



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2018

10th Edition

A practical cross-border insight into class and group actions work

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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Class & Group Actions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of class and group actions.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting class & group actions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in class and group actions in 18 jurisdictions.

All chapters are written by leading class and group actions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Ian Dodds-Smith and Alison Brown of Arnold & Porter Kaye Scholer LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

A specific procedure equal to the US “*class action*” does not exist in Switzerland. The Federal Council Dispatch to the Swiss Parliament regarding the new Civil Procedure Code (“CPC”), which entered into force on 1 January 2011, expressly refused to implement a “*class action*” into the Swiss civil procedure. One argument against the implementation was the “*principle of party disposition*”, which is a central pillar of the Swiss civil procedure. Under this principle, the parties exercise sole control over the object of the dispute.

The current CPC provides an alternative instrument for collective redress, such as the simple joinder (“*einfache Streitgenossenschaft*”, “*consortité simple*”, Article 71 CPC), which may be subsumed under the term “*group action*”. The simple joinder may exist either through a joint plaintiff consisting of several parties or where several parties are sued as joint defendants.

Nevertheless, there is a noteworthy exception under Swiss law which reflects closely a “*class action*”. Article 105 of the Swiss Merger Act (“SMA”) provides compensation for damages for any company member/shareholder who has been disadvantaged during a transaction (merger, split or change of corporate form). The decision of such a claim has legal effect for all company members/shareholders who have the same legal status as the plaintiff regardless of whether they were subject to the claim or not.

Furthermore, according to the Collective Investment Schemes Act (Article 85), a representative individual may represent a group of investors and claim in the name of the group. Such a judgment has a binding effect on all affected investors.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

In general, according to the CPC, the provisions apply to all areas of civil law.

Article 105 SMA is applicable to all company members/shareholders who are affected by a merger, split or change of corporate form of their company. It therefore has a very limited scope of application.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

The simple joinder is a classic group action and does not automatically create a binding precedent for the others in the group. Article 71 para. 3 CPC specifically states that each of the joint parties may proceed independently from the others in the group.

With regard to the determination of the claim, Article 105 SMA is a typical class action, insofar as all parties, who have the same legal status towards the company as the individual plaintiff, are affected by the decision.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

Pursuant to the “principle of party disposition”, the procedures in the CPC are quasi “opt-in”.

According to Article 105 SMA, the individuals with the same legal status as the plaintiff have no choice to “opt-in” or “opt-out”; they are automatically bound by the decision *ex lege*.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, there is no such minimum threshold or number of cases.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

To proceed jointly as plaintiffs or be sued as joint defendants, rights and duties must result from similar circumstances or legal grounds. This is, for example, the case in the following situations:

- Claim of joint and several debtors or creditors based on a contract (Articles 143 and 150 Swiss Code of Obligation “CO”).
- Claim for rent reduction of several tenants (Article 270 *et seq.* CO).
- Claim of several employees against mass redundancies (Article 335d *et seq.* CO).

- Claim of several co-sureties against the debtor (Article 497 para. 1 CO).
- Several consumers may claim together.

Furthermore, a simple joinder is excluded if the individual cases are subject to different types of procedure: e.g., simplified proceedings apply in general in financial disputes with a value in dispute not exceeding 30,000 Swiss Francs ordinary proceedings are applicable if the value exceeds 30,000 Swiss Francs.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

Court proceedings are filed together. To simplify the administration, the simple joinder may appoint a joint representative (Article 72 CPC).

Within the scope of the application of Article 105 SMA, only company members/shareholders can file the proceedings if they are affected by the merger, split or change of formation of the company.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Pursuant to the CPC, there is no provision which states that potential claimants must be informed of a group action such as a simple joinder. There are procedural rules if a similar claim is pending before another court (see question 3.5).

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

There are no statistics available concerning this matter.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

In the case of a simple joinder, all legal remedies are available, e.g. monetary compensation (“*Leistungsklage*”, “*action condamnatoire*”, Article 84 CPC) and action for a declaratory judgment (“*Feststellungsklage*”, “*action en constatation de droit*”, Article 88 CPC).

According to Article 105 SMA, only the claim for compensation (money or shares) is available.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

The Swiss legal system allows for collective actions by representative bodies under certain conditions.

Moreover, it is often the case that interest groups incorporate a “*Verein*” to represent its interests or establish a contractual relationship to support a model case.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Article 89 para. 1 CPC provides that associations and other organisations of national or regional importance that are authorised by their articles of association to protect the interests of a certain group of individuals may bring an action in their own name for a violation of the personality rights of the members of such group. A so-called “approval” takes place through the tribunal, which is mandated to decide if an association does have a “national or regional importance”.

