no other respects may the foreign decision be reviewed on the merits.

Recognition and enforcement of a foreign decision is often understood as a renunciation of a country's own sovereignty.<sup>20</sup> In other words, the recognizing and enforcing country relies on the judicial system of the country issuing the decision to be enforced. Thus, the State does not insist to decide on the facts and the

<sup>18</sup> ULRICH HÄBERLIN/WALTER HALLER, *Schweizerisches Bundesstaatsrecht*, note 1737, Zurich (2005); according to Article 48 of the Swiss Federal Statute on the Organization of the Courts (BOG), a decision is deemed to be final, when no ordinary judicial remedy is available.

<sup>19</sup> KARRER/ARNOLD/PROCOPI, supra note 17, at 54.

<sup>20</sup> ANTON HENNING/KURT SIEHR/FRANK VISCHER/PAUL VOLKUN (HENS), *Zürcher Kommentar zu PIL*, note 2 ss. to Article 27, Zurich 2004, although the Swiss doctrine would not refer to it as renunciation of sovereignty, but rather an act of cooperation and fairness; HENNING/ROSENBLUTH/NEUM-PETER VOORI/ANTON SCHEINBER/STEPHAN BÜRGI (HONSELL), *Basel Commentary to PIL*, note 1 ss. to Article 27, Basel 2007.

substantive laws applicable. A national statute on international private law (PIL Statute) determines the rules applicable on conflicting laws and the minimum standards required to enforce a foreign decision. The act of recognition and enforcement of a foreign judgment is itself exercise of the enforcing country's sovereignty.

The Swiss PIL Statute does not allow the courts to review a foreign decision on the merits, either *de novo* or in part (Article 27 Section 3 PIL Statute).<sup>21</sup> A *révision au fond* of a foreign decision is frowned upon and considered parochial.<sup>22</sup> It has, however, to be borne in mind that the traditional concept of review on the merits originally introduced by the French *Cour de cassation* was abandoned in France already in 1964.<sup>23</sup>

Recognition and enforcement of a foreign judgment in Switzerland is based on the application of public policy as determined in Article 27 Section 1 (substantive public policy) and Article 27 Section 2 lit. b (procedural public policy) PIL Statute.<sup>24</sup>

### 3. Public policy

Violation of Swiss public policy is one of the main limitations to the enforcement of a class action judgment or settlement. Public policy is divided into two categories, procedural and substantive public policy.<sup>25</sup> Non-recognition of a foreign judgment on the ground of substantive public policy is applied restrictively and only upon a serious violation of fundamental principles of Swiss law.<sup>26</sup>

<sup>21</sup> HONSELL, supra note 20, at Article 27 note 24.

<sup>22</sup> HEINI, supra note 20, at Article 27 note 58; HILTON v. GRUYOT, 159 U.S. 113 (1895); GARY B. BORN, International Civil Litigation in United States Courts, 938, Don Haag (1996); SOMPORTEX LTD. v. PHILADELPHIA CHEWING GUM CORP, 318 F.Supp. 161 (E.D. Pa. 1970).

<sup>23</sup> HEINI, supra note 20, at Article 27 note 127 and 128; Professor Paul Volken refers to the French landmark decision in re. Münzer.

<sup>24</sup> In fact only Art. 27 Section 2 lit. b of the Swiss PIL Statute is referring specifically to procedural public policy, whereas lit. a. is referring to lack of due service of process and lit. c. to its residents in Switzerland and *res judicata*. However these reasons can be considered as to be already comprised by the concept of procedural public policy stated in lit. b even though they are expressly stated in the PIL; Hess, supra note 1, at 376; for the purpose of this article, we will not examine whether a class action settlement will qualify as a decision pursuant to the Swiss PIL Statute; in this context, we refer to Art. 30 Swiss PIL Statute, according to which a settlement, approved by a foreign court, is deemed to be equivalent to a court decision; see also HONSELL, supra note 20, at Article 30 note 4 83.

<sup>25</sup> DROLSHAMMER/SCHÄFER, supra note 5, at 311; HEINI, supra note 20, at Article 27 note 19; HONSELL, supra note 20, at Article 27 note 2.

<sup>26</sup> KOMY, supra note 5, at 796; GERHARD WALTER, Internationales Zivilprozessrecht der Schweiz, 149, Bern (1995); HONSELL, supra note 20, at Article 27 note 5.

### 3.1 Procedural public policy

Procedural public policy is defined in Article 27 Section 2 PIL Statute. Fundamental elements of Swiss civil procedure are, for example, the defendant's right to be heard, the prohibition of arbitrary decisions, and the defendant's proper notification.<sup>27</sup>

The mere fact that class actions are unknown to Swiss cantonal civil procedures does not *per se* render judgments void and against procedural public policy.<sup>28</sup> Procedural differences between countries are common and cannot constitute the sole basis of non-recognition. The Swiss judge should determine whether the foreign judgment violates fundamental principles of Swiss procedural rules.<sup>29</sup>

One of the defenses brought up is that the foreign proceedings were lacking in due process. The Swiss Federal Court, however, denies recognition rarely on that basis and none to date has involved a class action judgment. For example, no unfair foreign proceedings were assumed when in two cases the defendants claimed that the court of arbitration consisted of prejudiced arbitrators.<sup>30</sup> In two other cases the defendants alleged that the rendered default judgments would be against procedural public policy. The Swiss Federal Court dismissed both cases and recognized the foreign decisions.<sup>31</sup> Furthermore, the Swiss Federal Court refused to assume violations of procedural public policy in cases where the decision lacked instructions about the defendant's right to appeal, or where the decision was not officially passed to the defendant as well as where the grounds of the decision were not pronounced in great detail.<sup>32</sup> In a number of cases tried before the highest courts in Switzerland, public policy violations were not

<sup>27</sup> BGE 65 I 139 (1939); HEINI, supra note 20, at Article 27 note 90; although the Swiss Penal Code, Article 271, forbids the service of process between the parties and considers service as a governmental act, the Swiss Federal Court never qualified it as a violation against public policy; BORN, supra note 22, at 774; HONSELL, supra note 20, at Article 27 note 5; Hess, supra note 1, at 379; further procedural public policy may be viewed in extensive discovery orders (e.g., document production requests) that solely aim to seek for information otherwise not obtainable or that violate European data protection laws; a further examples may be if document production orders or deposition proceedings violate the Hague Convention on Taking Evidence abroad of March 18, 1970.

