and supported that the concerned Decrees are 'individual administrative acts of general application' and are subject to the judicial review of the Supreme Court.

He further mentioned that as a result of the numerous Conventions which the Republic of Cyprus has ratified, the legal framework of Cyprus has evolved. He found that every member state court is also a European Court and thus there is an obligation by the court to review the faithful adherence of the national system to European law, with assistance from the European Court of Justice.

In relation to the ability of the depositors to take the alternative route of civil proceedings, Judge Erotokritou found it to be a significant mitigating factor for the violation of the principle of the effective protection of fundamental rights which does not extinguish the need for judicial review of administrative decisions.

While fully respecting the majority decision, Judge Erotokritou took the view that the preliminary objections should have been rejected so that the Full Bench could proceed to examine the main body of the applications before the Supreme Court, stating that in the event that the Decrees are exempted from judicial review then the rule of law and the principle of legality will be in serious doubt.

Legal basis for claims against the banks and/or the state before the district court

All the aforementioned evidence led to the conclusion that potential claimants would need to file a civil action for breach of contract against the Bank concerned (Laiki Bank and/or Bank of Cyprus) before the District Courts of Cyprus with a potential extension of the civil proceedings against the State, which affected the contractual obligation by issuing the concerned Decrees.

The civil proceedings will allow the Courts to examine whether the Banks have breached their contractual obligations towards claimants as a result of State and/or European intervention and whether this intervention violates the Constitution of the Republic of Cyprus and European law.

In order to be successful in any claims against the Banks and/or the State, claimants will need to prove that the resolution or rescue of the credit institution concerned has put them in a worse financial position than they would have been in, had the credit institution been liquidated under Article 3(2)(d) of the Resolution of Credit and other Institutions Law of 2013 (Law 17(1)/2013).

Note

1 George Z. Georgiou is the Managing Partner at George Z. Georgiou & Associates LLC, Cyprus.

---

Switzerland is reviewing its judicial system in relation to mass claims

Introduction

The need to ensure collective and effective access to courts in relation to mass claims is a point of debate in Europe and Switzerland. The criticism towards the inability of consumers and financial investors to effectively join forces to take legal action grew stronger following the recent financial scandals, which left numerous financial investors in the lurch. Reference is namely made to the clients of European and Swiss banks who acquired structured products issued by the Lehman Brothers group, which filed for protection under Chapter 11 of the United States Bankruptcy Code in September 2008.

While some European countries, such as France, are considering the introduction of collective redress mechanisms, other European states, such as Austria, Germany and the Netherlands, have already taken action. Moreover, owing to the lack of standardised regulation concerning the collective exercise of rights in Europe, the European Commission recently recommended that all European Union Member States implement collective redress
mechanisms through domestic legislation (the ‘Recommendation’).\footnote{The ‘Recommendation’ is a legal instrument issued by the Swiss government to address mass claims.}

Against this background, the Swiss government recognised, in a report dated 3 July 2013, the need to strengthen the legal framework for the collective exercise of rights in Switzerland (the ‘Report’).\footnote{The Report is a comprehensive document outlining the Swiss government’s response to the ‘Recommendation’.}

According to the Report, the procedural tools currently available in Switzerland do not allow for mass claims to be dealt with in an efficient and satisfactory manner by the court system, thus failing to provide sufficient protection to consumers and investors suffering a mass harm.

After briefly outlining the legal framework available in Switzerland for the treatment of mass claims and its shortcomings in light of the Report, we will examine the measures currently contemplated by the Swiss government to ensure an effective and efficient implementation of collective rights in case of mass harm.

