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Tel.: +41 (0)56 534 48 46
Lorenz.Langer@szier.ch


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## Praxis

# The Preclusive Effect of U.S. Class Action Judgments in Switzerland: Does a Judgment in an Opt-Out Class Action before a U.S. Court Preclude Absent Plaintiff Class Members from (Re)Litigating their Individual Claims in Switzerland?

by **Christian Kölz**[1]

*The Swiss legislator has so far refused to implement any substantial form of representative litigation into national civil procedure law. As an indirect consequence of the absence of domestic group litigation in Switzerland, it is unclear how Swiss courts have to deal with foreign class actions. One crucial question is whether money judgments in foreign class actions are enforceable in Switzerland, i.e. whether a class representative is able to enforce a judgment in favor of the class in this country. Yet foreign class actions also raise the additional issue whether absent class members are precluded from individually litigating their claims, particularly in case the class action was unsuccessful. While, according to the concept of U.S. opt-out class actions, individual claimants are generally barred from suing upon their own causes of action that have already been litigated in the context of a class action, the same issue is so far unresolved in the international context. Absent a relevant statutory provision or case law regarding this question, the opinions in Switzerland differ considerably.*

*In the United States, the issue of preclusion of class members in other countries has attracted increasing interest over the last few years. Acknowledging the risk that plaintiff class members might attempt to (re-)litigate their claims in foreign jurisdictions, U.S. courts have started to take the anticipated recognition/non-recognition of the class action judgment in the plaintiffs' home countries into account when asked to certify an international plaintiff-class.*

*In this article, I will analyze the issues arising when a defendant argues in a Swiss court proceeding that the plaintiff was part of a class which has already litigated its members' claims in the United States and that the plaintiff should therefore be precluded with his individual lawsuit. Then, I will examine how well Switzerland fares with its current provisions on the international level, in particular in light of the mentioned development in U.S. law regarding transnational class actions.*

[1] Dr. iur., LL.M., Attorney-at-law. This article is a modified version of my LL.M. Paper submitted to the Graduate Program at Harvard Law School in May 2011. My studies at Harvard were generously supported by the Janggen-Poehn Foundation, St. Gallen. I would like to thank my supervisor, Professor William B. Rubenstein, for his guidance and Dr. iur. Urs Hoffmann-Nowotny, Attorney-at-law, and lic. iur. Jan Kleiner, for their comments on various drafts. Finally, I am thankful to Professor Morris Ratner for his helpful insights.

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# I. Introduction

## A. The Setting

### 1. An Unsuccessful Class Action in the Unites States and its Potential Impact Abroad

The starting point of my analysis is a class action in the United States pursuant to Fed. R. Civ. P. 23(b)(3)[2] by a plaintiff class against an individual defendant.

[2] Abbreviations follow the The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

In other words, the focus of the article lies on plaintiff class actions before U.S. federal courts, more specifically on class actions in situations where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members". Generally, these class actions are intended to enforce the class members' rights in form of *money damages*.[3]

There are several circumstances in which such "common question class actions" can affect foreign jurisdictions, the most obvious one being that the prevailing class tries to enforce the money judgment abroad.[4] This constellation and the relevant issues are obvious and of particular interest for international companies trying to limit their exposure to U.S. class actions by structuring their business operations. In contrast, the present analysis focuses on a different but equally interesting set-up: If the class is certified but the action then unsuccessfully litigated, for instance if the claim is dismissed with prejudice or the court issues a judgment for the defendant, plaintiff class members might try to avail themselves of a second chance by "relitigating" their claims in a new lawsuit,[5] either in form of an additional class action or by filing an individual complaint.[6] Likewise, relitigation could be attempted in case of a judgment or settlement in favor of the plaintiff class if the class member is not satisfied with the amount awarded to the class or with the damages he has individually recovered under a settlement agreement. Finally, if the class member has failed to claim benefits under the judgment or settlement agreement in a timely manner, he is also in a similar situation as the members of an unsuccessful class action. The inquiry pursued in this essay is thus about *recognition* rather than *enforcement*. In other words, I will focus on the question whether the class action defendant can use a judgment as a *shield* rather than whether the plaintiffs can use it as a *sword*.

3 For an overview of the different types of federal class actions, see 1 William B. Rubenstein et al., Newberg on Class Actions § 1:8 (4th ed. 2002 & Supp. 2010).

4 *See, e.g.*, the illustration by Leandro Perucchi, Anerkennung und Vollstreckung von US class action-Urteilen und -Vergleichen in der Schweiz 3 (2008). *Cf. also* Samuel P. Baumgartner, *Die Anerkennung und Vollstreckung ausländischer Zivilurteile in der Schweiz: Neuere Entwicklungen*, *in* Rechtshilfe und Vollstreckung 111, 113 (Christoph Leuenberger & Jacques-André Guy eds. 2004) [hereinafter Baumgartner, *Anerkennung*]; Daniele Favalli & Joseph M. Matthews, *Recognition and Enforcement of U.S. Class Action Judgments and Settlements in Switzerland*, 2007 SZIER 611, 613–615.

5 To simplify matters, I will refer to the individual class member's attempt to litigate individually in a second forum as "relitigation", bearing in mind that whether the absent class member can be considered as having "litigated" in the first forum is actually in question.

6 In contrast, if the certification is denied, the respective order has no preclusive effect regarding the merits of the case. *See* Perucchi, *supra* note 4, at 152. That said, a valid question is whether the denial of the certification precludes future certification of a similar class. *See, e.g.*, Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. Pa. L. Rev. PENNumbra 203 (2011).

It is a significant characteristic of Rule 23(b)(3)-class actions that the class members can request their exclusion from the class.[7] Other than that, the class members have three choices: First, they can affirmatively "opt in" and participate actively in the class action by entering an appearance through counsel or by intervening formally.[8] Second, they can remain passive, wait for the final disposition of the case and then claim benefits under an eventual judgment or settlement agreement. Third, they can decide to take no action at all. Although usually only few class members request their exclusion from the class,[9] the *opportunity* to do so is of paramount importance. The reason is that—from the U.S. perspective—a class action judgment has the characteristic of binding passive, unnamed class members,[10] meaning that it precludes the class members who have not opted out.[11] Thus, provided that certain procedural requirements were satisfied, the doctrine of claim preclusion guarantees finality for the entire class and prohibits relitigation.[12]

While the preclusion of the passive class members does not seem overly delicate in the national dimension, the same issue becomes complex in an international setting: If relitigation abroad is possible depends on (1) whether the foreign jurisdiction recognizes the U.S. judgment and on (2) whether the class action judgment or settlement is granted preclusive effect according to the applicable conflict of law rules.[13] Only if both questions are answered in the affirmative, the plaintiff class member is barred from relitigating his claim in the court system of the respective country.

## 2. Relitigation in Switzerland or in a Third Jurisdiction

Switzerland seems to lend itself as a forum for a relitigation strategy[14]: On the one hand, it is the corporate domicile of numerous international corporations, such as important banks, insurers and pharmaceutical companies. As a general rule, these corporations can be subjected to civil actions in Switzerland: The

7 Fed. R. Civ. P. 23(c)(2)(B)(v).

8 *See* 5 William B. Rubenstein et al., Newberg on Class Actions § 16:6 (4th ed. 2002 & Supp. 2010).

9 *Id*.

10 *See Hansberry v. Lee*, 311 U.S. 32, 41 (1940) ("[...] the judgment in a class or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.").

11 *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

12 *Id*.

13 *See generally* Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 Notre Dame L. Rev. 313 (2011).

14 *Cf. also* Isabelle Romy, *Class actions américaines et droit international privé Suisse*, 1999 PJA 783, 784.

Swiss authorities at the (corporate) domicile of the defendant have jurisdiction over any civil lawsuit against this person.[15] On the other hand, if no other statutory basis for jurisdiction exists, defendants domiciled in other countries may be subjected to the Swiss courts' jurisdiction through the attachment of property, e.g., real estate or, more importantly, bank accounts in Switzerland[16]: An action to validate the attachment can be filed at the place in Switzerland where the attachment was obtained (Article 4 PILA). While the exercise of the respective "quasi in rem-jurisdiction" has been restricted vis-à-vis other European countries by the Lugano Convention,[17] it has survived the entry into force of this multilateral treaty with respect to defendants domiciled in non-signatory-states, i.e. outside of Europe.

Instead of relitigating in Switzerland, the plaintiff class member could also try to relitigate his claim in a *third jurisdiction*, i.e. in a country other than the United States or Switzerland. In case the respective court affirms jurisdiction and issues a judgment in favor of the plaintiff, the latter might attempt to enforce the judgment in Switzerland, again by attaching assets.[18]

In both cases, several alternatives regarding the *domicile of the plaintiffs* have to be taken into consideration: Depending on how broadly the class is defined in the certification order,[19] the relitigation can be attempted by plaintiffs from the United States, Switzerland or third countries. One question that we need to keep in mind throughout is whether, and to what extent, the different domiciles might require the application of different rules, potentially leading to different results.

[15] Bundesgesetz über das Internationale Privatrecht [IPRG] [Private International Law Act, PILA] Dec. 18, 1987, SR 291, Article 2 (Switz.) (translations of the PILA according to Umbricht Attorneys, *available at* http://www.umbricht.ch/de/news.html). *See also* Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [Lugano Convention] Oct. 30, 2007, SR 0.275.12, Article 2.

[16] *Cf., e.g.,* Samuel P. Baumgartner, *How Well do U.S. Judgments Fare in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173, 219 (2008) [hereinafter Baumgartner, *How Well*].

[17] *See* Stephen V. Berti, *Kommentar zu Art. 4*, *in* Basler Kommentar zum IPRG, para. 10 (Heinrich Honsell et al. eds., 2nd ed. 2007).

[18] If confronted with such an enforcement action, the Swiss court would have to consider whether a lawsuit between the same parties and concerning the same causes of action had already proceeded to judgment in the United States and that judgment can be *recognized* in Switzerland. *See* Article 27(2)(c) PILA; Article 34(4) Lugano Convention.

[19] *See infra* Part I.B.

