MASS TORT LITIGATION IN GERMANY AND SWITZERLAND

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I. INTRODUCTION

Professor Koch has been talking about non-class group litigation under EU and German law.[1] Given that we are here in Switzerland and that this country is not a member of the EU and has its own legal traditions, I would like to supplement the presentation of Professor Koch with a special Swiss perspective, while dealing sometimes with German law, too.

In dealing with the topic of our panel this morning—civil law approaches to widespread injuries—one may ask the question, "Why do we not use the device of class actions?" The answer is just that we do not have class actions in our legal system and that we think we can solve the problems without adopting class action systems. Even those who have considered adoption of class actions here have found that the device would only be useful in very limited circumstances.[2] I could also answer the question "Why do we not use class actions?" just by saying, "Why should we?" And I could feel confirmed in this attitude by the Florida Tobacco case decision, where one defendants' attorney said: "This case has shown once more to what outrageous results class actions can lead."[3]

So, once again: "Why should we have such a device?" In order to answer that question, we need to have a look at the way we deal

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1. *See* Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355 (2001).

2. *See infra* text accompanying notes 24-26.

3. Tz., *Strittige Geldstrafe für die US-Tabakindustrie*, NEUE ZÜRCHER ZEITUNG [hereinafter NZZ], July 17, 2000, at 13.

with the procedural problems of mass tort cases over here. For a better understanding, I have to make some preliminary remarks on our court system, concurring proceedings, and questions of jurisdiction.

II. THE COURT SYSTEM IN GERMANY AND SWITZERLAND

A. Court System

Both Germany and Switzerland have federal governments like the United States, yet they do not have dual court systems. Thus, in Germany, the Federal Supreme Court in Civil Matters is the court of last resort. The lower courts are state courts, usually on three levels: county courts, district courts, and courts of appeals. This means that a case always starts in a state court. The decision of the state court of appeals is then open for appeal to the Federal Supreme Court.[4]

The same is generally true in Switzerland, although here the parties can agree to bring the case directly in the Federal Supreme Court if (1) they so agree in writing after the dispute arose and (2) if the amount in controversy is at least 20,000 Swiss Francs.[5] In this fashion, twenty-eight cases were decided in 1996 and nineteen in 1997.[6] Understandably the Swiss Supreme Court justices are not very happy about having to act as trial judges. Thus, this so-called "direct process" is going to be abolished soon.[7]

B. Applicable Law

In Germany, both substance and procedure are controlled by federal codes. In Switzerland, however, only substantive private law is governed by federal codes, while procedural codes are still cantonal codes. This, too, is about to change, as the Swiss people just accepted a change to the Federal Constitution giving the federal government the power to pass a federal code of civil procedure in March of 2000.[8]

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4. *See* ZIVILPROZESSORDNUNG of Jan. 1, 1877, RGBl 83 [hereinafter ZPO], §§ 511-66a [Germany].

5. *See* BUNDESGESETZ ÜBER DIE ORGANISATION DER BUNDESRECHTSPFLEGE of Dec. 16, 1943, SR 173.110 [hereinafter OG], art. 41(c)(2) (before amendment of Jan. 1, 2001).

6. *See* 1996 Geschäftsbericht des Schweizerischen Bundesgerichts; 1997 Geschäftsbericht des Schweizerischen Bundesgerichts (copies on file with author).

7. *See* OG art. 41 (as amended on Jan. 1, 2001).

8. *See* SCHWEIZERISCHE BUNDESVERFASSUNG [Swiss Federal Constitution] of May 29, 1874, SR 101, [hereinafter BUNDESVERFASSUNG], art. 122 (as amended by popular vote of Mar. 12, 2000).

C. Consequences

Compared to the United States, this means that we do not have any transfer, removal, or consolidation problems between state and federal courts. There also is no question whether a federal court has subject matter jurisdiction concurrent with that of a state court.[9] And finally, *Erie* problems[10] cannot arise.

