This second edition of *Commercial Litigation* aims to provide an updated first port of call for clients and lawyers to start to appreciate the issues in each jurisdiction. Each chapter is set out in such a way that readers can make quick comparisons between the litigation terrain in each country.

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SECOND EDITION

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General Editors: Andrew Horrocks *Andrew Horrocks Law Limited* & Maurice Phelan *Mason Hayes & Curran*

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General Editors
Andrew Horrocks & Maurice Phelan

Commissioning Editor
Emily Kyriacou
emily.kyriacou@thomsonreuters.com

Commercial Director
Katie Burrington
katie.burrington@thomsonreuters.com

Publishing Editor
Dawn McGovern
dawn.mcgovern@thomsonreuters.com

Editor
Chris Myers
chris@forewords.co.uk

Editorial Publishing Co-ordinator
Nicola Pender
nicola.pender@thomsonreuters.com

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FOREWORD

Andrew Horrocks | Andrew Horrocks Law Limited
Maurice Phelan | Mason Hayes & Curran

Four years have now passed since the publication of the first edition of this book. Despite the generally improving economic outlook, the significant increase in commercial litigation remains evident, partly still caused by the previous financial crisis.

The growth of cross-border commerce means that jurisdictional principles have become more important as litigants are increasingly likely to find themselves involved in disputes in jurisdictions unfamiliar to them. They and their usual lawyers may have limited, if any, understanding of how the local legal system works. Sophisticated litigants are also increasingly aware of the benefits of bringing a claim in a jurisdiction more favourable to their cause of action, even if that means litigating in unfamiliar territories. It is therefore now more important than ever for parties and their advisors alike to be able to obtain an overview of the way litigation is conducted around the world.

Since the publication of the first edition, there have been a number of other noticeable trends. One is the increasing level of case management in commercial litigation undertaken by the courts in our own jurisdictions to attempt to avoid delay and reduce costs. The imposition of stricter time limits requires parties and in turn their lawyers to ensure resources are better managed.

The need to find cost-effective routes to the resolution of commercial disputes also remains a key trend. The market for mediation and other alternative dispute resolution services continues to expand, and arbitration remains popular for disputes arising out of cross-border commerce and investment. Insurance products relating to the costs of litigation have been available for some time in our jurisdictions, and here and elsewhere there is also a third party funding market.

The contributors to this second edition are all leading lawyers in their jurisdictions and are ideally placed to provide practical, straightforward commentary on the inner workings of their respective legal systems. Their kind contributions are greatly appreciated by us. We have been particularly pleased as general editors to have been able to gather such a breadth of contributors for this new book, from just about every major jurisdiction in the world. We express our thanks to all those at Sweet & Maxwell who have worked tirelessly to bring together the chapters and have assisted hugely in the editorial process.

As with the previous edition, a work of this nature will not allow for in-depth analysis or provide solutions for every problem encountered by litigants. The book is intended rather to provide a first port of call so that readers can start to appreciate the approach of the courts in each jurisdiction to commercial litigation and better understand both the procedure they adopt and how the dispute will be resolved in practice.

We hope this book will assist all who come to use it, and will be happy to receive suggestions for future editions.

Andrew Horrocks and Maurice Phelan, London and Dublin, September 2015

SWITZERLAND

Dieter Hofmann & Stefano Codoni | Walder Wyss Ltd

1. COURT STRUCTURE

1.1 How is the court structured? Does a specific court or division hear commercial claims?

In Switzerland, the organisation of the courts of first and second instance in civil matters is governed by the law of the cantons (states). The organisation therefore differs to some extent from canton to canton.

In essence, there is a two-layer civil court system in the cantons (in the Canton of Zurich, for example, these are several district courts (in German, which is the official language in the Canton of Zurich: "Bezirksgericht", normally serving as courts of first instance) and the superior court ("Obergericht", normally serving as court of appeal, but also as court of first instance in certain matters) and the Federal Supreme Court on the federal level as the highest court in Switzerland.

There are specialised courts in the fields of labour and tenancy, and certain cantons (such as the cantons of Zurich, Berne, Argovia and Saint Gall) have established specialised commercial courts that basically handle all disputes between commercial entities. At the Commercial Court of the Canton of Zurich, a judgment is rendered by five judges, two of them being professional judges (having a law degree and so on) and three senior business people (part-time judges, elected from among business people, senior management, experts or in-house counsel, providing for business expertise related to the matter heard).

Cases with a small amount (up to CHF 30,000) at stake and in summary proceedings are heard by a sole judge. Otherwise, there is normally a body of three judges sitting on a case, though there are also cases where five judges sit.