<sup>28</sup> KOMY, supra note 5, at 796; ADRIAN DORRIG, Anerkennung und Vollstreckung US-amerikanischer Entscheidung in der Schweiz, 443, Saint Gall (1998); WALTER, Mass Tort Litigation in Germany and Switzerland, II Duke J. Comp. & Int'l L. 369, at 369, (2001); BAUMGARTNER, supra note 4, at 303.

<sup>29</sup> HEINI, supra note 20, at Article 27 note 45 and 48; BGE 116 II 629 and BGE 120 II 87; HONSELL, supra note 21, at Article 20 note 5; similarly for Germany: Hess, supra note 1, at 376.

<sup>30</sup> BGE 93 I 49; BGE 93 I 267.

<sup>31</sup> BGE 102 Ia 308; BGE 105 Ib 45.

<sup>32</sup> HEINI, supra note 20, at Article 27 note 102 and 103.

affirmed.<sup>33</sup> In short, the standard for not recognizing a case on the grounds of public policy is high.

### 3.2 Substantive public policy

A second test applied is to check whether the foreign decision violates Swiss substantive public policy. Substantive public policy is defined in Article 27 Section 1 of the PIL Statute and requires compatibility of the foreign decision with fundamental principles of Swiss substantive law.<sup>34</sup>

Substantive public policy is violated if the decision infringes the Swiss sense of justice in an "obviously" intolerable manner.<sup>35</sup> The definition is broad and requires further analysis. It is questionable what the Swiss sense of justice is and how it can be defined, *i.e.*, when an infringing foreign decision becomes intolerable. An indicative and fair assessment may be to test whether the content of the foreign decision could have been rendered by a Swiss court as well. A further element would be whether Swiss laws only serve to circumvent foreign laws punishing a wrong that, *per se*, would also violate Swiss law. An infringement of Swiss public policy must be considered by the Swiss courts *ex officio*.<sup>36</sup> In particular, decisions with penalizing character, *e.g.*, punitive or treble damage decisions will be examined in Switzerland.<sup>37</sup>

The standard for the application of public policy varies depending on how close the parties are related to Switzerland. If there is a close relation to Swit-

<sup>33</sup> In 2004 and 2005, the Swiss Federal Court again refused to deny recognition and enforcement on the basis of public policy. In this case, a party raised such a defense in a divorce matter (BGE 130 III 336 and BGE 131 III 182); HONSELL, *supra* note 20, at Article 27 note 5.

<sup>34</sup> RICHARD FRANK/GIORG STRÄUBL/HANS MESSMER, *Kommentar zur zürcherischen Zivilprozessordnung* (commentary to the Zurich Statute on Civil procedure), vor §§ 238-258 note 107, Zurich (1997). For example, contractual fidelity, prohibition of abuse of law, and prohibition of discrimination are basic principles of the laws in Switzerland pertaining to Swiss public policy; HONSELL, *supra* note 20, at Article 27 note 8.

<sup>35</sup> EJM 1994, 34; Romy, *supra* note 5, at 796; Professor Isabelle Romy outlines that, in Switzerland, the institute of a class action may be defined as a means of civil procedure; HONSELL, *supra* note 20, at Article 27 note 5; interestingly for Germany: Fless, *supra* note 1, at 379, where a situation is outlined in which the defendant may force into a settlement because of one-sided publicity in the U.S. that may lead to serious damages of the defendant's business image in public and the media.

<sup>36</sup> BGE 122 II 351; Hinstl, *supra* note 20, at Article 27 note 60; all other grounds for non-recognition and enforcement must be pleaded by the parties; H. HONSELL, *supra* note 20, at Article 27 note 29.

<sup>37</sup> DVOLETAJAMES/STRÄUBLER, *supra* note 5, at 309; EJM 1991, 31. (A similar approach exists in the United States for collateral enforcement of judgments.) Swiss law provides, however, for an exception to this rule in article 149 section 2 lit. f of the PIL Statute: decisions based on tort cannot be enforced against a defendant that has its domicile in Switzerland. This constitutes an effective protection to Swiss parties doing business abroad, in particular in the U.S., for example, a component manufacturer may not fear enforcement of a jury verdict based on any tort theory which may have caused damages to U.S. parties; H. HONSELL, *supra* note 20, at Article 27 note 27.

zerland, a decision will more likely not be recognized and enforced on the grounds of Swiss public policy, because Switzerland's interest to protect Swiss public policy is put at stake.<sup>38</sup>

## III. Recognition and Enforcement of U.S. class action judgments or settlements in Switzerland

It is impossible to discuss all aspects of recognition and enforcement because multi-party disputes are complex. This paper looks at a selection of important issues.

### 1. Mandatory class actions

#### 1.1 Overview of mandatory class actions in the United States

According to Rule 23 (b) of the Federal Rules of Civil Procedure, three types of class actions are deemed to be mandatory for all members of the class. Those are the *incompatible standards class actions* (Rule 23 (b) (1) (A)), the *limited fund class actions* (Rule 23 (b) (1) (B)), and *class actions requesting injunctive or declaratory relief* (Rule 23 (b) (2)).<sup>39</sup> By including all class members in a mandatory class action, the definition of a litigating party changes dramatically compared to the traditional understanding of a two party (or multi party) litigation.<sup>40</sup>

<sup>38</sup> FRANK/STRÄUBL/MESSMER, *supra* note 34, at §§ 238-258 note 107; BJM 1991, 35; Hinstl, *supra* note 20, at Article 27 note 62; H. HONSELL, *supra* note 20, at Article 27 note 7; the validity of this requirement is debated; some authorities argue that there is no room for such a test since the law itself does not require any relations to Switzerland.

<sup>39</sup> RICHARD L. MARCUS/MARTIN H. REDISH/EDWARD F. SHERMAN, *Civil Procedure, A modern approach*, 288, St. Paul (1995); RICHARD L. MARCUS/EDWARD F. SHERMAN, *Complex Litigation*, 291-315, St. Paul (1998); Romy, *supra* note 5, at 787.

<sup>40</sup> The term "litigating party" is not used in a technical way knowing that absent class members are not real "parties". Under a civil law type of understanding it can be explained quite broadly that not every class member must be known by name or asked for instructions by counsel; WALTER, *supra* note 28, at 373; BUCHGARTNER, *supra* note 4, at 303, who refers in this context to the Swiss Public Interest Organization's Action (Verbandsklage); Fless, *supra* note 1, at 375; according to Rule 23 (e) Federal Rules of Civil Procedure, a class, in order to be certified by the judge, has to be "no numberous that holder of all members" would be impracticable, "questions of law or fact" exist common to the class, "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and the "representative parties will fairly and adequately protect the interest of the class."