III. CONCURRING PROCEEDINGS

Not only is it impossible in Germany and Switzerland to have concurring proceedings between federal and state courts, but there are also rules in effect that prevent parallel proceedings among different state courts. [11] As an example of a common civil law approach, consider Article 21 of the Brussels Convention: "Where proceedings involving the same cause of action and between the same parties are brought in [different courts,] any court other than the court first seized shall of its own motion [. . . dismiss the action.]"[12] Although the Brussels Convention applies to cases pending in different member states only, it stands for very similar rules contained in the civil procedure codes of many civil law nations. Because of those rules, only one action is possible between the same parties in the same cause of action (*eadem res inter easdem partes*).[13]

IV. PERSONAL JURISDICTION AND FORUM SELECTION

A. Personal Jurisdiction and Venue

The principal rule is that the defendant must be sued at his domicile (*actor sequitur forum rei*).[14] To this rule, there are some narrow exceptions. For example, the defendant may be sued, in matters relating to tort, delict or quasi delict, in the court of the place where the harmful event occurred (*locus delicti commissi*).[15] This usually includes both the place at which the alleged tort was committed and the

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9. *Cf.* Carlough v. Amchem Prod., Inc., 10 F.3d 189 (3d Cir. 1993).

10. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Van Dusen v. Barrack, 376 U.S. 612 (1964); Ferens v. John Deere Co., 494 U.S. 516 (1990).

11. *See supra* Section II.

12. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of Sept. 27, 1968, art. 21, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention].

13. *See generally* Samuel P. Baumgartner, *Related Actions*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 203, 205-06 (1998).

14. *See, e.g.,* Brussels Convention art. 2(1).

15. *See id.* at art. 5 nr. 3.

place where it had its effects. Or, for another example, in matters relating to contract, the plaintiff may sue in the court of the place where the obligation in question was supposed to be performed.[16]

Note, however, that the rules on jurisdiction and venue are contained in statutes rather than being derived from constitutional principle. Thus, they are binding on the court and do not leave any room for discretion or a balancing of interests by the judge. Similarly, there is no inquiry into "substantial or minimum contacts."[17]

B. Forum Shopping

Only if there is an exception to the general rule, that is, if a specific rule of jurisdiction applies,[18] does the plaintiff have a choice of fora.[19] For example, assume a car accident happened in Munich and that the defendant (driver) is domiciled in Berlin. In that case, the injured plaintiff (wherever he is domiciled) can sue either in Berlin (according to the general rule) or in Munich (at the *locus delicti commissi*). Once the choice is made, however (for instance, the action has been filed in Munich), it is binding.

C. Forum Non Conveniens

There is no doctrine of forum non conveniens, and, as indicated above,[20] the court does not have discretion to decide whether to take the case. When the requirements of jurisdiction and venue are met, the court has to deal with the case.

V. CLASS ACTIONS

Having clarified these preliminary matters, we can now take a closer look at how mass torts are dealt with in the German and Swiss legal systems. First off, as I indicated in the Introduction, class actions do not exist in Germany, Switzerland, and most other countries of the civil law system. The simple rule is that, in general, everyone

16. *See id.* at art. 5 nr. 1.

17. *See generally* Gerhard Walter & Rikke Dalsgaard, *The Civil Law Approach, in* TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES 41 (Campbell McLachlan & Peter Nygh eds., 1996).

18. *See supra* Section IV.A.

19. *See, e.g.,* Walter & Daalsgard, *supra* note 17, at 44-46.

20. *See supra* Section IV.A.

has standing for an action only regarding his or her own claim. Intermediate or representative actions for other persons do not exist.[21]

Mass torts occur in Germany and Switzerland as well as in other countries. German and Swiss courts have found ways to deal with them in an adequate way.[22] Although the instrument of a class action is not known in Germany and Switzerland, Swiss courts have developed other procedural means to deal with mass torts. Moreover, due to the dependence of Germany and Switzerland on international trade and commerce, their courts and lawyers have considerable experience in dealing with complex international litigation.

So, then, how do we deal with mass tort cases? First, many issues that would give rise to a class action in the United States as a civil case are dealt with by government agencies. For example, in Switzerland there is a Federal Office for the Equal Treatment of Men and Women to deal with issues of sexual discrimination, and the Federal Cartel Commission is charged with enforcing antitrust legislation. Second, model suits, funds solutions, and public-interest organization's actions (*Verbandsklagen*), and several multiparty solutions, all of which I will return to in a moment,[23] are available to deal with mass torts.