In general, there are two appeal instances: from the district court (court of first instance) to the cantonal superior court, and from there to the Federal Supreme Court. The appeal to the cantonal superior court provides for full scrutiny (both as to facts and as to law), whilst the appeal to the Federal Supreme Court essentially only allows for a scrutiny of law; the Federal Supreme Court is basically bound to the facts as established by the cantonal superior court. A judgment of a commercial court (as established in the cantons of Zurich, Berne, Argovia and St Gall) may only be appealed against before the Federal Supreme Court (with limited scope, as set out above).

2. PRE-ACTION

2.1 Are parties to potential litigation required to conduct themselves in accordance with any rules prior to the start of formal proceedings?

In the Swiss legal system, parties to potential litigation are not required to conduct themselves in accordance with specific rules prior to commencing formal proceedings. In particular, they are not required to discuss the claim or to exchange documents.

In most cases (for some exceptions, see below), before a matter may be brought to court, the claimant has to file a formal reconciliation request with a justice of peace, who will attempt to facilitate a settlement. If all parties agree, such reconciliation proceedings before the justice of peace may be replaced by mediation.

The parties may choose to waive the reconciliation proceedings if the amount at stake amounts to at least CHF 100,000. Moreover, in cases where a commercial court (in the cantons that have provided for one; see above) is competent, that is, normally in commercial disputes between commercial entities, there is no reconciliation proceeding before a justice of peace.

Of course, the parties' counsels are subject to the rules of professional conduct.

2.2 Are there any time limits for bringing a claim? If so, what are they?

In the Swiss legal system, there are essentially two types of time limits:

- Prescription periods (*Verjährungsfristen*), which in the Swiss legal system are a matter of substantive law.
- Forfeiture deadlines (*Verwirkungsfristen*).

The general prescription (time bar) period for contractual claims in Switzerland is ten years. There are certain exceptions where the deadline is five years, for example for claims for rent and other periodic claims, claims for delivery of food, claims resulting from treatment by a doctor and claims for wages based on an employment contract. There are also claims where the deadline is only one year, most notably with regard to claims based on tort.

Prescription periods are only recognised by the court if expressly raised by way of objection by the counterparty.

A prescription period may be interrupted, that is, made to commence again, in particular by filing a request for reconciliation or an action, or by filing a summons to pay.

Forfeiture deadlines may vary with regard to duration. The deadline to challenge a resolution taken in a shareholder meeting of a Swiss corporation, for example, is two months from the date the shareholder meeting took place. If this deadline is not met by filing an action, the respective right to challenge ceases to exist. In contrast to prescription periods, forfeiture periods must be observed by the court *ex officio*, that is, without the counterparty expressly raising an objection that the claim is forfeited. Forfeiture periods are quite rare.

Of note, in cases where the claimant has to go through the reconciliation procedure before a justice of peace (see above) and no settlement can be reached, the justice of peace will grant leave to sue to the claimant, which leave is valid for three months. However, if the three month period has lapsed and the claimant has not filed an action with the court, the claimant may simply institute a further reconciliation proceeding before the justice of peace and would not be precluded from claiming just because of missing the initial three month deadline (unless, of course, the claimant missed a prescription period or forfeiture time limit).

Once court proceedings have commenced, it is the court that determines the timetable and sets the deadlines for the parties to file their written briefs, and so on.

3. PROCEDURE AND TIMETABLE IN CIVIL COURTS

3.1 How are proceedings commenced?

Normally, in commercial matters and before a commercial court (for example, in the Canton of Zurich), the claimant will file an action by filing a written brief, setting out in detail his or her prayers for relief, the claim(s) and the facts,

along with documents that support his or her case (statement of claim along with exhibits). In the statement of claim, the claimant will indicate any and all means of evidence (in particular, witnesses) that he or she believes will prove his or her factual allegations. It is common to plead the law as well, though strictly speaking not formally required. In cases where the claimant has to first go through the formal reconciliation procedure before a justice of peace, he or she also needs to file a so-called "Klagebewilligung", that is, the document confirming leave to sue.

In cases where the claimant mandatorily first has to institute formal reconciliation proceedings (see above), the claimant will normally file a brief request for reconciliation, usually with his or her prayers for relief, requesting the justice of peace to call the parties to a hearing before said justice of peace. The claimant may set out the basis of his or her claims (or factual allegations) in the reconciliation request, but this is normally done in a somewhat generic and brief way.

In Switzerland, it is the court that serves the written submissions and exhibits filed by one party to the other party. In other words, it is not for the parties or their counsel to serve the other parties.

By filing a reconciliation request or a statement of claim, the claimant establishes *lis pendens*. In other words, such filing with the court (which is normally done via Swiss Post) constitutes the formal commencement of the proceedings.

3.2 What are the main steps to trial, once a claim has been formally commenced? What is the usual timetable to trial?

Once a statement of claim has been filed with the court, the court will briefly check whether certain formal requirements are met and will then normally issue an order requesting the claimant to pay an advance on the court costs (in accordance with a tariff, normally depending on the amount at stake). The court will also set a deadline for the defendant to file his or her statement of defence (again, along with any documents that the defendant believes will support his or her defence). Once the answer to the statement of claim has been filed by the defendant, the court may, in its discretion, call for a hearing or set a deadline for the claimant to file his or her second brief (reply) and, once such brief has been filed, set a deadline for the defendant to file his or her rejoinder.