## B. The Certification of "Transnational" U.S. Class Actions

### 1. U.S. Class Actions Involving Foreigners

Before focusing on the recognition and the preclusive effect of U.S. class action judgments in Switzerland, it is necessary to consider the rules applicable to international class actions in the United States, i.e. the rules for class actions that include foreigners on the plaintiff's or defendant's side. The more international the parties to a lawsuit are, the more relevant the effects of the judgment outside the United States becomes. For example, a U.S. plaintiff (or class representative) is more likely to enforce a judgment abroad against an alien defendant with no assets in the United States than against an American party. Then, the appeal of relitigation outside the United States might be stronger for non-American litigants because of their willingness and capacity to litigate in the courts of their home jurisdictions. Furthermore, it seems more probable that foreign class members will litigate their claims abroad because it is more plausible that they were unaware of the U.S. class action and thus failed to opt out or claim benefits under an eventual settlement. Consequently, the question whether and under what circumstances non-Americans can be part of a U.S. class action is highly relevant to the topic of this article.

With respect to the *defendant's side*, the answer is conventional: Non-U.S. respondents can be sued by means of a U.S. class action if they are subject to the personal jurisdiction of the court. More precisely, a class action against a foreign defendant is admissible if the plaintiff succeeds in showing that the defendant has the required *minimum contacts* with the forum state.[20] As to *foreign plaintiff class members*, however, the situation is more complex: While *personal jurisdiction* over passive class members by virtue of their minimum contacts with the forum is, according to the case law, not required,[21] a "common question class action" may only be maintained if the court finds that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy".[22] This *superiority requirement* has recently attracted considerable attention in the area of international class litigation, bringing up the question whether a class including *foreign members* can be certified. Without

[20] For a case in the securities litigation context involving a Swiss defendant, see *Pinker v. Roche Holdings Ltd.,* 292 F.3d 361 (3d Cir. 2002).

[21] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). For a critical discussion of this proposition with regard to foreign class members, see Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 Fordham L. Rev. 41 (2003).

[22] *See* Fed. R. Civ. P. 23(b)(3).

attempting to provide an exhaustive summary of the respective developments, the following points are worth mentioning[23]:

First, the superiority of the class action has been challenged on the basis that foreign class members are in a position to enforce their claims by commencing actions outside the United States.[24] The argument goes that if a valid alternative remedy is available in the courts of a class member's home jurisdiction, the U.S. class action would not be the superior device of dispute resolution with regard to this class member. This reasoning—sometimes also employed in the forum-non-conveniens-analysis[25]—requires the judge to consider the availability of aggregate and, more specifically, representative litigation at the domicile of the class members in order to rule on the plaintiff's motion for certification of the class.[26]

Second, defendants in international class actions regularly try to cast doubt upon the superiority of the class action by arguing that the foreign class members might relitigate their claims abroad in case the outcome of the class action is unfavorable to the class.[27] Put differently, they anticipate an argument that could be asserted by members of the unsuccessful class when attempting to relitigate, which is that they should not be bound by the U.S. judgment. In response to this argument, the U.S. courts have for some time now been taking the issue of recognizability in other jurisdictions into account when analyzing the superiority requirement: In a 1975 case, *Bersch v. Drexel Firestone*, the United States Court of Appeals for the Second Circuit eliminated all class members that were not residents or citizens of the United States, holding that "while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty".[28]

23 *See generally* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 479.

24 *See id.* at 485–486. *Cf., e.g., In re Royal Dutch/Shell Transport Secs. Litig.*, 522 F. Supp. 2d 712, 723–724 (D.N.J. 2007) (relying on jurisdictional grounds to dismiss the action, but emphasizing "that this holding does not leave the Non-U.S. Purchasers without an alternative recourse to address their alleged injuries" because they can "seek recovery [through a settlement agreement entered into before an Amsterdam court] or through procedures available within their respective jurisdictions".). For a discussion of the Amsterdam settlement from a transnational perspective, see Richard Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1, 37–41 (2009).

25 *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 37 (2007); Nagareda, *supra* note 24, at 35–36.

26 *See, e.g.*, Choi & Silberman, *supra* note 23, at 479, 486–488.

27 *See generally* Wasserman, *supra* note 13, at 314–315.

28 *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975).

A recent trial-court decision concerning a securities class action before the U.S. District Court of the Southern District of New York elaborated on the same question.[29] The plaintiff class included a large number of foreign members. Relying on *Bersch*, the defendant argued that "all foreign plaintiffs must be excluded from the class because it is a 'near certainty' that if this action is dismissed, taken to judgment, or settled, defendants would not be able to assert claim preclusion to bar subsequent actions in the countries in which foreign plaintiffs reside."[30] While, by doing so, the defendant was obviously trying to limit the jurisdiction of the U.S. court over the dispute (and thereby his own exposure to U.S. law), his legal theory was that, in case he should prevail in the action, he must be entitled to benefit from the same level of protection (i.e. finality) as the plaintiff would in the opposite case.

After considering the case law regarding the issue, the judge confirmed that the probability of non-recognition has to be taken into account as one factor in the superiority-analysis. Adapting the *Bersch* test, the court held that "the closer the likelihood of non-recognition is to being a 'near certainty,' the more appropriate it is for the Court to deny certification of foreign claimants".[31] The court then went on to examine the risk of non-recognition in the concerned countries and to apply this sliding scale test. It concluded that the defendant's concerns did not warrant exclusion of the citizens of France, England and the Netherlands because the courts in these countries were likely to give res judicata-effect to the U.S. class action judgment.[32] On the other hand, it found a likelihood of non-recognition in Germany and Austria, raising "weightier issues of fairness". Concluding that the class action for German and Austrian shareholders' did not appear to be necessarily superior to alternative means of adjudicating the dispute, the court decided that the shareholders from these two countries could not be included in the class.[33] In sum, by confirming the relevance of the issue of international preclusion for the superiority analysis and by adopting a new "probability" standard, the court has made clear that the showing of presumptive recognition in the class member's home jurisdictions will remain a serious obstacle to the certification of international class actions.

There is an obvious tension between the two aforementioned approaches, which, on the one hand, make the class certification dependent on the recogni-

[29] *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007).

[30] *Id*. at 92.

[31] *Id*. at 95.

[32] *Id*. at 95–103, 105–107. *But cf. also In re Alstom SA Secs. Litig.*, 253 F.R.D. 266, 282–288 (S.D.N.Y. 2008) ("Plaintiffs have not sufficiently demonstrated that French courts would more likely than not recognize and give preclusive effect to any judgment rendered by this Court involving absent French class members.").

[33] *See In re Vivendi*, 242 F.R.D. at 103–106. For a summary of the inquiry, see Nagareda, *supra* note 24, at 34–35.

tion of the judgment abroad and, on the other hand, take the availability of alternative remedies in the class members' home jurisdictions into account: In case of a foreign jurisdiction that does not provide means of domestic representative litigation and, for the same policy reasons, is hostile to the recognition of U.S. class action judgments, the "alternative remedy" prong would favor certification of the class while the "non-recognition" prong would weigh against it. Conversely, the higher probability of recognition in a class action-friendly jurisdiction could be offset by the availability of an alternative (domestic) remedy in this country.[34] It is difficult to say which aspect should prevail under such circumstances. Be that as it may, it is crucial to be aware that the attitude of other jurisdictions towards representative litigation—expressed either through the adoption/non-adoption of domestic class actions and/or through the recognition/non-recognition of foreign class action judgments—may be critical for the question whether the U.S. court will certify a class action including class members from the respective country.

## 2. Relevance to the Present Analysis

With respect to the topic of this article, the "international recognition"-inquiry conducted by U.S. courts is particularly relevant. While neither authoritative for all U.S. courts[35] nor beyond dispute among scholars,[36] the mentioned precedents illustrate two things: First, the recognition of class action judgments abroad has apparently become an issue that is regularly and fiercely litigated before U.S. courts in the context of international class actions, and the question thus seems to be of increasing practical significance in the landscape of American interna-

[34] *Cf.* Choi & Silberman, *supra* note 23, at 479 ("The answers to these questions may be a double-edged sword that often keeps these foreign plaintiffs out of the class in any case."); Nagareda, *supra* note 24, at 35–36. Interestingly, the *Vivendi* court considered French plans and debates regarding the introduction of securities class actions into the domestic litigation framework to be "strong evidence" for the proposition that foreign class actions would survive the public policy prong of the recognition test, *In re Vivendi*, 242 F.R.D. at 101–102. In other words, the (forthcoming) availability of class actions in the respective foreign jurisdiction was actually used as an argument in favor of certification because of its indirect influence on the preclusion-prong of the test. That said, the finding that representative litigation exists in the class members' home countries could also be invoked to support of the position that the risk of repetitive litigation is real, i.e. *against* certification. *Cf.* Buxbaum, *supra* note 25, at 33.

[35] For an overview of the case law, see Buxbaum, *supra* note 25, at 33–34.

[36] *See* Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 Tul. L. Rev. 1 (2011) (arguing "that U.S. courts should not be in the business of speculating as to the anticipated preclusive effect of their judgments abroad" and suggesting that the courts should rather "avoid the *res judicata* problem altogether by fashioning an opt-in mechanism for foreign claimants").

tional litigation.[37] Second, the inquiry pursued by the U.S. courts has created an interdependence between the recognition of U.S. class action judgments in a foreign jurisdiction and the probability that the jurisdiction will actually be confronted with the recognition/preclusion question: If, for whatever reasons, a country is not expected to recognize the preclusive effect of a U.S. class action judgment, its citizens are less likely to be included as class members in U.S. class actions. In contrast, defining a class so broadly as to include foreign members implies the court's belief that the members will be precluded from relitigating in their home jurisdictions. In other words, the courts' interpretation of the superiority-requirement has—at least partially—shifted the analysis of the international recognition of the U.S. class action judgments to the U.S. courts.[38] Accordingly, disputes about the recognition/preclusion issues *in the foreign courts* have become less likely.

That said, the protection against the risk of relitigation provided for by the U.S. courts still remains incomplete: In particular, it is worth mentioning that the relitigation does not necessarily need to occur at the domicile of the class member. For instance, Swiss courts could, at least theoretically, be seized with individual actions by class members from the United States or third countries against Swiss defendants or defendants domiciled in third countries holding assets in Switzerland.[39] From the U.S. perspective, it would thus seem that preventing class members from relitigating abroad might require to further restrict the certification, arguably in all cases in which the defendant has his (corporate) domicile or assets in a country where *any class member* would not be precluded and could thus relitigate. Assuming that at least one foreign jurisdiction (where the defendant has assets) does not even deem class members *from*

[37] It appears that, as a practical matter, parties regularly try to convince the court with the help of expert declarations that the respective jurisdictions are likely/unlikely to recognize U.S. class action judgments and preclude the absent class members. *Cf.* Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 Erasmus Law Review 31, 40, n.69–70 (2008). For a recent example of such an expert declaration concerning Swiss law, see Declaration of Isabelle Romy in Support of Defendant's Motion to Dismiss the Consolidated Class Action Complaint, In Re UBS AG Sec. Litig., No. 1:07-cv-11225-RJS (S.D.N.Y., 2009) [hereinafter Declaration Romy]. *Cf. also* Declaration of Professor Gabrielle Kaufmann-Kohler, In Re Royal Dutch/Shell Transport Sec. Litig., No. 3:04-cv-00374-JAP-JJH (D.N.J., 2005) [hereinafter Declaration Kaufmann-Kohler]; Declaration of Professor Samuel P. Baumgartner, In Re Royal Dutch/Shell Transport Sec. Litig., No. 2:04-cv-00374-JAP-MCA (D.N.J., 2005) [hereinafter Declaration Baumgartner]; Declaration of Dr. Paul Oberhammer, In Re Royal Ahold Sec. and "Erisa" Litig., No. 1:03-md-01539-CCB (D.Md., 2005) [hereinafter Declaration Oberhammer].

