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Chambers Europe 2022 – Practice Area Overview – Switzerland Litigation

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COLLECTIVE REDRESS – SWITZERLAND KEEPS UP WITH EUROPEAN DEVELOPMENTS

I. Introduction

In the recent past, "*class actions*" have been one of the prime topics discussed in Swiss civil procedure. The core of the debate is about whether – and if yes, to what extent – representative litigation mechanisms should be adopted in the Swiss Code of Civil Procedure (CPC), in order to ensure effective access to justice for persons affected by mass damages.

Meanwhile, in the European Union the Collective Redress Directive came into force on 24 December 2020. Member states of the European Union have to transpose the EU Directive into their national laws by 25 December 2022 and apply those measures from 25 June 2023 onwards. Legislative procedures are currently underway in the member states to implement the EU Directive.

In line with the recent developments in the European Union, the Swiss Federal Council has sought to facilitate the assertion of mass damage claims by broadening the scope of the (traditional) association claim as well as by introducing new collective redress mechanisms. On 10 December 2021, the message on the draft legislation was issued. The following article provides an overview of the most important amendments proposed.

II. Revision of the (traditional) association claim (art. 89 CPC)

Under current law, the association claim, as enshrined in art. 89 CPC, provides for a representative litigation tool. Pursuant to this provision, associations and other organisations of national or regional importance that are authorised by their articles of association to safeguard the interests of their members are – in specific cases – allowed to bring claims in their own name on behalf of those members. However, despite being praised in the 2006 message on the unified Swiss Code of Civil Procedure as a class action-like mechanism, the association claim has thus far proved toothless in practice. The lack of practical importance is attributable to multiple reasons: not only are association claims currently limited to violations of the personality rights of the members of the group, but remedies are limited as associations can only

request that (i) a threatened violation be prohibited, (ii) an existing violation be ceased or that (iii) a violation that continues to have a disturbing effect be declared unlawful. By contrast, monetary claims are not admissible. Moreover, only associations of Swiss or regional importance can make use of this tool.

The draft now aims to strengthen the practical impact of the association claim by broadening its scope of application in several respects. Most importantly, the current limitation to violations of personality rights is to be abolished by opening the scope of application to the enforcement of all violations of rights. In future, association claims thus might be brought in a broad range of substantive areas, such as financial services, antitrust, unfair competition, data protection, product liability and telecommunication, with the aim of making collective redress more uniformly available. In this respect, the proposal goes even further than the EU Directive, which only covers consumer protection.

The requirements are defined more clearly with associations and organisations being entitled to bring a claim in their own name if they:

• are not profit-oriented (indicating that the Federal Council has in mind associations according to art. 60 ff. Swiss Civil Code and foundations according to art. 80 Swiss Civil Code rather than commercial organisations to act as potential claimants);
• have existed for at least twelve months (and are thus not only established ad hoc on a short-term basis);
• are authorised by their articles of association or bylaws to safeguard the interests of the affected persons and
• are independent of the defendant (which under the EU Directive is also a key element, see art. 4 para 3 lit. e EU Directive).

As is the case under current law, the association claim is available for claims for injunctive relief, removal or for declaration of unlawfulness of a violation, whereby in the latter case, the claim does no longer depend on any additional special interest in a declaratory judgment (art. 89 para. 2 Draft CPC). In particular, it would not be necessary that an alleged violation continues to have a disturbing effect, which in the past has already led courts not to admit association claims. In addition, a new paragraph 3 would explicitly provide for an option to request notification to third parties or publication of a court's decision.

III. New association claim to assert damage compensation claims

In addition to strengthening the existing association claim (art. 89 CPC), the draft provides for a separate association claim to assert damage compensation claims (art. 307b et seq. Draft CPC). This "reparatory" association claim is

intended to allow the assertion of monetary claims, in particular in cases involving mass damages.

According to the draft, associations or organisations may bring claims in their own name and at their own risk but on behalf of the individuals they represent (art. 307b Draft CPC). The affected persons must either have previously authorised the association to bring an action on their behalf or joined the action after it has been admitted (art. 307d Draft CPC). Persons not directly forming part of the claim are not bound by any judgment in connection with the association claim, even if they have faced a similar type of damage. Accordingly, the proposal is based on the so-called opt-in principle, according to which only persons who have explicitly given their consent to the action are covered by the legal force of the judgment.

The filing of a "reparatory" association claim is permissible under the following conditions:

• The association or organisation is entitled to bring an association claim either under art. 89 Draft CPC or under a special legal provision, such as the Swiss Workers' Participation Act, the Unfair Competition Act, the Trademark Protection Act or under the Gender Equality Act (art. 307b lit. a Draft CPC).
• The association or organisation has been authorised to bring a claim by at least ten affected persons in writing or in any other form allowing it to be evidenced by text (art. 307b Draft CPC). This is to ensure that an association claim can only be brought if a fairly large number of persons are actually affected. The authorisation requirement must already be met at the time the association claim is filed.
• The claims asserted are based on similar circumstances or legal grounds (art. 307b c Draft CPC). This requirement overlaps with the factual connection as required for the (voluntary) joinder of parties pursuant to art. 71 CPC and is intended to ensure that a bundled assertion of claims for damages is efficient and economical.