The defendant may simply file a defence, that is, raise arguments against the claimant's case, or, depending on the case, may also file a counterclaim or join a third party.

It should be noted that there is no proper "trial" as in the US sense. In commercial matters, pleadings are mostly done by way of exchange of written briefs, and hearings tend to be rather brief, for example, focusing on settlement negotiations or on evidence taking, especially testimony from witnesses. This latter does not happen in all cases, and normally lasts a matter of hours and certainly not days.

It is the court that controls the procedure and the timetable, and sets the deadlines for the parties.

The court may decide on certain preliminary issues by way of a separate decision, particularly with regard to jurisdiction or in cases where the court has limited the proceedings to issues which could potentially terminate the case as such, for example whether the claimant's claims are time barred.

In commercial matters, for example in the Zurich Commercial Court, the whole procedure (from filing the action up to service of a judgment) would normally take one to two years. Most cases, however, are terminated by way

of settlement during the course of a settlement hearing, which normally takes place after the first exchange of written briefs. In such settlement hearing, the court renders a preliminary view of the case, based on the written submissions and documents filed so far, and facilitates a settlement. In these cases, a matter is normally terminated (with *res iudicata* effect) within a few months. Given that the parties are commercial entities, this special practice thus provides for a swift and efficient solution for most cases. Of course, the parties are not compelled to settle, but, based on the preliminary view given by the court, which is often quite a detailed assessment of the matter, they are often prepared to terminate the matter in an amicable manner.

3.3 Is it possible to expedite the normal timetable to trial? If so, how?

The parties may request the court to deal with certain issues that could potentially decide the case altogether, for example, with regard to whether the claim brought is time barred or not. Moreover, a claimant may choose a special (swifter) summary procedure if he or she believes he or she has a "clear case". The threshold for a "clear case" that would allow the court to render a judgment in such summary proceedings (in essence, a full decision based on the documentary evidence filed) is very high, so only a very small fraction of cases meet the threshold.

4. DOCUMENTARY EVIDENCE

4.1 Are the parties obliged to search for, retain or exchange documentary evidence prior to trial?

There is no pre-hearing fact discovery in the sense of discovery as in the US or other common law jurisdictions. Switzerland is a "no discovery" jurisdiction.

Under the Swiss Federal Civil Procedure Code (which came into force in 2011 and replaced the 26 Cantonal Civil Procedure Codes that were in force previously), there is a provision for a claimant to attempt to obtain specific evidence before instituting ordinary proceedings if certain conditions are met, though the threshold for this is rather high. It is also possible to request certain information based on the Swiss Data Protection Act. However, there is nothing that is even remotely comparable to US-style discovery or English disclosure.

As there is no discovery, there are no specific rules obliging parties to search for, retain or exchange documentary evidence (for exceptions, see below).

In order to understand the following answers to the issues raised, it is important to note that the Swiss civil procedure is quite different from the US procedure: as already mentioned, there is no discovery as such. Rather, a claimant files an action and all the documentary evidence that he or she believes supports his or her case. Likewise, the respondent files those documents that he or she believes support his or her case along with his or her answer to the statement of claim. Swiss civil proceedings essentially consist of two phases:

- The allegation phase (oral or written pleadings, and filing of documentary evidence by each party).
- The taking of evidence phase.

It is possible for a party to apply to the court to order the counterparty to disclose and file certain specific documents if they are relevant to and necessary for the outcome of the case. However, such documents must be clearly specified (no fishing expeditions, no request for broad categories of documents but rather, for example, disclosure of a specific

letter sent by Mr X to Mr Y on a specific date concerning a specific matter). It should be noted, though, that such production of documents would normally only take place at a later stage of the proceedings, that is, after the pleadings.

It is likewise possible to apply to the court to order a third party to disclose and file certain specific documents.

If a party fails to comply with such a court order, the court may take this into account when assessing and weighing the evidence. This would not mean that, just because of such failure, the allegations made by the counterparty would be considered as proven. However, it could, in principle, lead to a change in the burden of proof.

In principle, third parties are obliged to assist in the taking of evidence, which means that they have to serve as a witness, produce documents and so on, unless they have a right to refuse to take part – for example, because the relevant documents stem from a relationship with an (external) attorney or if there is a specific professional secrecy at stake.

4.2 Are there any special rules concerning the exchange of electronic documents?

As there is no general obligation to exchange documents, there are no special rules concerning the exchange of electronic documents.

