

THE CLASS ACTIONS
LAW REVIEW

FOURTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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This article was first published in May 2020
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THE LAWREVIEWS

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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-439-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAN SCHJØDT

ARENDT & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

DENTONS

GORRISSEN FEDERSPIEL

HENGELER MUELLER

JOHNSON WINTER & SLATTERY

KACHWAHA & PARTNERS

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LOYENS & LOEFF

MATHESON

PINHEIRO NETO ADVOGADOS

S HOROWITZ & CO

SLAUGHTER AND MAY

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved, but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this fourth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger

Slaughter and May

London

April 2020

SWITZERLAND

*Martin Burkhardt*¹

The Swiss system of civil procedure does not provide for a class action per se.

In its Report on Collective Redress in Switzerland of 3 July 2013² the Swiss Federal Council notes that Switzerland's mechanisms for collective redress are for practical purposes insufficient and partly unfit for the efficient and actual enforcement of mass and dispersed damages. There is, in particular, no class action available under Swiss law.³

The Swiss Federal Council notes that in this area of collective redress there is a gap in the system of legal protection that the legislator has so far not been willing to fill. On 2 March 2018, the Swiss Federal Council published a project for a revision of the Swiss Civil Procedure Code (ZPO) that also contains some steps towards collective redress.⁴ The proposals include (1) the extension of standing to claim monetary damages to representative associations on the basis of an opt-in;⁵ and (2) the introduction of a group settlement mechanism, with the resulting settlement to become binding on the entire class, subject, however, to individual opt-out.⁶

Both proposals were subject to a formal consultation process, which was open for comments by interested parties until 11 June 2018. The proposal of the 'reparatory associations' action', as provided for in Article 89a ZE-ZPO of the project for revision received disparate opinions.⁷ The views expressed ranged from endorsement and suggestions for improvement to questioning the very necessity to introduce means of collective redress of this kind. Currently the opinions are being evaluated prior to the Swiss government, the Federal Council, submitting the bill to the Federal Assembly along with the Federal Council's dispatch explaining the bill.

1 Martin Burkhardt is a partner at Lenz & Staehelin.

2 Report of the Swiss Federal Council 'Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und Handlungsmöglichkeiten', Berne 3 July 2013.

3 *ibid.*, p. 14.

4 https://www.admin.ch/ch/d/gg/pc/documents/2940/Bericht_ZPO_de.pdf, Erläuternder Bericht zur Änderung der Zivilprozessordnung (Verbesserung der Praxistauglichkeit und der Rechtsdurchsetzung), pp. 17–18.

5 Preliminary draft, new Article 89a ZE-ZPO p. 3 et seq.; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf>.

6 Preliminary draft, new Article 352a et seq. ZE-ZPO pp. 10 et seq.; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf>.

7 <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/ve-kantone.pdf>, last accessed 11 February 2020; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/ve-organisationen.pdf>, last accessed 11 February 2020; <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/ve-parteien.pdf>, last accessed 11 February 2020.

Under the current law, the most recent attempt at a class action-like suit was initiated by the Swiss consumer protection organisation Stiftung für Konsumentenschutz (SKS) before the Zurich Commercial Court against Volkswagen AG and Swiss car dealer AMAG on behalf of approximately 6,000 Volkswagen diesel car owners.⁸ They alleged that the sales of the vehicles were made under misleading statements, particularly as regards their emissions. In a first proceeding, SKS – in its own name but for the benefit of its members – brought an action for declaratory judgment under Article 10, Paragraph 2 in connection with Article 9, Paragraph 1c of the Federal Act Against Unfair Competition (UCA). SKS further lodged a second proceeding claiming individual damages in relation to certain individual car owners (Article 9, Paragraph 3 and Article, 10 Paragraph 2 UCA in connection with Article 41ff Code of Obligations), on the basis of individual assignments of the claims by the respective Volkswagen diesel car owners. On 12 July 2018, the Zurich Commercial Court decided not to consider the first suit on the grounds that the procedural requirement for the plaintiff to have a legitimate interest was not satisfied,⁹ as ‘it is undisputed that the alleged infringing act ended on 18 September 2015’ when the diesel motor ceased to be built into the 2015 vehicle model and no new cars equipped with this engine were put into circulation in Switzerland.¹⁰ Further, the Court added that, in light of the significant media attention, the car recall actions and the ban on registration of vehicles of this kind, the argument put forward by SKS of allegedly continued misrepresentation through misleading statements and advertising was not convincing.¹¹

On 8 February 2019, the Federal Tribunal upheld the decision of the Zurich Commercial Court not to consider the first suit.¹² On 6 December 2019, the Commercial Court of Zurich decided not to consider the second suit on the grounds that the plaintiff had no standing to initiate proceedings, as the plaintiff as a legal entity could only initiate proceedings within the scope of its purpose.¹³ The Court stated that an interpretation of the plaintiff’s purpose, namely ‘safeguarding the interests of consumers’,¹⁴ would lead to the conclusion that the

8 Plädoyer 01/2018, Sammelklage über Umwege möglich, available at: <https://www.plaedoyer.ch/artikel/d/sammelklage-ueber-umwege-moeglich>, last accessed 10 April 2020.

9 www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf, p. 13, E. 3.4, last accessed 13 February 2020.

10 www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf, p. 11, E. 3.2.3, last accessed 13 February 2020.

11 www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170181.pdf, p. 12, E. 3.3, last accessed 13 February 2020.

12 https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F08-02-2019-4A_483-2018&lang=de&type=show_document&zoom=YES&, E. 3.1, last accessed 13 February 2020.

13 https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170257-O12.pdf, p. 84, E. 7.4.3, last accessed 13 February 2020.

14 https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170257-O12.pdf, p. 73, E. 7.4.2.2.1, last accessed 13 February 2020.

plaintiff could carry out activities for the totality of consumers, but could not take legal action to protect the interests of certain individual consumers as it had attempted to do in this action.¹⁵ The challenge is currently pending before the Federal Tribunal.¹⁶

As a general rule, foreign judgments in class action proceedings are eligible for recognition and enforcement in Switzerland. Likewise, Swiss courts will normally entertain requests for judicial assistance by foreign courts dealing with class action proceedings.¹⁷

We continue to follow developments.

15 https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG170257-O12.pdf, p. 75, E. 7.4.2.2.3, last accessed 13 February 2020.

16 The challenge is pending with the Federal Tribunal under Case No. 4A_43/2020.

17 Report of the Swiss Federal Council 'Kollektiver Rechtsschutz in der Schweiz – Bestandesaufnahme und Handlungsmöglichkeiten', p. 52 et seq.

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He is a member of the Swiss Bar Association (SAV), the Swiss Arbitration Association (ASA), the New York State Bar Association (NYS BA) and the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI).

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ISBN 978-1-83862-439-2