To sum up, the association claim provides for a true representative litigation tool to assert damage compensation. However, whether the association claim will also prove effective in small claims disputes – as is also envisaged by the Swiss Federal Council – is difficult to foretell. As mentioned above, the association claim is based on an opt-in principle and thus, in each case a separate authorisation by the affected persons is required.

IV. New collective settlement proceedings

Since experience has shown that a significant number of collective disputes are terminated by settlement, the Draft seeks to supplement the new association claim procedure with provisions allowing for collective settlements

(art. 307h et seq. Draft CPC). Parts of the proposal are inspired by the Dutch model on collective settlement procedures which was adopted in July 2005 (*Wet collectieve afwikkeling van massaschades, WCAM*). With regard to the Swiss Federal Council's draft, a distinction can be made between (i) collective settlements in the context of an association claim and (ii) collective settlements without a preceding association claim. The key elements of the envisaged mechanisms are the following.

1. Collective settlements in the context of an association claim (art. 307h et seq. CPC)

Collective settlements may be reached in the context of an association claim. Also in that case, the settlement must be approved by the court, as the affected persons are not directly parties to the court proceedings. Consequently, the parties to the association claim, being the association or organisation itself on the one hand and the defendant on the other, must submit the settlement reached to the court for approval (art. 307h Draft CPC). The court approves the settlement if (art. 307j Draft CPC):

- The settlement reached is reasonable;
- if agreed by the parties, a minimum number or quota of affected persons bound by the settlement has been reached;
- the settlement does not violate mandatory law;
- the consequences of the costs are adequately regulated; and
- the interests of the persons affected by the settlement as a whole are adequately protected.

As a rule, the persons included in the settlement are those who have joined the association claim (art. 307h para. 1 Draft CPC). The bulk of settlements reached will therefore be based on an opt-in principle. However, in some specific cases and upon request by the parties, the court may extend the effects of the settlement to all persons affected by the violation who do not opt out within a period of at least three months after the publication of the settlement proposal in an electronic register (art. 307h para. 2 Draft CPC). In these cases, the group settlement would be of an opt-out nature. However, in order to avoid issues concerning due process or proper service, the extension will only be ordered to affected persons having their seat or domicile in Switzerland. In addition, it will be necessary that (i) the claims covered are of such low value that an individual claim would not be worthwhile (art. 307h para. 2 lit. a Draft CPC) and (ii) a significant number of the affected persons have not joined the association claim (art. 307h para. 2 lit. b Draft CPC). According to the Swiss Federal Council, the latter should always be the case if at least one third of the affected persons have not joined the claim.

2. Collective settlements without a preceding association claim (art. 307k et seq. CPC)

Moreover, the draft also provides for a collective settlement procedure without a preceding association claim (art. 307k Draft CPC). According to the message, the option to conclude a collective settlement should also be available without the parties having to introduce an association claim first. Here, the requirements are largely identical to those of the collective settlement in connection with an association claim as shown above. Collective settlements without a preceding association claim thus may only be negotiated by associations or organisations that are entitled to bring an association claim pursuant to art. 89 Draft CPC or under a special legal provision (art. 307k lit. a Draft CPC). Furthermore, the claims asserted must be based on similar circumstances or legal grounds (art. 307k lit. b Draft CPC). In contrast to a settlement reached in the context of an association claim, collective settlements without a preceding association claim are only permissible based on an opt-out-principle. Therefore, the claims covered must be of such low value that an individual claim would not be worthwhile (art. 307k lit. c Draft CPC). As regards the procedure, the provisions on collective settlements in the context of an association claim are applicable mutatis mutandis (art. 307l CPC). Consequently, also in the scope of collective settlements without a preceding association claim, the parties must submit the draft settlement to the court for approval (art. 307h et seq. CPC).

V. Outlook

By implementing new collective redress mechanisms, the Swiss Federal Council is keeping pace with the recent developments in the European Union. It is thereby fair to assume that the benefits to parties seeking an efficient and cost-effective way for the assertion of mass damage claims are likely to outweigh the potential risks generally associated with collective redress. Thus, for example, the opt-out-based collective settlement procedure may facilitate access to justice in cases where the assertion of claims on an individual basis would have failed because of cost-benefit reasons (*rational apathy*). Potential defendants could favour the option of collective settlements without a preceding association claim whereby due to the application of the opt-out principle all claims of potential claimants can be settled in one go. This provides for a final solution as well as legal certainty which is relevant for any business. However, the draft is likely to meet with some political opposition. It remains to be seen whether it will be enacted as intended by the Swiss Federal Council.