The qualification of parties in class action proceedings does conflict with the traditional understanding of a party litigating in Switzerland. The class members and their role in the civil action may be contrary to public policy.

No notice requirement exists in mandatory U.S. class actions.<sup>41</sup> Even if a class member received notice of the class action being tried, she/he does not have the right to opt out (Rule 23 (c) (2)). In other words, mandatory class actions include also, and by definition, members who do not even know that they are members of a class. Some U.S. State laws on class actions, however, do require notice (e.g., Texas). This is an important factor under Swiss law because Article 27, Section 2 (a) Swiss PIL Statute, requires proper service of process.

Some members, however, and the claims related thereto, may not even "exist" yet. Neither physical presence nor any other form of consent to the litigation may be requested. This notion potentially conflicts with the civil law perspective of proper notice and has to be examined below.

The paradigm of the U.S. system of class actions is the following: class members, although not being notified, would consent to the lawsuit (if they knew about it). This presumption does not exist under Swiss civil procedure.<sup>42</sup> The idea behind the U.S. class action lawsuits is that implied consent is to the benefit of the class action members. Without the aggregation of claims of all class members, the claim may never be filed.<sup>43</sup> By aggregation of all claims an incentive is being created to pursue the claim. Thus, it becomes more difficult for a wrongdoer to continue with his wrong behavior. The wrongdoer learns that small claims will now be pursued against him and he cannot circumvent the system.

Economically speaking, the costs of one plaintiff's action would always remain below the possible gain if the plaintiff wins the case. Aggregating all claims has, therefore, two consequences: *first*, the litigation costs are borne by lawyers willing to finance the class action. The cost per plaintiff (class member) ratio becomes significantly lower. *Second*, although the defendant's risk of los-

<sup>41</sup> A reason, therefore, is the general pattern that money damages may not be sought in mandatory class actions unless in exceptional cases. Nevertheless, a good deal of debate on this question is going on. So far, it seems to be possible to request money damages as well. *WETZEL v. LIBERTY MUTUAL INSURANCE COMPANY*, United States Court of Appeals, Third Circuit, 1975, 508 F.2d 239, certiorari denied 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1976); *JOHNSON v. GENERAL MOTORS CORP.*, 598 F.2d 432 (5<sup>th</sup> Cir. 1979).

<sup>42</sup> *PHILLIPS PETROLEUM CO. v. SHUTTS*, United States Supreme Court, 1985, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628; *HANSBERRY v. LEE*, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117-118, 85 L.Ed. 22 (1940): Failure to opt out is considered to be a consent and the due process requirements are met. In other words, those who choose not to opt out do consent. This is, however, not applicable to mandatory classes; *BAIDOO-KATREK*, supra note 4, at 304.

<sup>43</sup> It has to be borne in mind that Rule (b)(2) is not primarily about economies of scales; this is Rule (b) (3). *Hess*, supra note 1, at 374.

ing remains the same like an individual case, the amount at stake increases drastically in a class action. The aggregation of claims increases the risk of losing for the defendant because a bigger amount at stake leads plaintiffs to pursue the matter with greater effort. The case is tried more effectively because of the increased input by means of money and time.

There are other considerations in mandatory class actions. First, they are relatively rare. Second, in two of the three situations, the remedy is equitable and does not involve the grant of damages. For example, where injunctive relief is sought, the defendant does not face greater risk simply by virtue of the size of the class. If the remedy is granted, however, it will impact all members of any putative class. These are sometimes called "*public injunctions*." The same is generally true of requests for declaratory judgments.

## 1.2 Class Action Arbitration – No longer an Oxymoron

In 2003, the United States Supreme Court surprised many members of the U.S. Class Action Bar and the Arbitration Bar with its plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (U.S. 2003), which sanctioned the class action mechanism in arbitration proceedings under the U.S. Federal Arbitration Act, 9 U.S.C. § 1 et seq. and sent the American Arbitration Association ("AAA") and other supporters and practitioners of arbitration in the U.S. scurrying to develop rules and procedures for the conduct of class-wide arbitration.

The plaintiffs in *Bazzle* had signed arbitration agreements with Green Tree Financial related to home loans. The agreements provided that

"all disputes, claims, or controversies arising from or relating to this contract [the loan agreement] or the relationships which result from this contract ... [will be resolved] by binding arbitration by one arbitrator selected by us with the consent of you."

The plaintiffs filed two separate actions against the lender alleging that Green Tree failed to provide its customers with forms required by the South Carolina Consumer Protection Law. In both cases, plaintiffs asked the court to certify their claims as a class action.<sup>44</sup>

In early January 2003, the U.S. Supreme Court granted *certiorari* to decide whether the ruling of the South Carolina Supreme Court, which essentially

<sup>44</sup> In the U.S., a class action depends on the certification of the plaintiff's claims by the respective competent court (Rule 23 (b) (3) Federal Rules of Civil Procedure). Green Tree responded by seeking a stay of the proceedings and demanding arbitration. In both cases, the trial court certified a class but it also sent the claims to arbitration, which ultimately resulted in two multi-million dollar awards for the class claimants. Green Tree appealed the order of class-wide treatment and the South Carolina Supreme Court held that class-wide arbitration could be ordered where the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice.



bound the parties to procedures not explicitly included in the agreement was inconsistent with section 4 of the U.S. Federal Arbitration Act, which requires arbitration "in accordance with the terms of the agreement." In June 2003, the Court vacated the two multi-million dollar class-wide arbitration awards, holding only that it is for the arbitrator, not a court, to decide whether an arbitration agreement silent on the point authorizes the pursuit of class claims. Justice Breyer's opinion for the plurality of the Court sidestepped the question on which the Court had granted *certiorari*. Instead, the plurality concluded that the arbitrator, not the judiciary, should decide whether the arbitration agreement authorized class-wide arbitration. Since the arbitrator in the *Bazzie* case had not made an independent decision on the point, the Court vacated the lower court's judgment confirming the class awards, and remanded the case for further proceedings.