4.3 Can any documents be withheld from the other side or from the court?

Yes, a party may invoke a specific right to refuse to produce documents, for example, because the relevant document stems from a relationship with an (external) attorney or if there is another professional secrecy at stake. The protection with regard to documents that stems from a relationship between a party (or third party) with an attorney does not extend to in-house counsel, only to external counsel. Such documents are protected under the new Civil Procedure Code regardless of where they are kept (in contrast to the situation before the Civil Procedure Code entered into force).

5. WITNESS EVIDENCE

5.1 Do parties exchange witness evidence prior to trial? If so, how and at what stage in the proceedings?

As mentioned above, there is no discovery in Switzerland, with regard to either documents or depositions in the US style.

Witnesses give their testimony only in court. There are thus no depositions and/or written witness statements, and there is no exchange of witness evidence in advance of the hearing at which the witnesses are heard.

However, as Swiss proceedings (in commercial cases) are normally done by way of written briefs, and as these briefs have to set out the case in great detail (in a "substantiated" manner), indicating the evidence for each allegation, the parties will gain some understanding of what each witness is expected to give testimony on from the counterparty's written submissions (pleadings).

Witnesses are heard with regard to (disputed) facts that he or she directly perceived. In other words, witnesses are not heard with regard to the law or to mere hearsay. Moreover, the court must consider the witness testimony to be relevant and necessary to decide the matter.

Other restrictions might apply, depending on the specific relationship of the witness to the party (for example, a family relation) or in specific circumstances (for example, where there is a professional duty of secrecy).

5.2 Do witnesses give evidence at trial? If so, how? Is it possible for the court to hear oral testimony from expert or ordinary witnesses via teleconferencing, or any other remote live connection system?

Witnesses are heard only in a court hearing (before all sitting judges or a delegation of the court), and only if the court considers it necessary. They only give live testimony; there are no depositions and/or written witness statements.

It is the judge, not the parties or their counsel, who asks questions of the witness based on the allegations made by the parties in their briefs. Counsel (or parties) may be given the opportunity to ask additional questions of the witness, but always under the control of the court. (Depending on the court and the judge, the court will request counsel to formulate a question, which the judge will then consider. If the question is deemed appropriate, the judge will then ask the question of the witness. Sometimes this procedure is simplified in that a judge may allow counsel to ask questions directly, though still under the strict supervision of the judge, who may interfere at any time.)

There is therefore no cross-examination.

Moreover, Swiss courts tend to rely on documentary evidence more than oral evidence, especially documentary evidence that stems from the time in question. In the Zurich Commercial Court, for example, it is quite rare for witnesses to be heard.

It is not possible for a court to hear oral testimony from expert or ordinary witnesses via teleconferencing, or any other remote live connection system.

It is a criminal offence for a witness (and, to some extent, for a party representative questioned by the court) to lie in court. Such an offence is punishable by imprisonment for up to five years.

5.3 Can a witness be forced to attend court for the purposes of giving evidence?

If required, witnesses must attend the court hearing in order to give evidence. In particular, the court may penalise the witness with a fine or order that the witness be compelled to appear by force (for example, by the police).

6. EXPERT EVIDENCE

6.1 Are parties permitted to use experts in the proceedings to give opinion evidence? If so, who appoints the expert?

Parties may file written expert reports, but they do not qualify as evidence and have the same legal standing as the parties' allegations. In order to qualify as evidence proper, the expert must be appointed and instructed by the court. A party may request in its briefs that such expert be appointed by the court. It remains in the court's discretion whether the appointment of an expert will be made or not.

The parties are free to file along with their written pleadings one or more expert reports. If they file such a report, a copy is given to the counterparty by the court. However, the parties are not required to file expert reports. In most cases, a party will request that an expert opinion be obtained by the court at a later stage in the proceedings.

6.2 Do parties exchange expert evidence prior to trial? If so, how and at what stage in the proceedings?

Again, as there is no US-style discovery and the procedure differs greatly from that in the US, there is no pre-hearing for expert disclosure.

As set out in *Section 6.1*, the parties may file expert reports along with their briefs, but these reports do not qualify as evidence; rather, they rank as allegations of the parties (in fact, but not by law, they may nevertheless carry more weight than mere allegations, depending on the expert and the quality of the report).

If a party files a report (normally along with one of its written briefs, for example, the party's statement of claim), then the court will serve such report (along with the submission) on the counterparty. Normally, an expert report would cover factual issues in the field of the expert's peculiar expertise, for example, valuation of real estate or of a business. The expert may give his or her opinion verbally (in a hearing) or, more commonly, by way of a written expert report. It is also possible to have expert reports regarding issues of law, in particular regarding foreign (non-Swiss) law that might apply to a certain matter. Expert reports relate to a disputed fact or facts that are relevant and necessary to decide the matter and where the court does not have the necessary specific knowledge.