[38] *See* Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 Harv. Int'l L.J. 433, 455–461 (2011). *Cf. also* George A. Bermann, *U.S. Class Actions and the "Global Class"*, 19 Kan. J.L. & Pub. Pol'y 91, 95–101 (2009) (emphasizing the difficulties of the U.S. courts' respective task).

[39] *See supra* Part I.A.2.

*the United States* to be precluded (for example, because it considers class actions to be incompatible with the country's *ordre public*), a U.S. court might actually have to question whether it should certify a *purely national class*. To my knowledge, U.S. courts do not take the argument of finality that far, and it seems indeed questionable whether it is the court's task to provide the defendant with the respective level of protection. It appears that such an attempt would ultimately mean to sacrifice the very idea of an international class action or even the idea of a class action against defendants with international business activities.

## 3. Other Developments

For the sake of completeness, a related development in the U.S. case law should also be mentioned: In a recent landmark decision, *Morrison v. National Australia Bank Ltd.*, regarding purportedly fraudulent financial statements transmitted to shareholders outside the United States, the U.S. Supreme Court held the federal securities legislation inapplicable to transactions on foreign exchanges.[40] While this opinion concerns the jurisdiction to prescribe (i.e. the extraterritorial application of U.S. law) rather than the specifics of class action law, it seems evident that *Morrison* will reduce the number of class actions in U.S. courts involving foreign class members (and defendants), simply because, as a matter of substantive law, it reduces the causes of action based on which U.S. courts can grant relief to foreign investors.[41] However, the holding of the case does not *prohibit* class actions involving foreign class members or foreign defendants and, therefore, should not be expected to prevent the filing of such transnational class actions.[42] In many circumstances, the exceptional features of civil litigation in the United States, such as the financing through contingency fees, the wide scope of discovery, the availability of punitive damages and, finally, fact-finding by lay juries,[43] will probably remain too appealing to many

[40] *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. ___, S. Ct. 2869 (2010). For a summary of the Circuit Court decision, see Choi & Silberman, *supra* note 23, at 472–476.

[41] Therefore, it will at least limit the importance of the so-called "foreign-cubed" security class actions, i.e. class actions by foreign investors against a foreign issuer of securities for losses on a foreign exchange. *See* Wasserman, *supra* note 13, at 313–314. For example, the *Vivendi* court, applying *Morrison*, dismissed claims brought by purchasers of Vivendi's ordinary shares and restricted the class to "all persons from the United States, France, England and the Netherlands who purchased or otherwise acquired American Depositary Shares of Vivendi". *In Re Vivendi Universal, S.A. Sec. Litig.*, No. 1:02-CV-05571 (RJH) (HBP) (S.D.N.Y. Feb. 17, 2011).

[42] *See* Wasserman, *supra* note 13, at 314 (noting that "even after *Morrison*, class counsel are likely to keep filing transnational class actions").

[43] *See, e.g.*, Samuel P. Baumgartner, *Class Actions in der Schweiz?*, *in* Auf dem Weg zu einem einheitlichen Verfahren 111, 114–119 (Benjamin Schindler & Regula Schlauri eds., 2001) [hereinafter

potential plaintiff class counsels to give up even a slim chance of a certified U.S. class action in favor of individual or European-style aggregate litigation.

## C. Swiss Procedural Law and Representative Litigation

We have seen that the availability of domastic representative litigation in foreign jurisdictions can have an impact on the certification of international class actions by U.S. federal courts.[44] Swiss procedural law is known to provide no vehicles similar to U.S.-style class litigation. A fundamental rule in Switzerland has traditionally been that each person can litigate only upon his own legal claims and in his own name.[45] In other words, the plaintiff in a lawsuit can only enforce his own entitlement. While this understanding does not preclude traditional forms of *aggregate litigation*, such as joint actions by a plurality of parties, the Swiss cantonal and federal legislators have manifested a remarkable reluctance against adopting any (general) procedural device of *representative litigation*.[46] Most strikingly, on the occasion of the recent enactment of the Federal Code of Civil Procedure,[47] the issue of group litigation was dealt with in a highly superficial manner.[48] The government's report accompanying the draft for the statutory text briefly mentioned the American class action and dismissed it as an instrument "contrary to the European legal tradition" which "creates more problems than it solves".[49]

Baumgartner, *Schweiz*]; Lucy Gordon-Vrba, Vielparteienprozesse 14–20 (2007); Nagareda, *supra* note 24, at 2.

44 *See supra* Part I.B.

45 *E.g.*, Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 Duke J. Comp. & Int'l L. 369, 372–373 (2001).

46 For comprehensive analyses of multiparty, group and representative litigation in Switzerland, see Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 Nw. J. Int'l L. & Bus. 301 (2007) [hereinafter Baumgartner, *Class Actions*]; Samuel P. Baumgartner, *Group Litigation in Switzerland*, http://www.law.stanford.edu/library/globalclassaction/PDF/Switzerland_National_Report.pdf (last visited Nov. 24, 2011); Samuel P. Baumgartner, *Update on Group Litigation in Switzerland* (December 4, 2009) http://www.globalclassactions.stanford.edu/sites/default/files/documents/Switzerland_update_2009.pdf (last visited Nov. 24, 2011); Lorenz Droese, *Die Sammelklage in den USA und in Europa und die Auswirkungen auf die Rechtslage in der Schweiz*, *in* Haftpflichtprozess 2010 115, 133–146 (Walter Fellmann & Stephan Weber eds., 2010); Gordon-Vrba, *supra* note 43, at 169–214; Karen Topaz Druckman, *Class Actions*, *in* Rapports suisses présentés au XVIII[e] Congrès international de droit comparé 65 (Lukas Heckendorn Urscheler & Annelot Peters eds., 2010).

47 Schweizerische Zivilprozessordnung [Zivilprozessordnung, ZPO] [Code of Civil Procedure, CCP] Dec. 19, 2008, SR 272 (Switz.).

48 *Cf.* Baumgartner, *Class Actions*, *supra* note 46, at 310, 312–313.

49 *See* Botschaft zur Schweizerischen Zivilprozessordung, BBl 7221, 7224, 7290 (2006) (Switz.) (as translated by author).

The political decision not to adopt rules authorizing class actions leaves behind a vivid debate about whether the introduction of group litigation into the framework of Swiss procedural law is desirable.[50] Some of the respective scholarly contributions express a sentiment that the Swiss legislator has at least missed an opportunity to seriously evaluate the potential advantages (and disadvantages) of representative litigation as well as possible models of class actions.[51] Also, it has been emphasized that the decision stands in sharp contrast to the general trend elsewhere in Europe, which is to create devices of group litigation.[52]

# II. The Recognition and Preclusive Effect of U.S. Class Action Judgments in Switzerland

## A. Swiss Private International Law and U.S. Class Action Judgments

### 1. General Considerations

In the absence of a prevailing international treaty between the United States and Switzerland regarding the recognition and enforcement of court decisions in civil matters,[53] the question whether a U.S. judgment can be recognized in Switzerland country is governed by autonomous Swiss law, namely the Articles 25 et seqq. PILA.

Recognition means that the judgment has procedural effects in Switzerland. While collateral attack for lack of jurisdiction and on other statutory grounds remains possible, the recognizable judgment is not subject to review on the

[50] *See., e.g.*, Baumgartner, *Class Actions*, *supra* note 46, at 345–349; Baumgartner, *Schweiz*, *supra* note 43, at 126–28; Martin Bernet & Philipp Groz, *Sammelklagen in Europa?*, 2008 SZZP 75, 85–86; Alfred Bühler, *Es fehlt ein Instrument für den kollektiven Rechtsschutz*, NZZ, June 9, 2010, 21; Droese, *supra* note 46, at 146–47; Daniel Fischer, 5/10 Plädoyer 8 (2010); Gordon-Vrba, *supra* note 43, at 215–263; *cf. also* Leandro Perucchi, *Class Actions für die Schweiz*, 2011 AJP 489, 496–504; Eric Stupp, 5/10 Plädoyer 8 (2010); Walter, *supra* note 45, at 372–374.

[51] *See, e.g.*, Baumgartner, *Class Actions*, *supra* note 46, at 345–349; Bühler, *supra* note 50; Fischer, *supra* note 50, at 10; Paul Oberhammer, *Kommentar zu Art. 89*, *in* Basler Kommentar zur ZPO, para. 2–3 (Karl Spühler et al. eds., 2010). On the other hand, some commentators mention the necessity to leave the issue of representative litigation aside in order not to put the entire project at risk. *See* Bernet & Groz, *supra* note 50, at 86; Perucchi, *supra* note 50, at 496–497.

[52] *See, e.g.,* Paul Oberhammer, *supra* note 51. For an overview of the respective developments in Europe, see Nagareda, *supra* note 24, at 19–25; *cf. also* Droese, *supra* note 46, at 124–133; Gordon-Vrba, *supra* note 43, at 87–112.

[53] *See generally* Adrian Dörig, Anerkennung und Vollstreckung US-amerikanischer Entscheidungen in der Schweiz 25–31 (1998).

merits.[54] In case of a judgment in favor of the defendant, the plaintiff would thus be precluded from relitigating his claim,[55] regardless of whether the foreign court's decision was erroneous. Apart from the recognition of foreign *judgments,* deference is also due to foreign *proceedings* before a judgment is rendered: If the parties are engaged in a proceeding regarding the same dispute before a foreign court that can be expected to issue a decision recognizable in Switzerland within a reasonable time, the Swiss court has to stay its proceeding.[56] Then, foreign *court settlements* are generally granted the same effect provided that they are considered equivalent to judgments in the jurisdiction in which the settlement was entered.[57]

## 2. The Problem of Foreign Class Actions

When a court has to decide about the recognition of a foreign class action judgment, it faces a number of difficult issues that arise from the unique set-up of representative litigation. In a class action, the class representative litigates claims on behalf of absent and passive "plaintiffs", who did not request the litigation and, in particular, did not (at least actively) submit their claims to the court's jurisdiction.