Nonetheless, there appears to be some room for discussion of introducing narrowly tailored group-action devices. For example, a number of Swiss members of Parliament have requested the Executive to contemplate the usefulness of group actions in claims by tenants, employees, and consumers. The Executive answered that this is worth considering within the new Federal Code of Civil Procedure to be drafted soon.[24] Similarly, Professor Stadler has suggested the introduction of a carefully limited model of group action for consumer cases in Germany.[25] More recently, a South Tirol grass-roots organization upset with the noise and exhaust from the enormous North-South traffic on the Brenner Autobahn announced that it supports

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21. *See, e.g.,* Burkhard Heß, *Die Anerkennung eines Class Action Settlement in Deutschland*, 55 JURISTENZEITUNG 373, 378-79 (2000).

22. *See infra* Sections VI and VII.

23. *See infra* Sections VI and VII.

24. *See* Motion Jutzet of Sept. 28, 1998 and Antwort des Bundesrates of Mar. 8, 1999, 98.3401. On the newly created constitutional basis for a federal code of civil procedure in Switzerland, see supra Section II.B.

25. *See* Astrid Stadler, *Referat*, *in* II/1 VERHANDLUNGEN DES 62. DEUTSCHEN JURISTENTAGES 35 (1998).

the introduction of group actions that would allow inhabitants of the area to sue those who cause noise and exhaust.[26]

Mostly, however, the following devices have proven satisfactory in dealing with mass tort actions.

VI. MASS TORT ACTIONS

A. Model Suits

Model suits, in which the parties agree to bring the case of a single plaintiff or group of plaintiffs to judgment and then accept that judgment for all cases equally situated, have become a useful tool in dealing with mass torts in Germany and Switzerland.[27] For example, after the meltdown of the atomic reactor in Chernobyl, many Swiss vegetable farmers had to destroy their entire harvest of 1986 because many frightened consumers were no longer buying fresh vegetables. Pursuant to a provision of the Swiss Nuclear Liability Act, a farmer filed a suit that was to be a model for claims by all other vegetable growers before the courts of Bern against the Swiss government. The Bernese courts restricted the suit first to the question whether the Swiss government is liable to compensate the farmers. This question was affirmed on appeal by the Swiss Supreme Court and the case was sent back to the Bernese courts to decide on the exact amount of the damages.[28] But the Bernese courts did not have to resolve this question because, after the Swiss Federal Court had resolved the principal question that the Swiss government was liable, the parties settled the case. Based on this outcome, the Swiss government subsequently paid other vegetable growers damages totaling 8.7 million Swiss francs.[29]

This example shows that, under Swiss law, the non-availability of class actions is no detriment for plaintiffs who are seeking justice. Especially in cases against the Swiss government, the government ordinarily considers itself bound by the result of a model case.

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26. *See* B.A., *Tiroler Bürger auf der Brennerautobahn*, NZZ, June 24-25, 2000, at 3.

27. *See, e.g.,* FLORIAN JACOBY, DER MUSTERPROZESSVERTRAG (2000).

28. *See* Swiss Federal Supreme Court, decision of June 21, 1990, Bundesgerichtsentscheidungen [hereinafter BGE] 116 II 480 (1990).

29. *See e.g.,* Schweizerische Depeschenagentur (sda), dispatch of Dec. 17, 1990.

B. *Verbandsklage* (Public Interest Organization's Action)

While model cases have been used primarily in the civil courts, they are clearly available in administrative proceedings as well. Moreover, the agency's decision in an administrative proceeding can be appealed by an organization on behalf of its members if the following conditions are met: the organization must be an independent legal entity; pursuant to its charter, one of the aims of the organization must be the representation of the rights of its members; the majority or a high number of the members of the organization must be affected by the administrative proceeding; and the members themselves could bring an appeal.[30]

Outside the procedural cases under special statutes, the same is true in civil cases; certain consumer and industrial associations have the right to bring a public interest organization's action *(Verbandsklage)*.[31] In these instances, associations are granted standing without individual grievance. However, consumer associations can only seek injunctions to enjoin a business from misleading advertising or from using unfair terms in their standard forms or seek declaratory relief. They cannot sue for damages. Damages are limited to suits by the individual victims, whereby the declaratory relief from the group action helps enormously. Although the mere numbers of *Verbandsklagen* brought by consumer associations are relatively small, they have become an effective means to ensure fair dealing conditions for consumers. Most of the infringements are now settled out of court.