6.3 Do experts give evidence at trial? If so, how?

Experts may give written or oral evidence. In most cases, they would issue a written expert report. There is no cross-examination in court litigation in Switzerland, with regard to both witnesses and experts. It is possible for an expert to be requested to issue a written expert report and then to be asked by the court to explain that report in a hearing. The parties are given the opportunity by the court to request an explanation of the written report or to ask additional questions of the expert.

6.4 How are experts paid and are there any rules to ensure that expert evidence is impartial?

There is a distinction to be made between an expert who is appointed and instructed by the court, and is thus fully independent, and an expert report filed by a party where the expert is not independent but is acting on behalf of a party. An expert appointed by a party would render a report based on the mandate agreement with the party appointing him or her, and would be paid by such party. An expert appointed by the court, however, is paid by the court, though the costs of the court-appointed expert will ultimately to be borne by the losing party (in line with the general court costs and in accordance with the "loser pays" principle; the court will normally request an advance in order to make sure that the expert's costs are secured). The court-appointed expert must be impartial; in essence, the same rules regarding his or her impartiality apply as with regard to the court members.

7. ENDING A CLAIM/ALTERNATIVE DISPUTE RESOLUTION (ADR)

7.1 What are the main ways in which a claim may be brought to an end before trial?

An action that has been filed with the court can be brought to an end without going through the whole proceedings by one of three main ways:

- The claimant may withdraw his or her action.
- The respondent may admit the action.
- The parties may settle the matter (in court).

All three ways bring the case to a full and final end, with *res iudicata* effect.

A claimant may withdraw his or her action (and thus abandon his or her claim) at any time. As a consequence, the case will then be terminated based on the withdrawal, with *res iudicata* effect, that is, the same claim can no longer be brought against the same counterparty. Moreover, in accordance with the general "loser pays" principle, the claimant will have to bear the court costs and will have to pay compensation for the legal fees of the defendant.

As set out above, once an action has been filed with the court, the court will check whether certain formal requirements have been met. If they have, then the court will set a deadline for the defendant to comment, that is, to file a statement of defence. There is essentially no possibility to request that a claim be struck out on the basis that it lacks merit at the preliminary stage of the proceedings.

7.2 What ADR procedures are available?

The parties are essentially free to negotiate and settle their case out of court or in court. They may also refer their case to mediation or to expert determination. In case of out-of-court conciliation or mediation, the parties would normally ask the court to formally stay (suspend) the proceedings. Swiss courts normally assist with the facilitation of a settlement – see in particular the standard proceedings before the Zurich Commercial Court, which aim at achieving a settlement between the parties (*see Section 3.2 above*).

7.3 Can the court compel the parties to use ADR?

No. As set out above (*Section 2.1*), in certain cases, reconciliation proceedings before a justice of peace (which aim to facilitate a settlement) are mandatory, and they may, if the parties agree, be replaced by mediation. In addition, Swiss courts will normally try to facilitate settlement between the parties. However, the court may not formally compel the parties to use ADR. The court may not impose negative sanctions for failure to use ADR. If no settlement can be reached, the court will render a judgment and will impose the normal cost consequences on the parties (in accordance with the "loser pays" principle, the losing party will have to bear the court costs and will have to pay compensation for the legal fees of the winning party).

8. TRIAL

8.1 What are the main stages of a civil trial? How long would a significant commercial litigation trial last?

In Swiss civil proceedings, there is no real "trial" as in the US or other common law jurisdictions. In particular, in more complex commercial cases, pleadings are done by way of written brief, and documentary evidence is filed along with such briefs. The parties and the courts primarily rely on documentary evidence, and witnesses generally have much less importance than in the US. Hearings with oral pleadings are possible.

The time-frame to reaching a final and binding decision varies considerably from court to court. On average, a full civil proceeding (a written brief for each party and one hearing in which parties plead their case, or two rounds of written briefs for each party and a final hearing) usually takes from one to two years.

Cases dealt with by the Commercial Court in Zurich will usually be completed by way of settlement and within six to nine months. If no settlement is reached, the court will normally render a judgment within one to two years.

The length of the proceedings normally depends on:

- The complexity of the case.
- If witnesses and/or experts are to be heard or not.
- If the case requires the service of court orders and so on outside of Switzerland.
- If taking of evidence outside of Switzerland via international legal assistance (Hague Convention on the Taking of Evidence Abroad) is necessary.
- The workload of the judge in charge of the file.

8.2 Are civil court hearings held in public? Are court documents available to the public?

In general, civil court hearings are open to the public, but it is quite rare for people other than the parties or other people involved to attend. Civil court documents are not normally available to the public. It is possible for a specific judgment to be obtained if certain requirements were met, but such judgment would have to be anonymised. In contrast, all judgments of the Federal Supreme Court are published. Cantonal courts still do not publish their decisions on a regular basis, though there are exceptions.