As we have seen, this kind of procedural framework is unknown in Swiss domestic litigation. Considering, furthermore, the Swiss private international law's general approach to understand foreign law and proceedings in terms and under the framework of the Swiss legal system,[58] the absence of provisions dealing with foreign representative litigation does not come as a surprise. Thus, the relevant issues have to be dealt with in the light of norms that are—to say the least—not tailored to them.[59] To my knowledge, the respective questions regarding claim preclusion through a foreign class action are yet to be answered by a Swiss court.[60] In the following parts of the article, I will address the most pivotal issues and evaluate how they should be dealt with under the current Swiss provisions.[61]

54 Article 27(3) PILA.

55 Stephen V. Berti & Robert K. Däppen, *Kommentar zu Art. 25*, *in* Basler Kommentar zum IPRG, *supra* note 17, para. 49; Gerhard Walter, Internationales Zivilprozessrecht der Schweiz 380–381 (4th ed. 2007). *See also infra* Part II.E.

56 Article 9(1) PILA.

57 *See* Article 30 PILA.

58 Most notably, the PILA generally reflects the structure of the Swiss codifications of substantive law. *See, e.g.,* Anton K. Schnyder, Das neue IPR-Gesetz 5–6 (2nd ed. 1990).

59 *Cf. generally* Stiggelbout, *supra* note 38, at 479–495 (exploring the "dilemma of having defendant-based rules and a plaintiff-based problem").

60 *See also* Perucchi, *supra* note 4, at 199.

61 *See infra* Parts II.B, II.C, II.D, II.E.

## B. Jurisdiction over Absent Plaintiff Class Members?

### 1. General Considerations

Swiss courts have to examine according to Switzerland's autonomous procedural law whether the U.S. court is regarded as one of international jurisdiction over the parties and the dispute. In other words, the inquiry is whether the foreign court had jurisdiction *from the Swiss perspective*. It is neither necessary nor sufficient for the purpose of recognition that the foreign court had jurisdiction according to the local law.[62] Rather, the foreign court's jurisdiction must comply with the Swiss standards of "indirect jurisdiction", consisting of a set of norms specifically designed to assess the foreign court's exercise of jurisdiction *ratione loci*. The respective provisions are set forth in Article 26 of the PILA as well as in the specific rules contained in the following Chapters of the same statute.

In a conventional lawsuit, the jurisdictional inquiry comes to an end if the defendant had his domicile within the forum state.[63] Alternatively, the jurisdiction is also unobjectionable if the defendant has made a general appearance and thereby accepted the foreign court's jurisdiction.[64]

In contrast, if the defendant has his domicile in a country other than the forum state and has not submitted to the court's jurisdiction, the situation is different in the sense that the court's power to hear the case needs a specific statutory basis. For the present context, the most important provision is Article 149 PILA, applicable to, inter alia, contractual and tort claims. According to the rules set forth in this Article, the jurisdictional requirement would for example be met if a judgment relating to a contractual obligation "was rendered in the State of performance of the characteristic obligation" or if the dispute relating to a tort was adjudicated "at the place of the act or the resultant injury", in both cases under the condition that the defendant was not domiciled in Switzerland.[65]

### 2. The Problem

Considering these provisions in light of representative litigation, there is one obvious problem: The statutory requirements regarding jurisdiction are focused on the defendant of the foreign action. In other words, the rules answer the

[62] Stephen V. Berti & Robert K. Däppen, *Kommentar zu Art. 26*, *in* Basler Kommentar zum IPRG, *supra* note 17, para. 1; Walter, *supra* note 55, at 391. *But cf.* Favalli & Matthews, *supra* note 4, at 617.

[63] Article 26(a) PILA.

[64] Article 26(b) PILA.

[65] Article 149(2)(a)+(f) PILA.

question whether and to what extent it was fair to compel the *defendant* of the action to litigate in the forum. That, however, is evidently not the issue we have to resolve when we ask whether a member of a class on the plaintiff's side is precluded from relitigating his individual claim because of the previous foreign class action. Rather, we are concerned with the issue *whether the absent plaintiff class member is protected against the court's exercise of jurisdiction*.

In a conventional lawsuit, the *plaintiff* decides in which court (and at what time) to commence his action. In contrast, the defendant *may not choose the forum*. As a result, if the plaintiff prevails, an important procedural safeguard in international civil litigation consists in the defendant's ability to collaterally attack the judgment in an enforcement action abroad by invoking the lack of jurisdiction. In contrast, if the lawsuit results in a judgment in favor of the defendant, the plaintiff must be barred from relitigating the claim elsewhere. The preclusive effect of the judgment protects the defendant against repetitive litigation. Since the plaintiff has consented to the court's jurisdiction by filing the lawsuit, his jurisdictional objection would fail.[66] In the context of a class action, however, the passive class members have not decided to commence an action in a specific forum; it is likely that they were unaware of the class action and thus have not even chosen to litigate their claims at all. Obviously, this problem is unknown to the Swiss procedural law (focused on individual parties of a bipolar proceeding) and has, therefore, not been considered by the Swiss legislator when he designed the jurisdictional rules.[67]

## 3. Analysis

The unusual setting of a foreign plaintiff class action was discussed by Isabelle Romy in her analysis of U.S. class actions and Swiss Private International Law. Examining the situation arising after a judgment in favor of the defendant, she perceives the problem that, under the traditional Swiss preclusion doctrine, plaintiff class members would not be considered as "parties" to the foreign proceeding. Consequently, she argues, they would remain free to relitigate.[68] In order to avoid such a result, Romy suggests that the passive members should nonetheless be bound by the judgment provided that—in addition to other requirements—the court had *jurisdiction* over them. More precisely, the Swiss

[66] This proposition seems to be so obvious that it is rarely mentioned in the doctrine of international civil litigation. For a respective statement under German law, see Herbert Roth, *Kommentar zu § 328*, *in* 5 Stein/Jonas Kommentar zur Zivilprozessordnung, para. 85 (22d ed. 2006).

[67] *Cf.* Declaration Oberhammer, *supra* note 37, at 5.

[68] Concerning the question whether the passive class member qualifies as a party, *see infra* Part II.C.1.

recognition court should apply the defendant-based rules of jurisdiction *ratione loci* by analogy to the passive class members.[69]

To be clear, the idea is not to allow an absent class member to counter the res judicata objection before a Swiss court by arguing that the U.S. court had no jurisdiction *over the defendant*. In the absence of any statutory restriction regarding the right to invoke the lack of the court's jurisdiction[70] and given that—unlike a conventional plaintiff—the passive plaintiff class member did not choose the forum, one might, at first sight, be tempted to grant the passive class member this defense in the relitigation-stage. However, it would seem odd to deny the preclusive effect of the judgment to the defendant only because *his own* jurisdictional protection was insufficient from the Swiss perspective. Such an approach to protect the passive class member from preclusion would fail because it was obviously not the legislator's intention to protect one party (the *passive plaintiff class member*, i.e. the party on behalf of whom damages are claimed) through the application of jurisdictional rules protecting the other party (the *defendant*).

Rather, Romy's remarkable suggestion is to inquire whether the absent class members should be protected from preclusion by the *analogous application* of the conventional jurisdictional rules. In other words, the idea is to grant the passive class member the right to invoke defendant-based jurisdictional rules *as if they were defendants*. As a result, class members domiciled in the U.S. would generally be bound by the judgment pursuant to Article 149(1)(a) PILA. In contrast, at least passive Swiss class members would keep their right to litigate individually: If they were defendants, they could object to the U.S. court's jurisdiction according to Article 149(2)(a) and (f) PILA, which both restrict the jurisdiction (ordinarily given if the tort or contractual dispute has arisen out of the contacts to the United States) in case the defendant is domiciled in Switzerland. Therefore, they would not be precluded but remain free to relitigate their claims in Switzerland. With respect to passive class members domiciled in *third countries*, the defendant would be entitled to invoke the court's indirect jurisdiction based on the statutory rules for alien defendants.[71] In sum, the proposition is to use jurisdictional rules tailored to the defendant (e.g., "jurisdiction requires defendant's domicile in the forum state") and to apply them by analogy to a person on the plaintiff's side (the passive plaintiff class member).[72]

[69] Romy, *supra* note 14, at 793. *See also* Stiggelbout, *supra* note 38, at 480–487 (analyzing the similar "flip" thesis that was developed for the English law).

[70] See, e.g., the wording of Article 26 PILA.

[71] *See* Perucchi, *supra* note 4, at 124–125.

[72] If the plaintiff class member has actively participated in the class action by entering an appearance or intervening or if she has claimed benefits under a settlement, she would generally not be able to object to the court's jurisdiction. Regarding the notice requirement, *cf. infra* Part II.D.1.

Romy argues that the analogy is justified by the fact that the class members did not initiate the litigation and thus are subjected to an undesired court proceeding.[73] In other words, the jurisdictional rules are applied in order to protect the party that has been "dragged into court", which, at first sight, might seem consistent with the main objectives behind the respective provisions.[74] Yet, however appealing the idea of restricting preclusion to passive members who *could have been subjected to the court's jurisdiction as defendants* may be, it seems questionable whether current Swiss law actually allows for such a deviation from the ordinary rules on jurisdiction.

There are several substantive concerns weighing against this reverse application of defendant-based rules to the plaintiff class members: First, we need to recall that the class member's case is litigated by the class representative, meaning that if the member wishes to have his cause pleaded and his claim enforced, he does not need to appear in court. In Justice Rehnquist's words (on behalf of the U.S. Supreme Court), "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection".[75] Hence, being member of a foreign plaintiff class is not a burden that can be compared (or even equated) to the one a party required to litigate in a foreign forum bears.[76] Second (and related to the first point), if the member remains passive, he is not subject to the same kind of default rules as an absent defendant: The court will issue a judgment against the latter, while the former's claim is simply included in the class.[77] Most importantly, then, the class member has the right to opt out of the class, meaning that a mere declaration that he does not wish to be part of the class is sufficient to spare him any further involvement in the class action. Provided that the class member has received valid notice of the class action,[78] the burden of filing a request for exclusion seems rather insignificant.