Additionally, special legal provisions exist which permit associations to file claims to defend their members under the Swiss Workers’ Participation, Unfair Competition Act and the Trademark Protection Act, as well as organisations pursuant to the Gender Equality Act.

Furthermore, under certain conditions, a right to appeal is also given to organisations by the Federal Act on the Protection of the Environment, the Federal Act on the Protection of Nature and Cultural Heritage and the Federal Act on Non-Human Gene Technology.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

Since the new CPC entered into force, there are no limits in respect of certain areas of law (e.g. Unfair Competition Act, Trademark Protection Act, etc.). However, outside of the special legal provisions, the claims are limited to violations of the personality rights of the members of the group.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

With regard to associations that may file a claim, the remedies are limited to injunctive and declaratory claims. Claims for monetary compensation are not admissible.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

Cases are determined by a judge or judges. The civil jury does not exist in the Swiss legal system.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

In general, civil cases are not handled by specialist courts or judges. However, the CPC provides the Cantons some autonomy regarding their own court systems. Therefore, in several Cantons there exist specialised courts including Commercial Courts, Labour Courts and/or Tenant Courts.

Additionally, since January 2012, a new first instance patent court with nationwide jurisdiction over virtually all civil patent matters was established and came into operation.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off' date by which claimants must join the litigation?

There is neither a definition of group action nor can the court impose a "cut-off" date by which claimants must join the litigation.

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The CPC does not regulate "test" or "model" cases that may be selected by the courts.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

A court may consolidate proceedings through an order by joining claims of separately filed actions ("*Klagevereinigung*", "*la jonction de causes*", Article 125 *lit. c* CPC), or if factually connected cases are pending before different courts, the subsequently seized court may transfer the case to the court first seized if the first court agrees to take over ("*Überweisung bei zusammenhängenden Verfahren*", "*Renvoi pour cause de connexité*", Article 127 para. 1 CPC).

The consolidated or transferred proceedings will then fall under the regulations of the simple joinder (Article 71 CPC).

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court may, at the request of a party or *ex officio*, obtain an opinion from one or more experts (Article 183 CPC). If the court lacks the necessary capabilities to assess the facts, it is obliged to appoint an expert. However, the court must hear the parties first.

However, allegations of a party which are based on a private expert opinion are considered to be particularly substantiated or "qualified". Accordingly, a non-qualified submission from the opposing party will not be sufficient to disprove the aforementioned private expert opinion.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Pre-trial depositions similar to the discovery-phase in US procedure do not exist under Swiss law.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Before court proceedings are commenced, a so-called "precautionary taking of evidence" may be possible under Article 158 CPC. The

court is permitted to take evidence at any time (before and during the proceedings) if the law grants the right to do so or if the applicant shows credibly that the evidence is at risk or that it has a legitimate interest.

The condition of a "legitimate interest" is to ensure the plaintiff assesses its chances of success of future proceedings and/or the possibility of obtaining evidence. It is intended to avoid cases where a plaintiff has little or no reasonable chances of success. If the applicant applies for a "precautionary taking of evidence" he/she has to name the evidence as precisely as possible. So-called "fishing expeditions" are not allowed under Swiss law.

Furthermore, for cases involving e.g. financial institutions, clients of such institutions may also exercise their right obtaining access to information under the Data Protection Act.

3.9 How long does it normally take to get to trial?

Depending on the complexity of the case and the workload of the particular court, it normally takes between two and six months to get to trial.

3.10 What appeal options are available?

There are no specific rules or restrictions regarding appeal options within simple joinder proceedings. Depending on the circumstances of the case, a revision (Article 311 *et seq.* CPC), an objection (Article 319 *et seq.* CPC) or a review (Article 328 *et seq.* CPC) must be lodged.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, time limits are provided under substantive civil law. When the limitation period has passed and the defendant pleads this fact in its defence, the chances of success for a plaintiff are essentially non-existent.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

The law on time limits is currently under review and the Federal Council has quite recently dispatched a legislative proposal to the Swiss Parliament. At the time of writing, it was unclear when the new law will enter into force. Therefore, the following answers are based on the law in force in June 2017 (in this section, possible amendments according to the legislative proposal are mentioned in square brackets).