9. REMEDIES

9.1 What are the main remedies available prior to trial? In what circumstances can such remedies be obtained?

It is possible to apply for interim injunctions, in particular in order to maintain a specific situation until the court has rendered the final judgment. Injunctions may be obtained before the main proceedings have been instituted and may also be requested once the main proceedings have started. As set out above, it is possible to request the counterparty or third parties to produce specific documents, but only in a limited way, and such document production would normally only take place during the second stage of the proceedings – the taking of evidence

phase – that is, once the pleadings have been completed. If certain specific requirements are met, it is also possible to request security for legal costs. Urgent remedies may also be obtained without notice to the other party, that is, on an ex parte basis, but only if there is a real urgency and the case necessitates that the decision be rendered before the other party is granted its right to be heard.

9.2 What final remedies are available at trial?

There is no fixed catalogue of final remedies that are available. A claimant may request a specific performance and/or damages, injunctions, declarations or the amendment of a contract, or that the court ascertain something and so on.

10. ENFORCEMENT

10.1 How is an award of damages enforced if a party fails to make payment voluntarily?

With regard to enforcement of a judgment, a distinction is made in Switzerland between monetary claims and other claims. To enforce a monetary judgment where the debtor does not pay voluntarily, a claimant would file a summons to pay with the debt enforcement office, which would then issue a summons to pay to the counterparty. This procedure would eventually lead to the debt enforcement office seizing assets of the debtor or the bankruptcy of the debtor, as the case may be. In case of a non-monetary judgment, the court would deal with the enforcement, which, depending on the case, could include imposing criminal sanctions on the counterparty.

11. APPEALS

11.1 Is it possible for a defeated party to appeal a decision after the close of trial? In what circumstances will a party be allowed to appeal?

It is possible for a defeated party to appeal a judgment.

In general, there are two appeal instances: from the district court (court of first instance) to the cantonal superior court, and from there to the Federal Supreme Court. The appeal to the cantonal superior court provides for full scrutiny (as to both facts and law), whilst the appeal to the Federal Supreme Court essentially only allows for a scrutiny of law; the Federal Supreme Court is basically bound to the facts as established by the cantonal superior court. A judgment of a commercial court (as established in the cantons of Zurich, Berne, Argovia and St Gall) may only be appealed against before the Federal Supreme Court (with limited scope, as set out above).

The appeal period is normally 30 days from the day the reasoned judgment was served on the party.

11.2 What is the basic procedure for an appeal?

The basic procedure for an appeal depends on the type of appeal and the court level (*see Section 11.1*). Whilst it would be possible for a superior cantonal court to see witnesses, this is hardly ever done in practice. The Swiss Federal Supreme Court will never see witnesses in appeal matters, considering only the files of the case (including the documents filed in the previous instances and the minutes of the witness testimonies).

12. COSTS/FUNDING

12.1 How are legal fees ordinarily charged to a client? On an hourly rate?

In most cases, clients are charged on a time-spent basis.

12.2 Are there any restrictions on lawyers entering into "no win, no fee" agreements with their clients?

"No win, no fee" and contingency fee agreements are not allowed in Switzerland. It is, however, possible to agree on a success fee element in the sense that counsel will get a top up on his or her fee in case of success, but it is required that the fee that is payable in any case (regardless of the outcome) must at least cover any and all costs of counsel and must also contain some profit element.

In essence, such arrangements are possible with regard to all claims and in any circumstances.

12.3 Is it permissible for a third party to fund a claim? Are there any restrictions on the use of such funding?

Third party funding is permitted. As long as the party to the proceedings is directly funded by a third party, no limits apply. Third party funding might, however, interfere with the independency rule for counsel mandated to represent their client's interest. In that case, the rules of professional conduct might prohibit counsel from entering into a correspondingly funded client relationship.

12.4 Is it possible to obtain insurance which will cover the costs of bringing the claim?

It is possible to obtain insurance that will cover the costs of bringing a claim.

12.5 Can the court order a losing party to pay a winning party's costs? If so, in what circumstances and to what extent?

In Switzerland, the "loser pays" principle applies. The losing party has to bear the court costs and pay compensation for the legal fees of the winning party. Both the court costs and the compensation for the legal fees are determined by the court, usually in accordance with a tariff, which normally depends on the amount at stake.

Depending on the amount at stake, it is therefore possible that the amount payable as compensation for legal fees is higher or lower than the actual costs incurred. It depends on the canton and the respective court practice whether the court actually requests information on the legal fees incurred. In the Canton of Zurich, for example, the court would not normally ask for costs statements and so on, but would simply fix the amount of the compensation for legal costs based on the amount at stake in accordance with the tariff.

12.6 Can the court make an order providing security for costs prior to permitting a claim to proceed? If so, what are the circumstances in which such an order is possible?

The claimant has to pay an advance on court costs. Security for legal costs of the defendant is only available in specific circumstances, in particular:

- If the claimant is not based in Switzerland and there is no treaty that would exempt the claimant from providing security for legal costs.
- If the claimant is bankrupt.
- If the claimant has not paid the court costs of previous proceedings.
- If there are other reasons that establish a real risk that the claimant will not pay compensation for legal costs.