## 4. Conclusion

In light of these arguments, it is hard to see why a court should take a measure that would arguably be irreconcilable with the unambiguous framework of the PILA, providing only for a defendant-based jurisdictional test.[79] Even if one

[73] Romy, *supra* note 14, at 793.

[74] *Cf. generally* Teddy S. Stojan, Die Anerkennung und Vollstreckung ausländischer Zivilurteile in Handelssachen 101 (1986).

[75] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

[76] *But cf.* Bassett, *supra* note 21, at 82–83.

[77] *Cf. generally* Stiggelbout, *supra* note 38, at 484–485 (arguing that a class member as non-party has less to lose than a party to a foreign proceeding).

[78] *See* discussion *infra* Part II.D.

[79] *Cf.* Perucchi, *supra* note 4, at 126.

considers a jurisdictional protection for the absent plaintiff class members desirable, the important differences between a class member and a defendant raise the question whether, instead of applying the defendant-based rules to the plaintiff class member (with the result that passive class members domiciled in Switzerland are generally not bound by the judgment), it would not rather be appropriate to create new, separate rules specifically designed to meet the absent class member's interests.[80] In the absence of any such statutory provisions, however, the default rule should be that no jurisdiction over the passive plaintiff class member is required for the recognition of a class action judgment in favor of the defendant. In other words, if a plaintiff class member tries to relitigate his claim, he should not be able to invoke jurisdictional grounds to overcome the defense of res judicata.

Obviously, this does not yet answer the question whether the individual class member is bound by the judgment. In particular, the court still needs to analyze whether the judgment complies with the requirements regarding public policy and in particular notice and whether the preclusive effect of the class action actually extends to the individual class member. These questions do not concern jurisdiction *stricto sensu* and will thus be addressed separately.

## C. Public Policy *(Ordre Public)*

### 1. Is the Plaintiff Class Member a Party?

The Swiss private international law rules prohibit the recognition and enforcement of foreign judgments if the recognition would "be manifestly incompatible with Swiss public policy."[81] While this provision expresses the concept of *substantive ordre public,*[82] para. 2 lit. b of the same Article explicitly mentions the *violation of fundamental principles of Swiss procedural law* (i.e. of *procedural ordre public*) as a separate ground for refusal of recognition. Generally, neither the substantive nor the procedural public policy exception gives the courts the discretion to refuse the enforcement merely because the Swiss legal system does not provide for the same or a similar cause of action or procedural

[80] *See* Declaration Baumgartner, *supra* note 37, at 16–17 (questioning whether the analogous application of the jurisdictional provisions "should extend to the absolute protection of defendants domiciled in Switzerland from having to respond to proceedings abroad"). *Cf. also* Stiggelbout, *supra* note 38, at 480 (describing the similar suggestion by English commentators as an "attempt to place square pegs in round holes").

[81] Article 27(1) PILA.

[82] Stephen V. Berti & Robert K. Däppen, *Kommentar zu Art. 27*, *in* Basler Kommentar zum IPRG, *supra* note 17, para. 5.

device.[83] Nevertheless, the procedural *ordre public*-proviso is likely to be invoked as a ground for refusal of the recognition and enforcement of U.S. judgments in class actions.

The most crucial issue regarding judgments *in favor of the defendant* is whether Swiss procedural public policy allows for the U.S. judgment to bind unnamed, passive members of a plaintiff class. Put simply, the question that needs to be answered is whether it is permissible under Swiss procedural public policy standards that a plaintiff class member is deprived of her claim while remaining completely passive: Neither has she filed a complaint nor has she intervened or made an appearance in the class action.[84]

At this point of the inquiry, the difference between civil litigation in Switzerland and in the United States surfaces to the full extent. While the Swiss understanding of a civil action is that of one individualized plaintiff actively enforcing his own right against an individualized defendant,[85] the concept of representative litigation, in order to produce its full advantage, requires that at least a minimal number of passive members are included in the lawsuit. The U.S. civil procedural system acknowledges this necessity by allowing opt-out class actions, meaning that the passive members are represented by the class representatives and ultimately bound by the outcome of the litigation.

The respective issue can be understood as regarding the doctrine of res judicata, raising the question whether the passive class member is a *party* to the class action and, as such, precluded from relitigating the claim.[86] Much has been made of the fact that passive class members are not named in the proceeding. From this circumstance and from the absence of procedural autonomy for the individual class member, it has been inferred that these passive class members do not qualify as parties.[87] The ramification of this approach would be that all passive class members (and not only those domiciled in Switzerland) could relitigate their claims abroad.

Yet, as important as the formal nomination of the party may be under Swiss domestic litigation standards, it is hard to perceive a compelling reason why the effects of a foreign judgment should depend on whether the class members are formally named in the court proceeding. Since the respective concerns can be adequately dealt with under the aspect of public policy, it seems appropriate to limit the analysis and merely ask whether, according to the foreign procedural

[83] *Id.*; with regard to class actions, see Dörig, *supra* note 53, at 443.

[84] For an overview of the possible ways in which class members can participate in the class action, see *supra* Part I.A.1.

[85] *See supra* Part I.C.

[86] *Cf.* Romy, *supra* note 14, at 792-94.

[87] *Id.* at 792–793. *Cf. also* Declaration Kaufmann-Kohler, *supra* note 37, at 8, 27–28; Declaration Oberhammer, *supra* note 37, at 12.

law permitting the representative litigation, the proceeding includes absent members and eventually adjudicates their individual claims. Put differently, I believe that Swiss courts should defer to the *lex fori* under which the representative action was conducted.

In U.S. class action doctrine, absent members have "party status for limited purposes", including the purpose "of being subject to a binding judgment".[88] In other words, an opt-out class action is understood to be the final adjudication of the absent members' claims, which is why—as we will see—the class members are entitled to the best practicable notice.[89] In my view, this finding answers the question whether these class members are parties under Swiss conflict of law cules and should end the inquiry.[90] Hence, it seems that the problem of the class members' complete absence from the court proceeding is best framed as a question of public policy.

## 2. Binding the Absent Class Member?

Procedural public policy is violated if a decision was rendered in a manner that is inconsistent with "fundamental principles of Swiss procedural law, in particular if one party can show that it was denied the right to be heard".[91] The question is thus whether the fact that the claim was litigated without the class member's explicit consent violates such fundamental principles. In this context, it is worth mentioning that even the European countries that—unlike Switzerland—have recently approved one form of representative litigation or another remain averse to opt-out systems and reveal "a deep reluctance to bind those who neither commence litigation in their own name nor affirmatively choose to opt in".[92]

As mentioned above, the Swiss legislator has so far refused to introduce a general device of representative litigation into the framework of Swiss civil procedural law, meaning that a party can only sue upon his own cause of action.[93] Against this backdrop, it is no surprise that the preclusion through the class member's passive behavior has been disapproved on public policy grounds: In her recent declaration *In Re UBS AG Securities Litigation*, Professor Romy mentioned the "fundamental principle of Swiss *procedural* law that a claim and

88 *See generally* 1 William B. Rubenstein et al., *supra* note 3, at § 1:4.

89 *See infra* Part II.D.2.

90 *Cf. also* Perucchi, *supra* note 4, at 127–32 (requiring that the class member actually received the notice in order to qualify her as a party).

91 Article 27(2)(b) PILA.

92 Wasserman, *supra* note 13, at 380. *See also* Bernet & Groz, *supra* note 50, at 86.

93 *See supra* Part I.C.

the right to vindicate said claim in court may not be dissociated".[94] After emphasizing Switzerland's "traditional model of a process opposing two or more parties who vindicate their own rights", she concluded that "binding passive class members in Switzerland without their consent violates fundamental principles of Swiss procedural law."[95]

While the concern for the absent class members' rights is certainly understandable, I believe that this opinion falls prey to an overbroad reading of the principle of party disposition *("Dispositionsmaxime").* Obviously, nobody will deny that the right of the individual parties to delimit the subject matter of a lawsuit is a fundamental rule of civil procedure law in Switzerland.[96] However, it can by no means be inferred from the respective proposition that it must always be upon the claimant to decide whether, where and when to litigate his claim.[97] Most notably, Article 88 of the CCP entitles private parties to sue for a declaratory judgment, in particular for a declaration that a particular right or claim does not exist (e.g., a declaration of non-liability).[98] Consequently, the party whose liability is in controversy can—where the specific requirements are met—commence an action against the person who is claiming an entitlement in order to determine whether he is liable and, thereby, force the defendant to assert his claim in court. If the defendant (whose cause of action is the subject matter of the dispute) fails to respond, he will eventually be precluded, i.e. finality is achieved as if he had commenced the action himself and unsuccessfully litigated.[99] In view of this well-established procedural device, it is hard to see why the concept of an opt-out class action should be irreconcilable with Swiss procedural public policy: The class member has even the opportunity to choose (by submitting a request for exclusion) whether he wishes to make use of the representative action provided for by the U.S. law or whether he prefers to enforce his claim individually.[100]

Similarly, the absent class member's *right to be heard* does not seem to be violated by the set-up of a U.S. class action, provided that the class member was duly notified about the lawsuit involving his claim.[101] While it is true that the

94 *See* Declaration Romy, *supra* note 37, at 8. *Cf. also* Declaration Oberhammer, *supra* note 37, at 9–11.

95 *See* Declaration Romy, *supra* note 37, at 8–9. *Cf. also* Romy, *supra* note 14, at 797.

96 *See* Article 58(1) CCP.

97 *See also* Dörig, *supra* note 53, at 444; *cf.* Perucchi, *supra* note 4, at 117.

98 *See generally* Balthasar Bessenich & Lukas Bopp, *Kommentar zu Art. 88*, *in* Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), para. 9–10 (Thomas Sutter-Somm et al. eds., 2010).

99 *Cf.* Article 147 CCP.

100 *See also* Favalli & Matthews, *supra* note 4, at 631. *But cf.* Declaration Kaufmann-Kohler, *supra* note 37, at 19–20 ("[…] it is very likely that a Swiss court would consider that consent would have to be explicit.").