Similarly, the public interest organization's action introduced by the Swiss Act to Establish Equality between Men and Women[32] has been used sparingly. As the chairwoman of the Zurich mediation agency—an agency created by the same Act—has pointed out, this is likely to be the result of the strong preventive effect of that new legislation and the threat of a possible *Verbandsklage*,[33] keeping sexual

30. *See, e.g.,* Swiss Federal Supreme Court, decisions of Nov. 8, 1988, BGE 114 II 345 (1988); Jan. 19, 1960, BGE 86 II 18 (1960); May 20, 1947, BGE 73 II 65 (1947).

31. *See, e.g.,* § 13 GESETZ ÜBER DEN UNLAUTEREN WETTBEWERB (Unfair Competition Act) of June 7, 1909, RGBl. p. 499 (1909) [Germany]; § 13 GESETZ ZUR REGELUNG DES RECHTS DER ALLGEMEINEN GESCHÄFTSBEDINGUNGEN (Standard Contract Forms Act) of Dec. 9, 1976, BGBl I p. 3317 (1976) [Germany]; art. 7(1) BUNDESGESETZ ÜBER DIE GLEICHSTELLUNG VON FRAU UND MANN (Act to Establish Equality Between Men and Women) [GlG] of Mar. 24, 1995, SR 151 [Switzerland].

32. *See* GlG, *supra* note 31, art. 7(1).

33. *See Gleichstellungsgesetz ohne Prozessflut,* NZZ, Nov. 4, 1998, at 75 (Interview).

discrimination from happening. It seems that where disputes do arise, they are usually settled in the mediation process.[34]

C. Funds Solutions

Another way to deal with mass torts, particularly in Germany, has been funds created by the legislature. In the case of birth defects from Contergan, the German equivalent of Bendectin, the German parliament enacted a statute creating a fund for the victims.[35] The statute ordered the producers of the drug to pay certain amounts into the fund and provided for a distribution scheme comparable to those found in funds solutions in U.S. class action settlements. More recently, the German parliament has set up the fund "Erinnerung, Verantwortung und Zukunft" for the compensation of the victims of slave labor during World War II in accordance with the agreement negotiated with the United States and other countries. Again, the proposed legislation in this case creates a fund into which the Federal government and the German enterprises that had employed slave laborers have agreed to each pay DM five billion.[36]

This shows a clear preference for using the parliament for policy-making decisions. For example, in the United States class actions against gun manufacturers are used to achieve a policy that cannot be reached in Congress. Germany and Switzerland, on the other hand, have long since passed strict gun-control legislation, so that class actions are not needed to achieve this and many other policy goals.

VII. MULTI-PARTY SOLUTIONS

A. Joinder of Parties and Consolidation

There are various ways to deal with multi-party suits. One of them is the joinder of parties. Assume, for example, an air crash of a Lufthansa airplane at the Hamburg Airport. If the victims or their estates decide to sue Lufthansa, they may all sue the company at its domicile in Frankfurt if they wish to do so. If they sue together, they will be joined as plaintiffs from the beginning. If they bring different actions, both Article 38 (2) of the Bernese Civil Procedure Code and

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34. *See, e.g., id.*

35. *See* CHRISTIAN BEYER, GRENZEN DER ARZNEIMITTELHAFTUNG DARGESTELLT AM BEISPIEL DES CONTERGAN FALLES (1989).

36. *See Gesetz über die Entschädigung von NS-Zwangsarbeitern gebilligt,* NJW Wochenspiegel 15 at XLIX (2000); *Errichtung der Stiftung "Erinnerung, Verantwortung, Zukunft" abgesegnet*, NJW Wochenspiegel 23 at XLIX (2000).