The rules subsequently adopted by the AAA are patterned after Federal Rule of Civil Procedure 23, but have a number of features that are unique to arbitration. First, in light of the *Bazzie* decision, every demand for arbitration that seeks to obtain class-wide relief is first submitted to a single arbitrator for determination of a "clause construction" award to examine the arbitration agreement and see if it purports to prevent class treatment of claims.<sup>45</sup> The AAA rules then require a mandatory stay of 30 days for either party to take an appeal to a court of competent jurisdiction to challenge the clause construction award. There are more than 150 class arbitration cases listed on the AAA docket, though there are some cases that are related to each other so the actual number is a little less.

Most important is the probability that lawyers representing claimants in the U.S. will, either based on arbitration agreements that are silent as to class treatment of claims or, if such prohibitions are ultimately ruled unenforceable, such agreements seek to obtain class arbitration awards against non-U.S. respondents to improve the collectability of the remedies. It is not hard to imagine a time in the near future when a Swiss manufacturer (or other non-U.S. company) includes an arbitration provision in standard form distribution agreements and a claimant files a class arbitration demand in the U.S.

If that happens, enforcement of class action arbitration awards or judgments may well be analyzed by Swiss courts under the provisions of the New York Convention. For now, the analysis will focus on the general provisions of the Swiss PIL Statute.

<sup>45</sup> A review of the "Clause Construction Awards" among the more than 120 class arbitrations on the AAA public docket reflects that well over 90% of those awards have concluded that unless the language of the arbitration agreement specifically precludes class treatment, it will be permitted.

### 1.3 Right to be heard of law suit parties in Switzerland

In Switzerland, the principle of due process is incorporated in Article 8 of the Swiss Constitution which guarantees equality before the law. A party has constitutional rights, such as the right to request relief in a specific case (to have one day in court), the right to comment on the others party's allegations (right to a statement of defense), and the right to submit evidence to prove the claim. Those rights can be summarized as the right to be heard.<sup>46</sup>

### 1.4 Violation of Swiss public policy: Discussion of the "traditional" view

In a traditional civil law country perspective one would argue that class actions violate the party's freedom to decide on the commencement of a civil action as well as "subjective rights of the party" suffering damages.<sup>47</sup> This is true because these rights are viewed as not transferable, i.e., personal rights of a party. Moreover, the judge is not entitled to award more than what was requested (*ne eat iudex ultra petita partium*).<sup>48</sup>

A class member though, not having received notice of ongoing proceedings, could not possibly consent. According to the only commentator available in Switzerland, Professor Romy, mandatory class actions are considered to be against procedural public policy if the class members were not notified.<sup>49</sup> The defendant would have to face the risk of double payment if another plaintiff, not being a member of the class, would be entitled to file an individual complaint in addition to the class action. In other words, *res judicata* concerns exist. From a Swiss perspective, it seems odd to enforce a judgment against a defendant, if there is a risk that the same defendant could be held liable again for the same wrong, although a class action would imply the aggregation of all wrong. Therefore, even mandatory class action judgments would violate substantive public policy of Switzerland, although, from a U.S. perspective, the class members may not opt out and are bound by the judgment.<sup>50</sup> So far, however, no Swiss court has had to decide this question.

<sup>46</sup> Oskar Vogler/Karl Stöckli, Grundriss des Zivilprozessrechts ("Outline of Civil Procedure", Chapter 6 note 73, Bern (2006)); H. Honsell, supra note 20, at Article 27 note 16.

<sup>47</sup> Romy, supra note 5, at 797.

<sup>48</sup> Vogler/Stöckli, supra note 46, Chapter 6 note 9. In the United States the Supreme Court developed an exception to the rule that one could not be bound by a judgment *in personam* unless one was made fully a party in the traditional sense (Pennoyer principle). *HANSBERG v. LEE*, supra note 42.

<sup>49</sup> Romy, supra note 5, at 797; Honsell, supra note 20, at Article 27 note 9 ss.

<sup>50</sup> Romy, supra note 5, at 797.

## 1.5 Counterarguments

There are arguments against this view. *First*, not every difference regarding foreign procedure is necessarily against public policy.<sup>51</sup> *Second*, the principles of due process have been developed taking into account a traditional, adversarial litigation of two parties. *Third*, the "no due process" objection is at least a doubtful theory in the case where a decision has to be enforced against a Swiss defendant or against assets being located in Switzerland. Why would the due process concern be relevant if the "Swiss interests" are only related to the defendant of a class action or assets in Switzerland? For the following reasons, Professor Romy's view may be too narrow.

### 1.5.1 Swiss Bankruptcy Law

Swiss civil procedure has already developed modern concepts of multi-party litigation, which are qualified as various forms of the Swiss "*Prozessstandschaft*"<sup>52</sup>, e.g., action in one's own name but on another's behalf.<sup>53</sup> An example thereof is stated in Article 260 of the Swiss Debt Enforcement and Bankruptcy Law which was revised in 1997 (SchKG). Article 260 SchKG reads as follows:<sup>54</sup>

1. Each creditor is entitled to request the assignment of rights of the bankrupt estate which all the creditors decline to pursue.
2. The proceeds are used, after deduction of costs, to satisfy the claims of the creditors to whom the assignment was made, according to their rank. Any surplus is handed over to the bankrupt estate.
3. If all creditors decline to pursue the rights and none of the creditors requests assignment, the rights can be realized pursuant to article 256.

The action, to be best called a representative action, is a procedure *sui generis*.<sup>55</sup> It must be noted that bankruptcy proceedings vary substantially between the U.S. and Switzerland. If bankruptcy is declared against a Swiss company, the bankrupt debtor is in most cases in a status of (best) liquidation of its assets. Contrary to bankruptcy proceedings in the United States, the reorganization should be evaluated prior to the declaration of bankruptcy (e.g., Article 725 and Article 725a of the Swiss Code of Obligations, CO).<sup>56</sup>

<sup>51</sup> DROLSHAMMER/SCHÄUBER, *supra* note 5, at 312; HONIGSALL, *supra* note 20, at Article 27 note 9.

<sup>52</sup> VOGLER/SCHÜLLER, *supra* note 46, Chapter 5 note 37-41.

<sup>53</sup> ALFRED KOMAR, *Dictionary of Legal and Commercial Terms*, Part II, 622, Munich (1994).

<sup>54</sup> STEPHEN BERTI, *Swiss Debt Enforcement and Bankruptcy Law*, English translation of the Amended Federal Statute on Debt Enforcement and Bankruptcy (SchKG), 93, Zurich (1997).

<sup>55</sup> VOGLER/SCHÜLLER, *supra* note 46, Chapter 5 note 40.