101 *See infra* Part II.D.

individual member's influence on the proceeding in a U.S. class action is limited and cannot be compared to a litigant's control over his individual lawsuit, the respective restrictions should be understood in light of the important overall goal of Rule 23(b)(3) class actions for damages, which is to provide the—individually weak—claimants with an effective means of enforcing their claims.[102] This is why, in order to certify the class, the U.S. court has to make sure that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and that "the representative parties will fairly and adequately protect the interests of the class".[103] In light of this judicial control of the representation and the court's necessary involvement through the approval of an eventual settlement,[104] the passive member's interests should generally be in good hands with the class representatives. In this context, it is also worth recalling that, if the representation was not adequate, the U.S. class action doctrine permits a collateral attack on the judgment, meaning that the judgment is not binding on the class members.[105] There is no reason why this safeguard should not be available before foreign courts, i.e. on the occasion of recognition in Switzerland.[106] Then, most importantly, the class member keeps the opportunity to opt out of the class action, which—assuming that she has received valid notice—means that she is in a position to decide whether she wishes to be represented and have her claim litigated in the class action. In my view, this option should in itself satisfy the right to be heard under Swiss public policy standards.[107]

Therefore, provided that the class member has received valid notice, the mere procedural set-up of the class action should not bar the recognition of the judgment on public policy grounds.[108]

[102] *Cf. generally Amchem Products, Inc., et al. v. Windsor et al.*, 521 U.S. 591, 617 (1997).

[103] Fed. R. Civ. P. 23(a)(3)+(4).

[104] *See* Fed. R. Civ. P. 23(e).

[105] *Cf., e.g., Hansberry v. Lee*, 311 U.S. 32, 43–46 (1940).

[106] *See also* Favalli & Matthews, *supra* note 4, at 633.

[107] *Cf. also* Declaration Baumgartner, *supra* note 37, at 17–18.

[108] To be sure, it remains possible that the judgment violates Swiss procedural public policy in other respects. However, the fact that a jury verdict (in particular a general verdict) does not reproduce the jury's reasoning is generally not considered a violation of public policy. *Cf.* Baumgartner, *How Well*, *supra* note 16, at 222; Dörig, *supra* note 53, at 438.

## D. The Crucial Question: Service Abroad to Foreign Class Members?

### 1. Do the Prerequisites Under Swiss Law Apply to Plaintiff Class Members?

According to Article 27(2)(a) PILA, a foreign decision shall not be recognized if a party "was not duly summoned, either according to the law of his domicile or according to the law of his place of habitual residence, unless he had proceeded to the merits without contesting jurisdiction." This specific provision of procedural public policy refers to the service of the first document marking the beginning of the court proceeding.[109] For example, it requires the formal delivery of the initial pleading such as the complaint. The provision's characteristic of most interest to us here is that, unlike the jurisdictional rules examined above,[110] it does not constrain the scope of the inquiry to the *defendant*. Rather, according to the statutory text, the lack of valid notice can be invoked by the *party ("Partei")* opposing to the recognition of the judgment.[111] It seems evident that, under this provision, any *party* that has not commenced the action should be entitled to the same kind of notice: While it is certainly true that the notice requirement typically applies to *defendants*,[112] no reason is apparent why it should not apply to a natural plaintiff who has not filed the lawsuit and—without proper notice—would not know that his claim is about to be litigated. Then, it is also difficult to see why, from the Swiss perspective, the notice requirement would depend on whether the absent member is formally listed as a party to the lawsuit. If the member's cause of action is going to be adjudicated in the proceeding,[113] it seems appropriate to grant him the same party-status for the purpose of notice.[114] In sum, the only decisive factor should be whether the class member has commenced the action. If he did not—which, by definition, is true for a passive class member—he needs to be formally informed about the fact that a lawsuit pertaining to his legal rights and obligations is pending.

This result takes account of the class members' interests: Of course, it is true that plaintiff class members in an opt-out class action bear no risk to be subject to a default judgment in case they do not appear in court[115] and that they gener-

[109] Paul Volken, *Kommentar zu Art. 27*, *in* Zürcher Kommentar zum IPRG, para. 76 (Andreas Girsberger et al. eds., 2nd ed. 2004).

[110] *See supra* Part II.B.

[111] See *also* Declaration Kaufmann-Kohler, *supra* note 37, at 15.

[112] *See, e.g.*, Volken, *supra* note 109, at para. 74 (focusing on the protection of the defendant).

[113] *Cf. infra* Part II.E.

[114] Regarding the question whether it is appropriate to treat the class members as parties, see discussion *supra* Part II.C.1.

[115] *See generally* Perucchi, *supra* note 4, at 88.

ally have less to lose than an individual party. This, as we have seen, makes the foreign court's exercise of jurisdiction over a class member appear tolerable even though the latter might not have any relevant contacts with the forum state.[116] Nevertheless, the passive class members' interest to know that they need to decide whether or not to submit a request for exclusion still seems considerable: The class members must evaluate whether they wish to have their claims adjudicated by the class representatives and the class counsels in a foreign forum or whether they prefer to litigate individually, maybe in a domestic court and under procedural rules that could be favorable to them. It is even conceivable that class members have already been preparing for individual litigation of their claims when the U.S. class action is commenced. If they fail to file a request for exclusion in time, the ramification is that they would be precluded from continuing this attempt. It is worth mentioning that in light of these severe consequences, the U.S. procedural law itself requires that the class members receive *notice*.[117] In other words, U.S. law itself recognizes that plaintiff class members *do need* to be actively informed about the fact that their entitlements are about to be subjected to group litigation. Against this background, no reason is apparent why the defense of lacking (or insufficient) notice should be denied to the absent plaintiff class members from the Swiss court's perspective.[118] Rather, it seems appropriate for recognition purposes to treat the class members in the same way as a defendant and to require notice that conforms to the same rules.[119]

On the other hand, it seems obvious that the notification provision is not a crucial issue for *active class members*. If the class member actively participates in the class action by entering an appearance through counsel or by intervening formally in order to support the class action,[120] he will be considered as having proceeded to the merits without contesting jurisdiction and the notification requirement becomes obsolete: Unlike a defendant, who can have good reasons to oppose to jurisdiction and at the same time plead on the merits of the case, a plaintiff class member is in a position to decide at the outset of the litigation whether she wishes to pursue the class litigation (more precisely, have it pursued by the representative) or whether she prefers to reserve her claim by opting out of the class action. If she chooses to participate, her decision should be binding. The same result seems appropriate for class members who have

116 *See supra* Part II.B.

117 *See infra* Part II.D.2.

118 *Cf.* Romy, *supra* note 14, at 793–794. *But see also* Perucchi, *supra* note 4, at 89.

119 *But cf. Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 104 (S.D.N.Y. 2007) (stating that the formal delivery requirement under German law only applies to the "initial pleading to an *opposing* party, i.e., the defendant").

120 *See supra* Part I.A.1.

claimed benefits under a settlement or judgment in the class action proceeding and, therefore, should not be allowed to invoke in the recognition stage that they were not duly notified of the pending class action.

In sum, from the Swiss recognition perspective, the notice directed to a *passive class member* has to be in compliance with the notice requirements of the law of the member's domicile (alternatively his place of habitual residence). In particular, the passive Swiss class member who tries to relitigate his claim can overcome the respondent's res judicata defense by establishing that he was not duly summoned according to Swiss standards.

## 2. Class Action Notice

The key provision for notice in U.S. class actions is Fed. R. Civ. P. 23(2)(B), which requires that the court direct "to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort". Compliance with this requirement is necessary in order for the judgment to bind the class members who have not opted out.[121]

That said, the requirements under U.S. law for notice to class members are less strict than the rules applicable to the service of summons and complaints to individual parties.[122] First, delivery via mail is generally sufficient.[123] Second, if (but only if) not all class members can be identified through reasonable effort, it is permissible to provide the notice through publication.[124] In these cases, the notice consists of a public announcement requesting persons falling into a certain category (e.g., purchasers of a specific product) to decide whether they wish to participate in or opt out of the class action. In contrast, if the class members can be identified, individual notice to each class member is possible and thus required, even if the costs may be prohibitively high.[125] For example, the obligation to individualize and notify the members might be relevant in case of a securities class action (if the shareholders' names are known from the share register) or in case of a representative action on behalf of a class of consumers (whose names are registered in the company's records).

[121] *Cf.* Fed. R. Civ. P. 23(c)(3)(B).

[122] *See, e.g.*, Bassett, *supra* note 21, at 80–81.

[123] *See id.* at 64.

[124] *See* 7AA Charles A. Wright et al., Federal Practice and Procedure § 1786–1788 (3nd ed. 2005) (providing an overview of the mechanics of giving notice); 3 William B. Rubenstein et al., Newberg on Class Actions § 8:34 (4th ed. 2002 & Supp. 2010).

[125] *Cf. Eisen v. Carlisle & Jacquelin* 417 U.S. 156, 173–177 (1974).

## 3. Notice to Class Members in Switzerland

While notice via mail or—if the respective requirements are met—through publication on the Internet and/or in local newspapers are thus sufficient under U.S. standards and hence as far as U.S. class members are concerned, the inquiry from the Swiss perspective is a different one. In particular, one has to bear in mind the following basic principles: In Switzerland, service of process is considered a sovereign act that only *Swiss authorities* are allowed to conduct within the country. It would be improper for anyone else to direct notice to persons in Switzerland, irrespective of whether the act is carried out by a foreign court or by a private party (e.g., a class counsel).[126] More precisely, the service of foreign court documents in Switzerland must be accomplished in accordance with the applicable international treaty, i.e. the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (to which both Switzerland and the United States are signatories).[127] The relevant provisions of said Convention set forth the rule that service has to be initiated through an official request addressed to the Swiss central authority.[128] This requirement may not be circumvented by mailing the notice directly to the class members or by unofficial publication in local newspapers or on the Internet.[129] Once a request to the central authority has been submitted, the authority proceeds either according to the forms provided for by its internal law or "by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed".[130] In this context, it should be mentioned that, if a U.S. court requests notice to the Swiss class members, the Swiss authorities may not refuse to comply with the request merely because the internal law "would not permit the action upon which the application is based", i.e. because class actions are unknown in Switzerland.[131]

The most crucial issue with regard to Swiss class members is whether Switzerland's procedural order requires *individual notice* in all cases or whether it is possible to comply with the Swiss notice standards through *publication*, for example in local newspapers. When answering this question, one commentator

[126] *See generally* Dörig, *supra* note 53, at 380–381.

[127] Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, SR 0.274.131 [hereinafter Hague Service Convention]. *See* Dörig, *supra* note 53, at 387; Volken, *supra* note 109, at para. 86. *Cf. also* Martin Bernet & Nathalie Voser, *Praktische Fragen im Zusammenhang mit Anerkennung und Vollstreckung ausländischer Urteile nach IPRG*, 2000 SZIER 437, at 443–449.

[128] *See* Articles 2–3 Hague Service Convention.