Time limits are not ruled consistently. The general provision says that all claims based on a contractual relationship become time-barred after 10 years unless otherwise provided by federal civil law (Article 127 CO) [legislative proposal: the time limit shall be extended to 20 or 30 years in the case of damages and compensation for homicide and personal injury based on a breach of contract]. There are several specific provisions that qualify the general rule. For example, for claims on periodic payments and in employment contracts, a limitation period of five years is applicable (Article 128 CO) [legislative proposal: these specific provisions shall be

omitted]. Claims under chattel sale law on breach of warranty of quality and fitness are generally time-barred two years after delivery of the goods to the buyer (Article 210 CO).

For non-contractual claims, there are two time limits – a relative and an absolute time limit. The relative time limit passes one year after the injured party has knowledge of the damages [legislative proposal: the relative one-year time limit shall be extended to three years]; the absolute time limit ends 10 years after the damage has occurred [legislative proposal in cases of homicide and bodily injury the absolute time limit shall be extended to 20 or 30 years].

The age or condition of the claimant is not relevant to the proceedings; the court has no discretion to deviate from the law on time limits.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

If there is a criminal offence, the time limits applicable in criminal law apply. These are generally longer than time limits under civil law [legislative proposal: for non-contractual claims in such cases the right to claim damages for homicide and bodily injury after the time limit starts running shall be extended to 20 or 30 years].

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Swiss law considers as recoverable those damages that have financial consequences. These include property damages, economic loss (under certain conditions) and bodily injury (physical and/or psychological injury), as well as different kinds of infringements on privacy (e.g. prejudice to a person's reputation). Moreover, in certain situations and under strict conditions, environmental damage is also recognised and recoverable. Secondly, mental damage is a non-pecuniary damage that is also compensable under Swiss law, if it is determined to be serious, the extent of which is determined in each case.

Further, when associations are entitled to claim, claims for monetary compensation are not allowed (see question 2.4 and section 8).

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Damages are recoverable if all legal conditions of liability are met. Under Swiss law, generally, costs regarding preventive measures, such as costs of medical monitoring, put in place before any damage has occurred are not compensable. In the example given above, the cause of liability (malfunction) is not fulfilled and the costs of medical monitoring are not yet recoverable. The Swiss legal system has adopted a Product Security Act ("PSA") to ensure consumers' safety under administrative law. Under the PSA, manufacturers are required to respect the safety obligations before and after a product has been introduced into the market. If a product presents a risk to the health of consumers, authorities may impose different measures against the manufacturer (e.g. selling or exportation prohibition, product recall, product destruction, etc.).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not recoverable under Swiss law. They are contrary to the Swiss legal principles according to which the maximum limit of compensation is the total amount of the damage suffered.

As a common legal remedy for the protection of the creditor's interests, the parties may agree on a contractual penalty as a fixed sum that is triggered in case the debtor is in breach of its contractual obligations. A contract clause penalising one party for non-performance or breach of contract is enforceable under Swiss law. According to Article 161(1) of the Code of Obligations, the enforcement of such a penalty clause requires no proof of any real damage.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

A plaintiff has the right to obtain full compensation in respect of the damages suffered but is not entitled to receive any overcompensation. Under Article 43 CO, the court determines the maximum compensation. This entitles the court to reduce the compensation according to the circumstances and the plaintiff's contributory negligence, if any.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Swiss law requires every plaintiff to justify and prove the amount of any alleged damage. There is no allocation of damages to classes/groups since the damage has to be determined for each person individually.

An exception to this principle is foreseen in the "class action" of the Swiss Merger Act. Article 105 SMA provides compensation for damages for any company member/shareholder who has been disadvantaged during a transaction (merger, split or change of corporate form). As the decision of such a claim has legal effect for all company members/shareholders who have the same legal status as the plaintiff, the damage does not have to be determined individually.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

There are no specific rules with regard to the settlement of claims which can be reached in court or out of court. Most claims are resolved by an out of court agreement. Courts tend to motivate the parties to enter into a settlement agreement in the course of the proceedings, which is ratified by the court and has the same effect as a judgment.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

The costs of the proceedings comprise the court costs and party costs. Each Canton issues its own tariff. According to Article 104

et seq. CPC, the court determines and allocates the court costs *ex officio* to the party that succumbed. Where neither party has won completely, the costs are charged according to the outcome of the proceedings. The court awards the party costs pursuant to rules of court costs in accordance to the cantonal tariffs, provided the reimbursement has been requested by the winning party.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

As class actions are not admissible under Swiss law, general rules are to be applied. Where more than one party proceeds as an ancillary or main party, the court must determine under Article 106 CPC the proportion of costs of each plaintiff. Even though the court retains discretion to determine the costs, it must take into consideration the role of the parties and the amount of their claims, as well as the conduct of the parties throughout the proceedings in order to determine the allocation of costs. Joint and several liabilities may also be ordered by the court.