<sup>56</sup> SWISS-AMERICAN CHAMBER OF COMMERCE, *English translation of the Swiss Code of Obligations*, Zurich 1992, Article 725a: "Upon being notified, the judge adjudicates the bankruptcy

Any creditor willing to take the risk of losing the battle of pursuing rights of the bankrupt estate (and that the other creditors have declined to pursue) may request permission from the bankruptcy administration. As such, the creditor requests the assignment of those rights. This procedure resembles a class action for the following reasons. The action is commenced in the interest of all the creditors and once the permission is granted, all creditors are bound by the decision.<sup>57</sup> Any settlement (or judgment) is binding for the company in bankruptcy, the creditors, and the bankruptcy administration.<sup>58</sup> This is true also for any unknown creditor who for whatever reason failed to file its claim with the bankruptcy administration.

One difference between the above procedure and a class action in the U.S. is that the creditors are known from the very beginning of the procedure. Not so in the United States where it is common that an attorney who regularly pursues class action claims will often seek out individuals with potential representative claims to serve as class representatives. In essence, it is the plaintiff's attorneys who are the "real" plaintiffs due to their personal and financial interest in the claim. In Switzerland, however, every claim can be transferred to a third party who may be in a better position to pursue the claim.<sup>59</sup> It is the U.S. attorney who initiates a class action because the class members may not even know about the existence of their claim.<sup>60</sup>

From a Swiss perspective, several problems arise from this constellation. *First*, an attorney may not solicit his services. In other words, the client, i.e., the class member, has to know his/her claim. *Second*, the related contingent fee agreements would not be permitted in Switzerland. But if not for the incentive of a future return on the plaintiffs' attorney's investment class actions would likely not be tried. *Third*, the plaintiffs' attorney's own interest in the claim could be viewed as a problem with regard to the attorney's independence in the case. The plaintiffs' attorney's interest in the case may not be the client's best

[...].

<sup>57</sup> This procedure could be considered akin to the certification of a class action, although here the known creditors are notified.

<sup>58</sup> Decision of the Swiss Federal Court in BGE 113 III 137.

<sup>59</sup> The following example may illustrate the idea: a creditor doing construction work for a debtor in Switzerland may have a big claim in the bankruptcy proceedings. The debtor at the same time may have claims to be enforced in a foreign country, for example in Russia. Due to complexity and lack of experience such valid claims of the debtor in Russia would probably be valued as virtually nil. Another creditor who is also doing business in Russia may have the know-how and the experience to enforce a claim in Russia. He might therefore be interested to buy the Russian claims from another creditor. After having transferred the claim, the new creditor of the Russian claim may request the assignment under Article 260 SchKG and pursue the claim successfully.

<sup>60</sup> For example, a lay person is unlikely to be aware if his insurance carrier applies an improper method when calculating interest on an insurance policy. Even if his/her class members would know, the incentive to pursue a small claim of a couple of dollars may be very low.

interest. But as stated, not every procedural difference to Swiss civil procedure is *per se* a violation of public policy.

Therefore, the difference between the role of the Plaintiffs' lawyer in the U.S. and a civil law country that permits lawyers in the U.S. to pursue class action should not be crucial. As a result is questionable if lack of notification would violate public policy.

### 1.5.2 Factual denial of justice

One of the reasons in favor of class action claims is to punish wrongful conduct that affects many people, where the individual claim would never be filed because the amount at stake is too small. By allowing aggregation of the individual claims, the law gives an incentive to file such law suits.

The following principle underscores the purpose of rules authorizing class action claims to be pursued: the smaller the amount at stake, the smaller the risk of a suit for the defendant. The smaller the risk of a suit would be, the bigger the risk of misbehavior by any wrongdoer. This behavior may not even be a conscious one by the wrongdoer. Economically speaking, the wrongdoer should be given an incentive to change wrong (or at least unfair) policies. A company will compare the costs of changing a policy to the associated risk of being regarded as a wrongdoer before the courts. In other words, only if there is a significant risk for the wrongdoer to be held liable will he have an incentive to adjust or change the wrongful policy or conduct. This logic is also valid for Switzerland.

A common basis for concluding that the judgment of a foreign court violates Swiss public policy occurs when legislation and/or the application of law are contrary to the Swiss Constitution (Article 8 of the Swiss Constitution and all written or unwritten constitutional rights resulting thereof), if the rule or the application of the rule is only useless, pointless, or simply harassing.<sup>61</sup> The Swiss Federal Court held in a landmark case that if a statute is applied obviously wrongly, the application of such statute would have to be considered arbitrary and therefore against Swiss constitutional law.<sup>62</sup>

The Swiss Federal Court has defined the arbitrariness of a decision and, therefore, a violation of the Swiss Constitution: *First*, the decision must be obviously wrong and in essence intolerable. *Second*, the decision needs to violate a fundamental principle of Swiss law or be otherwise contrary to reasonable sense of justice. *Third*, an arbitrary violation may be assumed if a decision suffers an inherent and insoluble contradiction, in case of significant abuse of dis-

<sup>61</sup> HÄVELIN/HALLER, supra note 18, at note 1576 and 1610.

<sup>62</sup> Decision of the Swiss Federal Court in BGE 108 III 41.

cretion, or if the decision disregards general principles of law or rational legal fundamentals.<sup>63</sup>

In the case of an enforcement of a class action decision, it can hardly be argued that wrongful conduct is tolerable simply because the amount at stake is too small to be adjudicated. This reasoning would not give a satisfactory answer to the fact that small wrongs may occur repeatedly by the same wrongdoer and, therefore, small claims would arise over and over. In such instances should aggregation of the claims on behalf of possibly unknown class members be allowed? Of course, the question here presented relates only to whether class action decision allowing the aggregation should be recognized and enforced. In this context, not to allow aggregation of the claims seems almost intolerable, because it would allow the wrongdoer to continue to do wrong. This conclusion would be obviously contrary to a reasonable sense of justice. Justice should not affirmatively protect wrongful even though there is a well-established notion that the judicial system cannot fully eliminate injustice. No judicial system is that efficient but that does not require the system to offer protection to wrongdoers by refusing enforcement of class action judgments entered by the courts of other nations. The fact that the Swiss legal system does not know the institution of class actions should not lead to a factual denial of justice when a legitimate decision is sought to be recognized and enforced.

This notion is corroborated by Cantonal statutes on civil procedure which provide for a mandatory conciliatory procedure before the justice of the peace (*Friedensrichter*).<sup>64</sup> It is a mandatory proceeding before a civil action becomes pending. For small amounts, the *Friedensrichter* is even empowered to render a final decision.