[129] Declaration Romy, *supra* note 37, at 7–8. For an example of such a notice to an international class provided through publication, see Perucchi, *supra* note 4, at 208.

[130] Article 5 Hague Service Convention.

[131] Article 13(2) Hague Service Convention. *Cf.* Romy, *supra* note 14, at 800.

observed that, under certain circumstances, the Code of Civil Procedure allows notice through publication in the Swiss Official Gazette of Commerce or in the Official Gazette of the Canton.[132]

While it is true that such an exception exists, it appears that the scope for service through publication under Swiss civil procedure law is narrower than the use of publication in U.S. class action practice: In Switzerland, publication as a substitute for individual notice is only admissible in case the place of residence of the person to be notified is not known or if service is impossible or would require extraordinary efforts.[133] These exceptions intend to mitigate the situation for the requesting party (in general the plaintiff) in case the service to the opposing party (the defendant) cannot reasonably be carried out.[134] For example, this is the case if no address for service is known. In all cases, however, the recipient is *individualized*. In contrast, it would require a stretch to argue that *unknown whereabouts of a party* can be dealt with in the same way as an *unknown party*.[135] The Swiss procedural framework, tailored to the traditional dispute between two (or a plurality of) individual parties, suggests quite the contrary answer, which is that the notifying authority needs to individualize every single addressee. Thus, absent a specific statutory provision stating an exception for foreign class actions, it is at least questionable whether a Swiss court is authorized to assist a foreign court proceeding that abstains from individualizing the parties and provides notice by means of a publication directed to a category of unnamed persons.

*A fortiori*, if the notice shall be considered *valid for recognition purposes* under Article 27(2)(a) PILA, it is required that the class members domiciled in Switzerland are individualized and—absent a serious impediment—individually served with process. In contrast, a foreign court proceeding that deprives Swiss claimants of their right to decide about the fate of their individual entitlements only because they did not see (or pay attention to) a public notice directed to an entire class of claimants would violate Swiss notice standards.[136]

In case the foreign class members of a U.S. class action are informed by means of unofficial publication in Switzerland or through notice via mail in disregard of the Swiss notice provisions, the respective action might be considered a violation of Swiss sovereignty, and, from the Swiss perspective, the no-

[132] *See* Perucchi, *supra* note 4, at 89.

[133] *See* Article 141 CCP. *Cf. also* Article 1 Hague Service Convention.

[134] *See* Adrian Staehelin, *Kommentar zu Art. 141*, *in* Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), *supra* note 98, para. 2 (illustrating the scope of the rule with the example that service is impossible because of *war conditions*).

[135] *But see* Perucchi, *supra* note 4, at 89, n.414.

[136] *See also* Baumgartner, *Anerkennung*, *supra* note 4, at 119.

tice so directed to Swiss class members would be void from the outset.[137] Hence, it should be irrelevant whether the class members had *actual knowledge* of the class action and of the public notice.[138] This consequence seems all the more justified given the absence of similar procedural devices in Switzerland and in light of the resulting unawareness in this country that one risks to forfeit a right by not responding to the public announcement of a representative litigation proceeding.[139]

## 4. Notice to Class Members in Third Countries

The rule that the parties have to be summoned according to the law of their domicile, as set forth in Article 27(2)(a) PILA, is not limited to parties domiciled in Switzerland. Therefore, the notice to parties domiciled in third countries must comply with the law of the respective jurisdiction.[140] For the reasons stated above, the same rule should apply to plaintiff *class members* in third countries. Consequently, a class member who wishes to relitigate his claim before a Swiss court can invoke that he received no notice at all or that the notice was in violation of the relevant treaty between the United States and his country of domicile (often the Hague Service Convention), respectively, of the autonomous law of his home jurisdiction. It is at least conceivable that a third jurisdiction (most likely one with a domestic class action tradition) allows notice to class members through publication in local newspapers or on the Internet and that thus, even from the Swiss perspective, notice would be valid with regard to the class members domiciled in the respective country.

## 5. Summary

As a result, unless the Swiss class members are individually notified through official service of process, the class action judgment should not be recognized

[137] *See* Declaration Romy, *supra* note 37, at 8.

[138] *See* Berti & Däppen, *supra* note 82, at para. 11. *But cf.* Baumgartner, *How Well*, *supra* note 16, at 223–25 (citing Swiss court opinions which seem to set forth a less strict standard). However, in Bundesgericht [BGer] [Federal Supreme Court] Oct. 31, 1996, 122 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 439 (Switz.), the defendant was, despite the lack of notice, actually represented before the U.S. court by his own counsel, which is why the denial of enforcement based on the lack of notice would have been particularly formalistic. As I have already mentioned, a different outcome would be appropriate if the class member actively participated in the class action or claimed and received benefits under an eventual settlement agreement, but not merely because he knew about the foreign proceeding. *Cf. also* Declaration Oberhammer, *supra* note 37, at 8. *But see* Perucchi, *supra* note 4, at 88–89, 91, according to whom the Swiss class member must prove that he had no knowledge of the class action proceeding in order to avoid preclusion.

[139] *Cf. also* Declaration Kaufmann-Kohler, *supra* note 37, at 18–19.

[140] Berti & Däppen, *supra* note 82, at para. 13.

and, consequently, have no preclusive effect on them in a Swiss court proceeding. If a U.S. court or class representative aspires to extend the preclusive effect of an eventual judgment or settlement to these members, the only way to achieve such a result is through individual, official notice directed to them.

This requirement will regularly be fatal for the Swiss members' participation in the class: There can be no doubt that it is in many cases impossible or at least highly impractical for a U.S. court to comply with the individual notice requirement for foreign class members, particularly for class actions dealing with tort claims (where the class members are often unknown) and in general for those aggregating small claims (where individual notice abroad is too costly). Although the courts might in some cases be able to comply with the mentioned rules, one might ask whether the requirement of individual, official service of process in the member's country of domicile is not generally irreconcilable with the basic concept of U.S. opt-out class litigation because it frustrates one of its main purposes.[141] That said, in order to ease the requirements for the notice to Swiss class members, legislative action would be required.[142]

## E. Res Judicata (Claim Preclusion)

If and to the extent that the judgment survives the notice-test and can thus be recognized, a separate question is whether it has *preclusive effect* upon the class members' claim, i.e. whether it actually bars the individual relitigation before Swiss courts.[143] Under U.S. law, a judgment in a class action generally precludes the absent class members from subsequent litigation of their individual claims.[144] In the international context, the first step in the respective analysis is to determine the applicable preclusion law.[145] Switzerland has adopted the "extension of effects approach" and, therefore, generally grants judgments of foreign courts "the same preclusive effect that they would have under the rendering state's law".[146] However, the extension is not an unlimited one. Rather, the

141 *Cf.* Perucchi, *supra* note 4, at 90–91.

142 *See infra* Part III.C.

143 *See generally* Wasserman, *supra* note 13.

144 *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim."). Regarding settlements, see Wasserman, *supra* note 13, at 325–328. With respect to *issue* preclusion, see *id.* at 328–331.

145 *Cf. generally* Wasserman, *supra* note 13 at 369–378. With respect to Swiss law, see Perucchi, *supra* note 4, at 171–176.

146 Wasserman, *supra* note 13, at 378; Walter, *supra* note 55, at 379.

courts have to control the effects and may restrict them to what is acceptable under Swiss standards.[147]

With respect to the nature of the judgment to be recognized, we have already seen that the preclusive effect only comes into question after a disposition on the merits (e.g., dismissal with prejudice, judgment in favor of the defendant) or a settlement and not if the class action was dismissed on procedural grounds, for example if the certification of the class was denied.[148]

Other than that, the issue of transnational claim preclusion does not seem to raise any insurmountable problems: According to *Swiss procedural rules*, both claim and issue preclusion require that (1) the parties and (2) the matter in dispute are identical.[149] Regarding the personal scope, I have argued that it is appropriate to treat the class members as parties to the action.[150] Therefore, assuming that the members were individualized and properly notified, it would seem acceptable under Swiss preclusion standards to extend the binding effect to them. As to the identity of the subject matter of the dispute, a general issue of U.S. procedural law is whether the class action constitutes simply an aggregation of individual claims (with the judgment dealing with all these claims) or whether a class action is a dispute *sui generis*, adjudicating an issue common to the whole class but separate from the individual claims.[151] Under Swiss law, identity of the matter of the dispute exists if the same claim, based on the same facts and on the same legal ground, has already been adjudicated.[152] Absent particular circumstances—and generally for damages class actions—it should be consistent with Swiss standards to say that the individual damages claims were already part of the class litigation and that they are, therefore, barred by the prior judgment: Since class actions pursuant to Fed. R. Civ. P. 23(b)(3) presuppose that "questions of law or fact common to class members predominate over any questions affecting only individual members", there will be good reasons to argue that the individual tort action requesting money damages is based upon the same facts and legal grounds as the prior class action for monetary

147 BGer Mar. 11, 2004, 130 BGE III 336, 342 (Switz.); BGer Feb. 14, 2011, 4A_508/2010, para 3.3; Berti & Däppen, *supra* note 55, at para. 40; Paul Volken, *Kommentar zu Art. 25, in* Zürcher Kommentar zum IPRG, *supra* note 109, para. 34. *Cf. also* Walter, *supra* note 55, at 380.

148 *See supra* note 6.

149 *See, e.g.*, Alexander Zürcher, *Kommentar zu Art. 59*, *in* Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), *supra* note 98, para. 40. But *cf. also* BGer May 13, 1964, 90 BGE I 113, 119–120 (Switz.).

150 *See supra* Part II.C.1.

151 *See, e.g.*, *Cooper*, 467 U.S., holding that the judgment in a class action about a pattern or practice of class-wide employment race discrimination does not preclude an individual case based on race discrimination.

152 BGer Jan. 15, 1997, 123 BGE III 16, 18 (Switz.).

relief.[153] Hence, although the issue whether the outcome of an opt-out class litigation is binding upon the class members is not known from Swiss domestic litigation, it seems quite clear that a recognizable U.S. class action judgment should preclude an absent class member from relitigating his claim in Switzerland, to the same extent that it would preclude him from relitigating in the United States.