13. COLLECTIVE ACTIONS

13.1 Can claimants with similar claims bring a collective action against an alleged wrongdoer?

The Swiss legal system does not provide for class actions or collective redress. Multi-party actions are, however, allowed (that is, several claimants with identical or similar claims may join together and file one action).

13.2 Is the procedure for bringing a collective action different to the procedure for a normal claim?

The Swiss legal system does not provide for class actions or collective redress. The procedure for multi-party actions is essentially the same as that for a normal claim.

14. OTHER SPECIAL FEATURES

14.1 Are there any other special features of the commercial litigation regime that litigants should be aware of?

No.

14.2 Are there any forthcoming changes to commercial litigation practice in your jurisdiction or any proposals for reform?

There is currently a discussion going on as to whether Switzerland should introduce collective redress mechanisms or not. Whilst a few years ago, in its report explaining the new Civil Procedure Code (which entered into effect in 2011), the government held that such mechanism would be "alien to Swiss law", a recent draft act for financial services provided for certain collective redress mechanisms. However, this met with quite a lot of criticism. Potentially, over the years, certain collective redress mechanisms are likely to be introduced, but they will certainly not reflect all of the features of collective redress in the US.

CONTACT DETAILS

GENERAL EDITORS
Andrew Horrocks
Andrew Horrocks Law Limited
35 Bedford Road
London N2 9DB
UK
t +44 7786 738254
e andrew@horrockslaw.co.uk

Maurice Phelan
Mason Hayes & Curran
South Bank House
Barrow Street
Dublin 4
Ireland
t +353 1 614 5000
f +353 1 614 5001
e mphelan@mhc.ie
w www.mhc.ie

ARGENTINA
Gonzalo García Delatour &
María Lucila Marchini
Estudio Beccar Varela
1 Tucumán Street, 3rd Floor
Edificio República
Buenos Aires C1049AAA
Argentina
t +54 11 4379 6800/4700
f +54 11 4379 6860
e gdelatour@ebv.com.ar
e mmarchini@ebv.com.ar
w www.ebv.com.ar

AUSTRALIA
Minter Ellison, Scott Chesterman &
Vicki Bell
525 Collins Street
Melbourne VIC 3000
Australia
t +61 3 8608 2614
t +61 438 363 093
e scott.chesterman@
e minterellison.com
e vicki.bell@minterellison.com
w minterellison.com

BRAZIL
Carlos Roberto Siqueira Castro, Daniela
Soares Domingues, Iara Santos Conrado
& Caroline Gomes Tabach da Rocha
Siqueira Castro – Advogados
Rua Tabapuã, number 81 -4 floor
Itaim Bibi
São Paulo – SP 04533-010
Brazil
t +55 11 3704 9840
f +55 11 3704 9848

Praça Pio X 15 – 3 floor – Centro
Rio de Janeiro – RJ 20040-020
Brazil
t +55 21 2223 8818
f +55 21 2516 8308
e danieladomingues@siqueiracastro.
com.br
e ddomingues@siqueiracastro.com.br
e ebassaco@siqueiracastro.com.br
w www.siqueiracastro.com.br

CANADA
Michael Statham & Nadia Chiesa
WeirFoulds LLP
66 Wellington Street West,
Suite 4100
PO Box 35, Toronto-Dominion Centre
Toronto, Ontario
M5K 1B7 Canada
t +1 416 947 5023
t +1 416 947 5084
f +1 416 365 1876
e mstatham@weirfoulds.com
e nchiesa@weirfoulds.com
w www.weirfoulds.com

CAYMAN ISLANDS
Peter Hayden, Hector Robinson & Louis
Mooney
Mourant Ozannes
94 Solaris Avenue
Camana Bay
PO Box 1348
Grand Cayman KY1-1108
Cayman Islands
t +1 345 814 9165
f +1 345 949 4647
e louis.mooney@mourantozannes.com
e hector.robinson@mourantozannes.
com
e peter.hayden@mourantozannes.com
w www.mourantozannes.com

CONTACT DETAILS

CHINA
Denning Jin
King & Wood Mallesons
17th Floor, One ICC, Shanghai ICC
999 Huai Hai Road (M)
Xuhui District
Shanghai 200031
China
t +86 21 2412 6020
t +86 1390 188 3273
f +86 21 2412 6150
e denning.jin@cn.kwm.com

CYPRUS
Andreas Erotocritou & Antreas Koualis
AG Erotocritou LLC
1 Arch Kyprianou & Ayiou Andreou
Corner,
Loucaides Building, 6th Floor,
Limassol 3036
Cyprus
t +357 25 370101
f +357 25 370102
e info@erotocritou.com
e andreas.erotocritou@erotocritou.com
e antreas.koualis@erotocritou.com
w www.erotocritou.com