As a result, one may conclude that Swiss Civil procedures do not provide an appropriate system for claims with small amounts.<sup>65</sup> A plaintiff, however, may seek justice through a class action before U.S. courts.<sup>66</sup> If the conclusion is correct that for small claims no access to court exists, due process is violated by the Swiss legal system rather than by the recognition and enforcement of a class action. Such factual denial of justice should not be taken as a basis to not en-

<sup>63</sup> HÄVELIN/HALLER, supra note 18, at 1610.

<sup>64</sup> § 95 of the Rules of Civil Procedure of the Canton of Zurich.

<sup>65</sup> Under economical aspects it certainly does make sense not to provide such judicial institution for small individual claims. Public peace should not be disturbed no matter how big the claims at stake are. Class action cases, however, do emphasize on the fact that there are many small individual cases related to each other.

<sup>66</sup> This rather critical analysis of the proceedings before the justice of the peace is not meant to be a general critique of this traditional element of Swiss civil procedure, although for most of the complaints the chances to reach a settlement agreement are virtually impossible. In proceedings before Commercial Court of Zurich no such proceedings before the justice of peace are mandatory (§ 103 of the Rules of Civil procedure of the Canton of Zurich, ZPO).

force a class action judgment or settlement on the grounds of risk of double payment.

### 1.5.3 Class actions with higher individual claims at stake

The situation is different for cases in which at least some class members' amount at stake would be high enough to file an individual complaint. This could be true for a class action regarding claims related to breast implant surgeries or other medical claims. In those cases, one would expect that not only the amount at stake might be higher, but also the personal interest to file a complaint would be stronger. In other words, such plaintiffs would have an individual interest to file a suit.

A plaintiff then may have its "own" and distinct legal interest to pursue its claim. The problem of factual denial of justice, as described above, would not be an issue. To the contrary, the principle of "party disposition" should not be disturbed.<sup>67</sup> A party must be in a position to pursue a claim and not be virtually excluded, because the claim at stake is too little. Further, highly personal claims, such as claims related to personal injuries or wrong medical treatments, may also be brought according to the principle of party disposition.<sup>68</sup> In short, mandatory class action cases should be qualified as against Swiss public policy if party autonomy is violated and the parties would be perfectly in a position to pursue their claims.<sup>69</sup>

## 2. Rule 23 (b) 3 class actions

The problems described above do not concern class action proceedings under Rule 23 (b) 3 because they are not mandatory. According to Rule 23 (c) 2, the class members must be notified about the ongoing action. Any notified class member is free to opt out and may decide not to become part of the class action proceeding. In *Cimino v. Raymark Industries*<sup>70</sup>, for example, over 3000 class members had to be notified. Rule 23 (b) 3 is therefore in accordance with the party definition under civil procedure in Switzerland because the members of the class are individually known and the loss has already occurred when the suit is filed.<sup>71</sup> This may not be true for further cost, *i.e.*, medical monitoring of the class members. Nevertheless, further problems of public policy may arise and

<sup>67</sup> VOGL/SÜRNLEB, supra note 46, Chapter 6 note 6.

<sup>68</sup> It has to be borne in mind that medical treatment may be extremely expensive to a point where those costs may preclude a party from bearing any legal costs.

<sup>69</sup> BGE I 10 II 115; VOGL/SÜRNLEB, supra note 46, Chapter 6 note 9 (*no procedural iudex ex officio*).

<sup>70</sup> CIMINO v. RAYMARK INDUSTRIES, 751 F.Supp. 649 (E.D.TEX.1990). Hess, supra note 1, at 375.

<sup>71</sup> ROMY, supra note 5, at 797.

hinder recognition and enforcement.<sup>72</sup> The three public policy issues are addressed in the following paragraphs.

### 2.1 Violation of the principle of party disposition

It has to be determined whether the principle of party disposition is violated because each member of the class has to present the claim at the same time. For two reasons, however, public policy is not violated.<sup>73</sup> *First*, Swiss civil procedure provides exemptions to the principle of party disposition, such as negative declaratory actions or actions governed by the principle of *ex officio* proceedings.<sup>74</sup> *Second*, class members may decide not to be part of the class action and opt out. Thus, it is in the party's discretion whether they want to participate in the proceedings.

### 2.2 Implicit consent to class counsel

Notification of the class action could be viewed as sufficient to recognize and enforce a judgment, although Article 396 Section 3 of the Swiss Code of Obligations (CO) requires an explicit consent of the principal to the filing of a complaint by its agent (class counsel).<sup>75</sup> Article 396 Section 3 CO reads as follows:<sup>76</sup>

The agent must have a special authorization, subject to the provisions of the applicable Federal or Cantonal laws of procedure, to commence a legal action, conclude a settlement, consent to arbitration [...].

In other words, class action members *visà* are not opting out do implicitly consent to their class counsel. Professor Romy argues that not every difference of the proceedings justifies a refusal to recognize and enforce a judgment. Thus, the problem would exist only for passive, *i.e.*, silent members who do not appear in the class action proceeding.<sup>77</sup> Unfortunately, there is no further explanation why lack of explicit consent to class counsel would, on its own, be contrary to fundamental principles of Swiss laws.

The answer could be provided by analogy to Swiss bankruptcy proceedings (Article 260 SchKG). As discussed for mandatory class actions, the creditors

<sup>72</sup> Those aspects are also of concern in mandatory class actions. In order to facilitate the reading, they are discussed here.

<sup>73</sup> ROMY, supra note 5, at 797.

<sup>74</sup> VOGL/SÜRNLEB, supra note 46, Chapter 6 note 45 and 49.

<sup>75</sup> ROMY, supra note 5, at 797.

<sup>76</sup> SWISS-AMERICAN CHAMBER OF COMMERCE, Swiss Code of Obligations, English Translation of the Official Text, Articles 1-551, 141, Zurich (1995).

<sup>77</sup> ROMY, supra note 5, at 797.

have the right to interfere once the claim has been transferred. Creditors would not be in a position to consent or dissent to any representation chosen by the creditor to whom the claim was assigned. By analogy, the same principle could be applied to class members.<sup>76</sup>

The mere fact of notification should not be the only test applied to assume implicit consent to class counsel. In addition, the Swiss courts should decide whether class counsel acted in the interest of the involved class members. The reason for this assumption can be found in Article 419 CO setting forth rules on how to conduct business without an agency relationship. It reads as follows:<sup>77</sup>

A person who conducts a business transaction on another's behalf without being mandated by him is obliged to carry out the business transaction thus undertaken for the benefit of and in accordance with the presumed intention of the other party.