Section 147 of the German Code of Civil Procedure contain a rule that is very similar to the U.S. Federal Rule of Civil Procedure 42(a) and that allows the consolidation of actions if they are closely related with regard to the legal questions involved, or if they could have been brought in a single action. In either way, great numbers of plaintiffs can be joined. In a recent case in Greece (which has adopted the German Code of Civil Procedure), for example, 117 plaintiffs sued the German government out of the massacre of Distomo in 1944, during which German troops had randomly shot Greek civilians. The plaintiffs gained a judgment of approximately $15 million for pain and suffering.[37]

Note, however, that in Swiss administrative proceedings, if more than twenty parties with the same or similar interests are joined, then the administrative agency dealing with the case can ask the parties to name a sole representative.[38]

If the parties fail to do so within reasonable time, the agency, pursuant to Article 11a of the Administrative Procedure Act, has the right to name the representative or representatives.[39] In a recent case, for example, over two thousand Swiss cattle farmers demanded payment of damages from the Federal Department of Finances alleging a failure of the federal government to take appropriate action to prevent Bovine Spongiform Encephalopathy (BSE) from spreading in Switzerland and thus from causing financial harm to those farmers. As one would expect, the Department of Finances required that the farmers name a representative.[40]

B. Stay of Proceedings

If, however, the plaintiffs in a mass tort do not all sue in the same forum, then the court may issue a stay to achieve a consistent outcome. Pursuant both to Article 96 of the Bernese Civil Procedure Code and Section 148 of the German Code of Civil Procedure,[41] a

37. *See* Greek Supreme Court, decision of Apr. 13, 2000, *reprinted* [in German] *in* DIKE INTERNATIONAL at 31, 722 (2000) (deciding that direct appeal on basis of foreign sovereign immunity without merit).

38. *See* BUNDESGESETZ ÜBER DAS VERWALTUNGSVERFAHREN [Administrative Procedure Act] of Dec. 20, 1968, SR 172.021, art. 11a.

39. *See id.*

40. *See* Decision of Jan. 18, 2000, BGE 126 II 63 (2000), (the case has been reviewed by the Federal Supreme Court on other grounds).

41. *C.f.* Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention], art. 22:

judge can stay a proceeding if the result of this proceeding is dependent on the result of another proceeding, is substantially influenced by another proceeding, or is deciding the same legal question as another proceeding.[42] This allows a judge to coordinate closely related proceedings and makes it easier for him to concentrate on one model suit. If in our previous example the crashed Lufthansa airplane also had code-shared Swissair passengers on board and the estates of those passengers decide to sue Lufthansa in Hamburg at the place of the accident, while the others have already sued in Frankfurt, the Hamburg district court may stay its proceedings until the Frankfurt district court has determined liability.

C. Consolidation by Court of Appeals

Finally, assume that some or all of the plaintiffs decide to sue the Munich engine manufacturer and the Hamburg airport authority in addition to Lufthansa. Assume also that they do not all sue in Hamburg at the place of the accident and at the domicile of the airport authority. Instead some sue in Hamburg, some in Frankfurt at Lufthansa's domicile, and some in Munich at the engine manufacturer's domicile. In this case, Section 36(3) of the German Code of Civil Procedure provides that the court of appeals can determine in which forum all these actions should proceed.[43]

VIII. CONCLUSION

When I was at the University of Texas in 1998, I went to Linda Mullenix's class on mass tort litigation and worked through her outstanding book on the topic.[44] I could never write such a book or teach such a class, however, because we have very little mass tort litigation here. We also have no class actions and only very limited group action devices. By choice, most of our mass tort problems are primarily

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> Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.
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> A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
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> For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

42. *See* ZPO § 148 [Germany], ZIVILPROZESSORDNUNG FÜR DEN KANTON BERN, of July 17, 1918, BSG 271.1, art. 96 [Canton of Bern, Switzerland].

43. *See* ZPO § 36(3) [Germany].

44. *See generally* LINDA S. MULLENIX, MASS TORT LITIGATION (1996).

dealt with by the legislature or by administrative agencies, both of which are better able to deal with the more abstract policy decisions to be made in such cases than are our courts. Where mass tort suits are necessary, our systems often provide adequate measures to deal with them. Accordingly, suggestions for introducing group actions have been very narrow and limited to consumer actions.