Collective access to courts in Switzerland: an overview

Under Swiss civil procedural law,\footnote{Swiss civil procedural law regulates the relationship between courts and litigants.} collective access to courts is the exception to the rule and is subject to various limitations. In its Report, the Swiss government assesses the various mechanisms which allow for several individual claims to be dealt with under a single procedure. Such mechanisms comprise the simple joinder and the combination of claims;\footnote{The simple joinder is a procedural tool allowing for the joint initiation of legal proceedings by a number of plaintiffs with similar claims. The combination of claims involves the joining of several claims by a claimant.}

the representative action;\footnote{The representative action allows for a collective action to be brought by a representative body on behalf of a group of plaintiffs.}

special collective actions; as well as certain procedural powers entrusted to the courts to enable a simplification of the proceedings.\footnote{Procedural powers refer to mechanisms by which the court can manage the proceedings in an efficient manner.}

The simple joinder is common to most European legal systems and allows for a plurality of plaintiffs, who hold claims based on a similar set of facts or legal grounds, to initiate judicial proceedings jointly. The combination of claims enables a claimant to combine several claims — whether his own or assigned to him — in one single action. The Report states that both of these procedural tools are highly unsuitable for the handling of mass claims, particularly where each individual claim is relatively small. The main shortcomings are found to be the absence of a favourable treatment in terms of cost determination and allocation, as well as the lack of a common practice in Switzerland of third-party professional funding of lawsuits. Moreover, the absence of adequate representative bodies such as the ‘Verein für Konsumenteninformation’ (VKI) — which is

known to conduct most mass trials in Austria on the basis of a mechanism similar to the Swiss combination of claims\footnote{The VKI is an Austrian consumer information body that conducts mass trials.} — is identified as particularly problematic.

In certain circumstances, collective interests can further be safeguarded by way of a representational action, meaning a collective action brought by a representative body. The Report finds that even though this instrument has long been well-established and recognised under Swiss law, it has gained little practical importance. Indeed, and contrary to the solution chosen by most European legal systems, the representative action may only be initiated to protect personality rights of the members of the group, by way of injunctive relief and, thus, excludes monetary claims.

Several federal statutes expressly reserve the possibility of initiating special collective actions similar to the representative actions, be it through a representative body or an individual.\footnote{Special collective actions are specific legal instruments designed to address mass claims.}

These instruments are deemed unfit to claim mass damages for similar reasons as for the representative action. Moreover, the scope of application of such collective actions is limited to specific areas of the law.

Finally, the possibility for the court to order, in view of a simplification of the proceedings, the joinder, the stay or the postponement of the proceedings does not enable a collective enforcement of rights. Indeed, the court must, in any event, decide separately on each individual claim.

In sum, Swiss law does not provide for adequate procedural tools for dealing with mass claims, in particular where the separate individual claims are relatively small. The current rules on determination and allocation of litigation costs, the absence of a common practice of professional third-party funding of lawsuits, as well as the limited scope of application of the representative action, are found to be particularly problematic.

Towards a broadened collective access to courts in Switzerland

In an attempt to remedy the shortcomings of the Swiss judicial system, the Swiss government envisages various legislative measures to facilitate access to justice in cases of mass harm. The envisaged changes are largely based on collective redress mechanisms successfully developed abroad. Two main approaches are considered, namely the improvement of existing procedural tools and the introduction of collective redress mechanisms with a general scope of application.
SWITZERLAND IS REVIEWING ITS JUDICIAL SYSTEM IN RELATION TO MASS CLAIMS

Improvement of existing procedural tools

Firstly, the Swiss government recommends the setting up of a specific regime for court costs, as well as the development of the Swiss market for third-party funding of lawsuits. Such measures would enable an effective and collective enforcement of rights, not only by way of a simple joinder but also of a combination of claims. In addition, financial and organisational measures are envisaged to foster the creation of representative bodies capable of conducting large-scale trials, similarly to the VKI in Austria.

Another envisaged improvement is the extension of the scope of application of the representative action so as to allow for compensation to be claimed by a representative entity for violations other than of personality rights of the members of the group. The Swiss government specifies that such an extension would be useful, in particular where the separate individual claims are relatively small.

Introduction of a general collective redress mechanism

Three types of general collective redress mechanisms are contemplated: namely, a model or test procedure, a collective action, as well as a group settlement procedure. The collective action and the group settlement procedure are identified as being particularly adequate for the judicial settlement of mass claims where each individual claim is relatively small.

The test procedure outlined in the Report is largely based on the German 'Kapitalanlager-Musterverfahren' provided for under the 'Kapitalanlager-Musterverfahrensgesetz' (KapMuG). In this respect, the Report specifies that the German model should be adapted so as to comply with the Swiss principles of procedure, including the right to be heard of the aggrieved persons - most of which will not be a party to the test procedure. Indeed, the outcome of the test procedure would be binding under all subsequent individual proceedings as regards all factual and legal common issues.