Swiss agency law, as an exception, entitles the agent to perform transactions without any consent of the principal, so long as it is in the principal's interest. This mechanism resembles somewhat the system of the class action certification proceedings. Class counsel in a class action must represent its class members fairly and adequately.<sup>78</sup> The situation for the passive class members would even be better than under Article 419 CO by having the U.S. judge supervising the adequacy of representation at the time of certification of the class action.

Article 25 Section (a) of the PIL Statute provides a ground for non-recognition if the U.S. courts had no jurisdiction over the parties involved. Recognition and enforcement of a judgment may be denied, although the class members have been represented by a certified class counsel, if they are not subject to U.S. jurisdiction.

As a result, the assumption of implicit consent of the class members to the representation of the class should not necessarily be viewed as against Swiss public policy. Although there are supporting grounds in favor of a public policy violation, such a violation should not *per se* be assumed.

<sup>76</sup> The difference, however, to the Swiss bankruptcy Statute is that Art. 260 SchKG concerns claims of the bankrupt party whose claims are transferred to one of its creditors whereas class actions relate directly to the claims.

<sup>77</sup> SWISS-AMERICAN CHAMBER OF COMMERCE, supra note 56, at 151.

<sup>78</sup> Rule 23 (a) of the Federal Rules of Civil Procedure. In 2003, Rule 23 was amended to impose more strict judicial oversight over class action settlements. Under the amendments, a court may approve a settlement only after conducting a "fairness" hearing. Any class member may object and the court may require a new opportunity for class members to opt out after learning of the terms of the settlement, even if they did not opt out earlier. Whether at the initial class action stage or at the enforcement stage under the PIL, heightened judicial review to insure the fundamental fairness of the class procedures employed in a particular case cannot be faulted and seems to be the clear trend in the U.S., which has the most experience with class actions.

### 2.3 Right to be heard, adequacy of representation

A fundamental principle of civil procedure in Switzerland is the right to be heard.<sup>81</sup> In class actions in the U.S., adequate representation of the class members is a sufficient substitute for the right to be heard.<sup>82</sup>

Most class members in class actions would never want to appear in court.<sup>83</sup> All possible benefits may be gained by free riding any way. Nevertheless, class actions foresee court hearings in which class members can intervene if they wish to do so.<sup>84</sup> Therefore, the requirement of adequate representation of the class members in lieu of a strict right to be heard does not violate public policy.

However, a class member (or the defendant) may argue that she/he was not represented adequately. If so, his right to be heard would be violated. As a consequence, the decision should not be enforceable. Is the Swiss judge entitled to judge the adequacy of representation, even though the United States judge certified the class? The answer must be yes because otherwise the purpose of the provisions for recognition and enforcement under PIL Statute would be voided.<sup>85</sup> As discussed above, the Swiss judge is obliged to decide whether a party's right to be heard was violated. Likely, the judge would examine also possible violations of an absent class member's right to be heard. If so, the court must deny recognition and enforcement of the foreign judgment.

### 3. Recognition and enforcement of punitive damages in Switzerland

Swiss courts have had to decide on the recognition and enforcement of foreign judgments granting punitive damages.<sup>86</sup> None of cases, though, were class actions.

In a first case, a Swiss district court judge denied recognition and enforcement of a Texan judgment granting exemplary damages in a real estate misrep-

<sup>81</sup> Article 27 PIL Statute.

<sup>82</sup> HANSBERRY v. LEG, supra note 42.

<sup>83</sup> For example, in highly technical class actions, such as billing methods of insurance companies. See also BISEN v. CARLISLE & JACQUELINE, Supreme Court of the United States, 1974, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732.

<sup>84</sup> Romtz, supra note 5, at 798; WOOLEN v. SURTRAN TAXICABS, INC., United States Court of Appeals, Fifth Circuit, 1982, 684 F.2d. 324.

<sup>85</sup> Romtz, supra note 5, at 798.

<sup>86</sup> Heintz, supra note 20, at Article 27 note 51; HONIGSMAN, supra note 20, at Article 27 note 27; WALTER, supra note 28, at 377, referring to a Greek decision granting USD 15 million for pain and suffering.

resentation case October 1, 1982.<sup>87</sup> The district court of Sargans held that the punitive character of exemplary damages is contrary to the Swiss principle of impermissibility of enrichment. A plaintiff should not be put in a better economic position than if the contract were fulfilled and no violation of the plaintiff's rights had occurred (the Texas Courts granted double the amount of the damages as exemplary damages). The penal purposes of punitive damages: to punish, to deter, or to teach the defendant as well as to prevent that the same wrong happens again are reserved to the penal jurisdiction of the Government under Swiss law.<sup>88</sup>

The District Court of the Canton of Basel, however, granted recognition and enforcement of a decision rendered by the U.S. District Court of the Northern District of California (USDC) in 1989. The Appellate Court of the Canton of Basel affirmed the decision in 1991.<sup>89</sup> On June 10, 1985, USDC had granted the plaintiff damages in the amount of USD 120,060 as well as punitive damages in the amount of USD 50,000. The Basle Court of Appeal held that a judgment granting punitive damages still must be seen as a civil law decision for the purpose of recognition and enforcement.<sup>90</sup> Moreover, the court pointed out that the PIL Statute should avoid as much as possible contradicting results between final foreign judgments and their recognition and enforcement in Switzerland.<sup>91</sup> It stressed that a violation of Swiss public policy would depend on the relation of the facts to the country in which recognition is sought. The relation may be close depending for example on the domicile of the parties, their citizenship, or the common nucleus of facts.<sup>92</sup> The Swiss defendant was a Swiss company doing business world-wide (container business). It was involved in the sale of containers between the U.S. and the U.K. Therefore, the only close relation to Switzerland was the seat of the defendant.<sup>93</sup>

The court held that punitive damages awarded in that case did not have a penal character. To the contrary, punitive damages would balance the unjust enrichment of the defendant who should not be allowed to keep the profit.<sup>94</sup> The defendant did not prove the exact amount of its profits. Therefore, an overall

<sup>87</sup> *Droschlmann/Schärer*, supra note 5, at 310; unfortunately, the materials available do not state the exact amount at stake.

<sup>88</sup> *Droschlmann/Schärer*, supra note 5, at 310.

<sup>89</sup> *BJM* 1991, 31.