## III. Summary and Discussion

### A. The Non-Recognition and its Consequences

My analysis may be summarized as follows: While the Swiss legal order does not provide for *domestic* representative litigation devices similar to U.S. opt-out class actions,[154] *foreign* class action judgments would not per se violate Swiss public policy for recognition purposes. In particular, such a consequence does not follow from the mere fact that the class members have not affirmatively decided to litigate their claims. To the contrary, it does not seem manifestly contrary to the fundamental norms of Swiss procedural law that a person is compelled at a certain point to decide whether or not to have his claim litigated in a U.S. class action by a class representative.[155] Similarly, in case the class member has decided to participate in the class action and has expressed that she so wishes by actively participating or by not opting out, it would go too far to say that the procedural design of the U.S. class action restricts her right to be heard in a manner that amounts to an unacceptable incompatibility with Swiss public policy.[156] Therefore, the opinion that Swiss public policy generally prohibits the recognition of U.S. class action judgments in Switzerland cannot be endorsed. As a result, an unsuccessful class action could—at least theoretically—have res judicata effect in Switzerland, i.e. preclude passive class members from relitigating their claims before Swiss courts.[157]

Still, the second court might ask whether the first court had international jurisdiction over the parties and the subject matter of the dispute. Because of the unusual set-up of a class action, a question unknown to domestic Swiss civil litigation arises[158]: Can a passive plaintiff class member challenge the court's jurisdiction? If so, should he be allowed to invoke norms that are designed to protect the *defendant*? It has been suggested that the absent class members

153 *See also* Romy, *supra* note 14, at 794.
154 *See supra* Part I.C.
155 *See supra* Part II.C.
156 *See supra* Part II.C.
157 *See supra* Part II.E.
158 *See supra* Part II.B.2.

should be protected by means of the conventional (i.e. defendant-focused) jurisdictional rules as applied to them, i.e. *to the individual class member*.[159] While this approach has a certain appeal, I have argued that the analogous application of the jurisdictional rules does not actually meet the concerns raised by the concept of a plaintiff class action. It seems questionable whether such an application of the jurisdictional provisions is really appropriate in light of the absent class member's interests. Be that as it may, I believe that the respective attempt must fail under the current statutory framework, which tailors the jurisdictional analysis exclusively to the defendant.[160] In sum, while the issue is yet unsettled, it seems that current Swiss private international law should not be understood to require jurisdiction over absent plaintiff class members in order for an eventual judgment to be binding.

Even so, U.S. class actions will—for a different reason—hardly ever bar passive Swiss class members from relitigating in Switzerland: The crucial question is whether the plaintiff class members are entitled to receive notice of the court proceeding according to the same standards as individual parties. The Swiss Private International Law Act does not limit the application of the notice requirements to defendants, and the answer thus depends on whether we conceptualize the individual class member as a *party*: Since Rule 23(b)(3)-class actions are designed to provide a final adjudication of the individual class members' claims,[161] I believe that Switzerland's international notice provisions and the Hague Service Convention should apply to the notification of the absent members domiciled in this country.[162]

The Swiss procedural rules generally require individual, official notice to each party that can be reached by service of process, meaning that notice in form of a publication directed to a category of unnamed persons is neither permissible nor sufficient. Rather, individual notice to each and every Swiss class member through a formal request to the Swiss central authority is required.[163] Although there may be situations where it is possible for the foreign court to comply with this standard, it seems that the notice requirement will in most cases be fatal for the judgment as far as *Swiss class members* are concerned.[164] In contrast, the notice to *U.S. class members* should be considered as valid if it was made in compliance with the U.S. requirements.[165] Finally, the validity of

[159] *See supra* Part II.B.3.
[160] *See supra* Part II.B.4.
[161] *See supra* Part II.C.1.
[162] *See supra* Part II.D.1.
[163] *See supra* Part II.D.3.
[164] *See supra* Part II.D.5.
[165] *See supra* Part II.D.3.

the notice to class members in *third countries* depends on the third country's notice provisions.[166]

The result of this analysis is rather disillusioning: Apart from class members that have actively participated in the class action or claimed benefits under the judgment or settlement, the preclusive effect of an international U.S. class action judgment before Swiss courts is generally limited to class members domiciled in the United States and in certain third jurisdictions.

With respect to Swiss class members (and class members from third countries with similar notice provisions), two different perceptions are possible: Either we treat them as *non-parties* to the class action, or we understand them as *parties that have not been served with proper notice*. While I have argued that the latter solution is preferable, the outcome seems to be similar: In either case, the class members remain free to relitigate their causes of action in Switzerland. Alternatively, they could attempt to relitigate in a third jurisdiction and then enforce the judgment in Switzerland. As a result, once a transnational class against a defendant with assets in Switzerland has been certified, these class members can simply wait and, if the class action is successful, claim benefits under the U.S. judgment or settlement agreement; if the class action fails or if the passive members are not satisfied with the outcome, they are free to get a second bite at the apple in Switzerland.

The resulting lack of finality provided by the judgment seems particularly unfortunate if we consider that many defendants in U.S. class actions have business activities and assets in the United States and that, therefore, they would hardly be able to escape enforcement of a judgment in favor of the plaintiff class. As the respective risks of relitigation and double payment can be addressed in a global settlement of the class action,[167] the "non-recognizability" in Switzerland might create an incentive for Swiss defendants (as well as for defendants with assets in Switzerland) to settle transnational class actions before U.S. courts.

## B. The Impact of the U.S. Certification Requirements Regarding Transnational Class Actions

The interim result of my analysis is, to say the least, counterintuitive: It seems that defendants would generally be better protected if class action judgments conformed to the requirements for recognition in Switzerland. If, to put it differently, foreign class actions were accommodated by Swiss private international law, defendants domiciled or with assets in Switzerland would at least

166 *See supra* Part II.D.4.

167 *See* Romy, *supra* note 14, at 799, n.117.

avoid repetitive litigation. This finding brings up the question whether the Swiss legislator should take such actions as to extend the preclusive effect of a U.S. class action to all absent class members.[168]

Of course, any legislative action must first be evaluated in the light of its anticipated international implications. My analysis of the U.S. case law regarding transnational class litigation has revealed that American courts take into consideration the foreign procedural and private international law in two distinct ways: First, U.S. courts are more generous in certifying a global class if the plaintiff class members have no access to alternative remedies in their home jurisdictions. Second, other factors aside, U.S. courts are more likely to certify a class including foreign members if it is probable that a judgment for the defendant would be recognized in the respective jurisdictions and that absent class members would thus be precluded from relitigating their claim there.[169]

Without trying to anticipate whether a U.S. court would—in a specific case—certify a class action including Swiss class members, it can be said that the current Swiss law has a twofold impact on the inquiry undertaken by the U.S. courts: On the one hand, the traditional procedural law in Switzerland does not accommodate the need of small claims plaintiffs to gain access to justice by means of representative actions. Consequently, to exclude Swiss class members from a U.S. class action generally means to leave them without a real chance of obtaining legal relief. It is likely that U.S. courts would take this circumstance into consideration as an argument in favor of including the Swiss members in the certified class. On the other hand, the difficulties pertaining to the recognition of an opt-out class action judgment in Switzerland and the resulting risk for the defendant would hardly go unnoticed in the certification stage of the class action, calling into question whether the class action would survive the superiority analysis with respect to class members from this country.

In particular, while the U.S. case law regarding transnational plaintiff classes does not (and probably cannot) shield class action defendants completely from repetitive litigation abroad, the non-recognition in Switzerland and in other foreign jurisdictions has a remarkable effect: Weighing in favor of the exclusion of the respective international claimants from the class, it tends to reduce the defendants' exposure to transnational U.S. class litigation. Obviously, this impact only becomes significant if the number of Swiss (and other international) class members is considerable.

[168] *Cf.* Stiggelbout, *supra* note 38, at 499–500 (suggesting a "'representative action' criterion of recognition" for the context of English law). In Switzerland, the legislator could adopt a rule permitting Swiss authorities to publish foreign opt-out notices in the official Swiss publications and, at the same time, clarify that—provided the class action proceeding guarantees an efficient representation of the class members' interests—class members are bound by the class action judgment or settlement.

[169] *See supra* Part I.B.

## C. Conclusion

In light of the mentioned interdependency, one could draw the following conclusion: If the intention is to protect Swiss defendants against the risk of U.S. class actions, non-recognition in Switzerland fares unexpectedly well under the U.S. case law interpreting the superiority requirement. It appears that, from the Swiss defendant's point of view, keeping the status quo concerning the requirement of notice is not as unattractive an option as one might first assume: While the resulting non-recognition certainly does increase the risk of repetitive litigation in Switzerland, it minimizes the class action-exposure of Swiss companies by virtue of the U.S. certification rules. Of course, the liberal recognition of U.S. class action judgments would, as a general matter, better shield defendants from repetitive litigation. However, as long as and to the extent that U.S. courts aspire to prevent such relitigation by denying the certification of global classes, the non-recognition in Switzerland provides the defendants with a procedural defense against the certification of transnational class actions including Swiss class members before a U.S. court. From the defendant's perspective, the price for this significant gain is modest: Relitigation in a jurisdiction which does nothing to enhance the collective enforcement of small claims is not what puts domestic companies and assets at a serious risk. In other words, the possibility of repetitive litigation in Switzerland does not seem particularly threatening.[170]

While the individual notice requirement thus combines the advantages of both protecting Swiss claimants against the loss of their claims through unwanted preclusion and of reducing the risk of threatening U.S. class actions for Swiss companies and assets, the question remains whether the current *domestic* procedural framework in Switzerland reflects the right balance between, on the one hand, the defendants' interest in protection against the threat of abusive class action practice and, on the other hand, the need of small claims plaintiffs for an efficient enforcement of their individual rights. Without suggesting specific modifications, I believe that the international context would—at the least—*leave room for* the creation of domestic group litigation in the form of representative actions. If the Swiss legislator succeeded in combining the necessary elements of efficient representative litigation (including an opt-out mechanism for class members, a plaintiff-friendly system for the imposition of court costs and an incentivizing fee structure for class counsel[171]) with the otherwise well-established Swiss procedural rules, it would seem possible to meet the several interests at stake: By creating an alternative remedy to U.S. class actions, such reforms would further reinforce the protection of Swiss defendants

[170] *Cf. generally* Bermann, *supra* note 38, at 95 ("such litigation is not likely to be brought").
[171] *Cf.* Droese, *supra* note 46, at 146; Perucchi, *supra* note 50, at 502–504.

against U.S. class actions and its arguably undesirable by-products (such as extensive discovery, jury adjudication and punitive damages) because U.S. courts would be even less likely to certify classes including Swiss members. At the same time, it would enhance the legitimacy of the current non-recognition (and of the resulting exclusion of the Swiss members from the U.S. class actions) by finally providing for a meaningful procedural device enabling the collective enforcement of small claims in Swiss courts.