Moreover, and as a ground-breaking novelty, the Swiss government also considers the introduction of a collective action in Switzerland. The envisaged collective action departs to a large extent from the US class action provided for under Rule 23 of the US Federal Rules of Civil Procedure, which is specifically rejected. Many of the US class action components, such as the opt-out mechanism, punitive damages and contingency fees, are considered foreign to Swiss — and more generally European — legal tradition. Along the same lines as the European Commission’s Recommendation, the Swiss government recommends the adoption of a procedure with an opt-in basis. In other words, only those persons who expressly adhere to the procedure would be bound by its outcome. This approach is in conformity with European legal tradition and would help avoid potential difficulties at the enforcement stage. In addition, the Swiss government indicates that an adequate regime for the determination and allocation of costs, as well as for the funding of such collective procedures, will have to be put in place.

Lastly, the implementation of a collective settlement mechanism similar to the Dutch collective settlement procedure provided for under the Dutch Act on the Collective Settlement of Mass Damage Claims, otherwise known as the WCAM, is envisaged. However, unlike the Dutch model, the Swiss procedure would have an opt-in basis, thus limiting possible difficulties at the enforcement stage. Moreover, the Swiss government indicates a special regime for court costs would have to be provided so as to ensure effective access to courts. It is further specified that such collective settlement procedures would either have a general scope of application or be limited to very specific situations, mainly cross-border mass harm situations.

In its Report, the Swiss government fails to take a stance on the measure best suited to ensure collective access to civil courts in mass harm situations. The Swiss Parliament also failed to do so in its recent parliamentary motion instructing the Swiss government to draft a legislative bill on the basis of the Report. In sum, it appears an official stance in this respect is not to be expected from the Swiss authorities in the near future.

Conclusion

Swiss civil procedure does not allow for an effective and efficient collective judicial settlement of mass claims, in particular where each individual claim is relatively small. The current rules on the determination and allocation of litigation costs, the absence of a common practice of professional third-party funding of lawsuits in Switzerland, as well as the limited scope of application...
of the representative action are found to be particularly problematic by the Swiss government.

The legislative measures envisaged by the Swiss government to facilitate access to justice in case of mass harm fall in line with the developments taking place internationally, notably at the EU level. Moreover, the Swiss government does not limit its Report to the improvement of existing procedural tools in Switzerland, but goes a step further and contemplates the introduction of actual group procedures, namely a collective action with a general scope of application as well as a group settlement procedure. The Swiss government fails however to take a stance as to which measure should be preferred. Nevertheless, the group procedures under consideration appear to be better suited to address mass claims in a satisfactory manner, especially where each individual claim is low.

The introduction of a collective redress mechanism would be a ground-breaking novelty for Swiss civil procedure, which is based on individual access to justice. Indeed, the implementation of such a procedural tool would open a Pandora’s box and several key legal issues would need to be addressed. Such issues comprise the proper notification of all persons concerned, the sufficient protection of each aggrieved person’s procedural rights without excessively complicating or delaying the collective proceedings, as well as the compensation to be granted to the aggrieved persons and, in particular, the method to be applied by the court for allocating such compensation. However, and as stated by the Swiss government, such measures would not only guarantee a better access to justice, but would also ensure the proper functioning of Swiss civil justice when faced with mass claims and would, eventually, further promote Switzerland’s international competitiveness as a jurisdiction.

Notes

3 Swiss civil procedural law is governed by the Swiss Code of Civil Procedure of 19 December 2008 (SCCP, RS 172), which entered into force on 1 January 2011.
4 Art 71 and 90 SCCP.
5 Art 89 SCCP.
6 Art 125 let c, 126 and 127 SCCP.
8 The Federal Act against Unfair competition, the Federal Trademark Act, the Federal Gender Equality Act as well as the Federal Workers’ Participation Act provide for collective actions to be brought by representative bodies.
9 The possibility of initiating a collective action through an individual is provided for under the Federal Collective Investment Scheme Act and the Federal Swiss Merger Act.
10 Art 71 let c, 126 and 127 SCCP.