In the case of a merger, a demerger, or a conversion pursuant to Article 105 SMA (see questions 1.1 and 5.5), the cost of the proceeding shall be borne by the surviving subject.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Article 106 CPC provides that the party that withdraws its action will be charged for the costs. In the case of a simple joinder, the court applies Article 106 CPC to the discontinuing plaintiff in order to charge the costs incurred until that time; the plaintiffs are jointly and severally liable for the costs.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Each Canton issues its own tariff for the court and the party costs. The amount of recoverable costs depends on this tariff. In practice, the prevailing party is prevented from obtaining reimbursement for its entire costs. The court's determination on recoverable costs is generally determined in the final judgment.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

Legal assistance is available only under certain conditions. It includes the appointment of a counsel (if necessary) and various waivers of costs.

7.2 If so, are there any restrictions on the availability of public funding?

A party that requires legal assistance must make an application before or, at least, during the proceedings. To be eligible for legal aid, the applicant should firstly be unable to support the necessary costs for

the proceedings. Secondly, the applicant's case should appear to have a chance of success. The court determines whether these conditions are met, and if so, can award full or a partial legal assistance.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Under Article 12 *lit. e* of the Federal Lawyers Act, it is recognised that Swiss law prohibits funding through contingency fees (*pactum de quota litis*). Despite the prohibition, it is possible to fix attorney fees partially (i.e. on a reasonable basis) according to the result of the proceedings (*pactum de palmario*).

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding is permitted in Switzerland. Legal expenses are often covered by a legal expenses insurance policy; there is commonly a maximum limit to the cover provided. If costs for a plaintiff's proceedings are paid by an insurance company, the plaintiff is not entitled to receive legal assistance.

Furthermore, there is the possibility of process financing in Switzerland. The litigation funders will finance the process and take the risk of litigation in return for a participation in the positive process result.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

Yes. Regarding the procedure, see questions 2.1–2.4.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

An assignment of a claim is possible under conditions provided by Article 164 *et seq.* CO. Not all claims are assignable; pecuniary claims are, however, generally assignable (e.g. claims for damage caused to property or infringement of privacy). Payment can be by way of a fixed price or a share of the damages awarded. The assignment of a claim must comply with general provisions of contract law.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Under Swiss criminal procedure, a claim for the compensation of damages can be claimed within criminal proceedings. However, only a victim of a criminal act can be a party of such proceedings and therefore claim compensation. In other terms, this is not possible for a group or an organisation.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

The CPC encourages extrajudicial and alternative dispute resolution

mechanisms, including arbitration, conciliation and mediation. An Ombudsman is available for specific areas (e.g. banking, telecommunications, insurance, tourism).

8.5 Are statutory compensation schemes available e.g. for small claims?

Statutory compensation schemes are not available.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Generally, remedies are similar to those available in litigation matters before state courts (including injunctive and declaratory relief). Monetary compensation is more commonly claimed and awarded.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims can be brought by residents from other jurisdictions. There are no restrictions in this regard.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

An increasing number of legal scholars have published support for permitting class actions in Switzerland, mainly in the fields of banking and finance law and consumer protection, data protection and gender equality. The Swiss Government had an open ear for these concerns and published a report in July 2013 that analysed the situation in different countries, e.g. the US, and in the European Union, and stated that the collective redress is currently insufficient. Even the Swiss Parliament has come to the conclusion that in specific areas of law, class actions should be introduced, and has now mandated the Swiss Government to issue a draft-proposal for class actions in specific areas of law. The aim is to introduce neither a unilateral plaintiff-friendly nor a non-economic-friendly instrument. Among others, one possible system might be that the courts may select 'test' or 'model' cases which will be binding for similar proceedings.

In June 2014, the Federal Council launched a consultation on the draft of the Federal Financial Services Act. This legislative proposal did not include any class action mechanism as expected beforehand, but only a group settlement proceeding for the amicable settlement of disputes in the event of a large number of claimants (*Verbandsklage* and *Gruppenvergleichsvereinbarung*). Since the group settlement proceeding of the abovementioned draft was met with harsh criticism from various sides during the consultation, the Federal Council decided in March 2015 not to pursue this instrument within the Federal Financial Services Act, but to implement it in the legislative work concerning the revision of the CPC.

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