<sup>90</sup> *EGR* 57 1203.

<sup>91</sup> The Appellate Court used the term *linkende Rechtslage* (no limping, i.e., inappropriate legal situation).

<sup>92</sup> *FRANK/STRÜLL/MISSNER*, supra note 34, at vor §§ 238-258 N 107; *BJM* 1991, 34; *DROSLMANN/SCHÄRER*, supra note 5, at 312.

<sup>93</sup> *BJM* 1991, 35; *HONIGEL*, supra note 20, at Article 27 note 7.

<sup>94</sup> The court compared the decision to Article 423 CO. Article 423 CO reads as follows: "If the conduct of the business has not been made in the principle's interest (Art. 422), the latter may never

sumary by the U.S. court of the defendant's profits was not seen as contrary to public policy.

The situation in Switzerland regarding punitive damages is not clear. It appears that penal elements, i.e., an excessive amount on top of the actual and proven damages would violate Swiss substantive public policy, unless it is to prevent an unjust enrichment of the wrongdoer. Plaintiffs, however, should not be enriched either. A plaintiff should be in the same situation before and after damage occurred.<sup>95</sup>

It has also to be borne in mind that penalty clauses are often included in contracts under Swiss law (Article 163 CO).<sup>96</sup> Therefore, civil law in Switzerland already provides a mechanism to deal with similar situations. To empower the judge to reduce liquidated damages at his discretion could be a possible solution when it comes to recognition and enforcement of punitive damages. The judge would then adjust the amount at his discretion in analogy to Article 163 CO.

So long as punitive damages do not substantially exceed the actual damages, public policy would not be violated. An unjust enrichment of the plaintiff may be preferable to an unjust enrichment of the defendant.<sup>97</sup>

#### IV Conclusion

Recognition and enforcement of U.S. class actions in Switzerland should not be impossible, unless under public policy aspects class actions would be considered *per se* to be against fundamental principles of law in Switzerland. A proposition of Swiss defendants on the grounds of market policy is a political rather than a legal qualification of Swiss public policy and therefore should not prevent recognition and enforcement of a U.S. class action judgements or settlements.

The price, therefore, would be a lack of protection of Swiss and other foreign plaintiffs seeking recognition and enforcement of a foreign judgment against assets located in Switzerland. The PIL Statute and the known public policy decisions of the Federal Supreme Court in Switzerland on private international law, however, do not allow this conclusion to be drawn.

Although it is not realistic to expect the Swiss to enact class action procedures in their civil procedure statutes, recognition and enforcement of such

cases

is less appropriate the benefits resulting from the other person's acts." SWISS-AMERICAN CHAMBER OF COMMERCE, supra note 56, at Article 423.

*HONIGEL*, supra note 20, at Article 27 note 7.

*BJM* 1991, 37.

*FRANK*, supra note 5, at 258.

judgments or settlement agreements could be perfectly possible for at least some class action decisions. Recently, however, the EU has started a discussion about possible legal means equal or similar to the U.S. class actions.

Mandatory class actions should be recognizable and enforceable, so long as the amount at stake would not allow a plaintiff to sue individually. Class actions under Rule 23 (b) (3) should also be enforced, particularly because class members have a right to opt out. The assumption that class members consent to their representation if they do not opt out would not be against public policy. However, recognition and enforcement should be denied if the right to be heard would be violated by inadequate representation. Although a Swiss judge should not assess the facts of the case or examine evidence, he would be obliged to protect a party's right to be heard of defendant and class members.

Finally, class action judgments granting punitive damages may be recognizable and enforceable if the punitive damages intend to balance an unjust enrichment of the wrongdoer. It appears, however, to be against Swiss substantive public policy if the punitive damages are granted solely to punish the defendant or to deter another wrongdoer from acting similarly.

## Droit européen : Suisse – Union européenne Europarecht : Schweiz – Europäische Union

Von Christine Kaddous\* / Christa Tobler\*\*

In der vorliegenden Chronik wird vorerst eine kleine Auswahl von Entscheidungen des EuGH zum EG-Recht sowie des EFTA-GH zum EWR-Recht besprochen, die aus der Sicht des bilateralen Rechts von Interesse sind. Anschließend folgen die erste Entscheidung des EuGH zum bilateralen Recht sowie eine Auswahl von Entscheidungen des schweizerischen Bundesgerichts zu eben diesem Recht. Hinsichtlich der Rechtsprechung zum EG-Recht rufen wir in Erinnerung, dass die schweizerischen Gerichte zur Beachtung derjenigen Rechtsprechung des EuGH verpflichtet sind, welche sich auf gemeinschaftsrechtliche Begriffe bezieht, die auch im Rahmen des bilateralen Personenfreizügigkeitsabkommens relevant sind, sofern die Rechtsprechung vor dem 21. Juni 1999 ergangen ist. Schon in früheren Chroniken konnte jedoch festgestellt werden, dass die schweizerische Praxis diese Verpflichtung nicht formell handhabt, sondern vielmehr auch spätere Rechtsprechung beachtet, sofern sie eine Fortführung oder Präzisierung der früheren Rechtsprechung darstellt.<sup>1</sup> Im Übrigen gibt es auch Gebiete des EG-Rechtes, welche für die Schweiz unabhängig vom bilateralen Recht unmittelbar relevant sind. Dazu gehören insbesondere das Wettbewerbsrecht nach den Art. 81 und 82 EG, das unabhängig vom Sitz der betroffenen Unternehmen alle Sachverhalte erfasst, welche sich innerhalb der EU auswirken (siehe dazu die spezielle Chronik in der SZIER)<sup>2</sup> sowie das Recht über die Kapitalverkehrsfreiheit (dazu unten B.I.2.), aber auch das EG-Recht über Drittstaatsangehörige (darunter etwa die Richtlinie 2003/109<sup>3</sup>). – Das EWR-Recht bzw. die Rechtsprechung dazu ist für die Schweiz nicht verbind-

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<sup>1</sup> Siehe die früheren Chroniken, SZIER 2005, S. 628, sowie 2006, S. 475.

<sup>2</sup> Das EG-Wettbewerbsrecht wird in der vorliegenden Chronik nicht behandelt; siehe dazu die Chronik von Jürg Borer in SZIER 2007, 517ff.

<sup>3</sup> Richtlinie 2003/109/EG des Rates vom 25. November 2003 betreffend die Rechtsstellung der langfristig aufenthaltsberechtigten Drittstaatsangehörigen, ABl. 2004 L 16/44.