ENGLAND & WALES
Andrew Horrocks
Andrew Horrocks Law Limited
35 Bedford Road
London N2 9DB
UK
t +44 7786 738254
e andrew@horrockslaw.co.uk

Leah Alpren-Waterman
Watson Farley & Williams LLP
15 Appold Street
London EC2A 2HB
UK
t +44 20 7814 8000
f +44 20 7814 8141
e lalpren-waterman@wfw.com
w www.wfw.com

FINLAND
Kristiina Liljedahl & Saara Lapiolahti
Borenius Attorneys Ltd
Eteläesplanadi 2
FI-00130 Helsinki
Finland
t +358 20 713 33
f +358 20 713 3499
e kristiina.liljedahl@borenius.com
e saara.lapiolahti@borenius.com
w www.borenius.com

FRANCE
Thierry Bernard
CORUS, société d'avocat
14, rue d'Anjou
75008 Paris
France
t +33 1 42 66 58 57
f +33 1 42 66 60 73
e tbernard@corus-avocats.com
w www.corus-avocats.com

GERMANY
Bettina Joos & Felix Muuss
Ehlermann Rindfleisch Gadow
Rechtsanwälte Partnerschaft mbB
Ballindamm 26
20095 Hamburg
Germany
t +49 40 37 48 14 0
f +49 40 37 48 14 30
e joos@erg-legal.com
e muuss@erg-legal.com
w www.erg-legal.com

GUERNSEY
Karen Le Cras
Carey Olsen
Carey House, Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands
t +44 1481 741524
e karen.lecras@careyolsen.com
w www.careyolsen.com

CONTACT DETAILS

HONG KONG
Richard Wilmot, Justin Gan & Howard Hsu
Watson Farley & Williams
Units 1703-1707, One Pacific Place
88 Queensway
Hong Kong
t +852 2168 6700
f +852 2918 9777
e rwilmot@wfw.com
w www.wfw.com

INDIA
Aditi Pandey, Nihit Nagpal, Malyashree Sridharan, Geetanjali Sethi, Pragati Aneja & Puneet Dhawan
Amitabha Sen & Co
Attorneys & Advocates
Suite 601 F, 5 Hailey Road
New Delhi – 110 001, India
t +91 11 2335 2365
f +91 11 2335 2594
e asenco@vsnl.com
w www.asenco.in

INDONESIA
Firmansyah, Karen Mills & Margaret Rose
KarimSyah Law Firm
Alamanda Tower, Level 27
Jalan TB Simatupang Kav. 23–24
Jakarta 12430
Indonesia
t +6221 2966 0001
f +6221 2966 0007
e kmills@cbn.net.id
e firmansyah@karimsyah.com
w www.karimsyah.com

IRELAND
Maurice Phelan & Paul Bassett
Mason Hayes & Curran
South Bank House
Barrow Street
Dublin 4
Ireland
t +353 1 614 5000
f +353 1 614 5001
e mphelan@mhc.ie
e pbassett@mhc.ie
w www.mhc.ie

ITALY
Cino Raffa Ugolini
CREA – AVVOCATI ASSOCIATI
Via del Lauro, 9
20121 Milano
Italy
t +39 0289836800
f +39 0289836899
e c.raffa@crealaw.com
w www.crealaw.com

JAPAN
Akihiro Hironaka
Nishimura & Asahi
Ark Mori Building
1-12-32, Akasaka
Minato-ku
Tokyo 107-6029
Japan
t +81 3 5562 8644
f +81 3 5561 9711
e a_hironaka@jurists.co.jp
w www.jurists.co.jp/en/

MALAYSIA
Siva Kumar Kanagasabai & Lee Shih
SKRINE
Unit 50-8-1, 8th Floor
Wisma UOA Damansara
50 Jalan Dungun
Damansara Heights
50490 Kuala Lumpur
Malaysia
t +603 2081 3999
f +603 2094 3211
e skk@skrine.com
e ls@skrine.com
w www.skrine.com

MEXICO
Carlos Sierra & Miguel Ruelas
Abogados Sierra y Vázquez
Prolongación Reforma No. 1190 25th Floor
Santa Fe
Mexico DF 05349
t +52 55 52 92 78 14
f +52 55 52 92 78 06
e csierra@asyv.com
e mruelas@asyv.com
w www.asyv.com
w www.asyv.aero

CONTACT DETAILS

NEW ZEALAND
Jonathan Scragg
Duncan Cotterill, Lawyers
Level 2 Chartered Accountants House
50 Customhouse Quay
PO Box 10376
Wellington 6143
New Zealand
t +64 4 499 3280
f +64 4 499 3308
e jonathan.scragg@duncancotterill.com
w www.duncancotterill.com

POLAND
Dr Jerzy Modrzejewski
Modrzejewski i Wspólnicy Sp.k.
Al. Stanów Zjednoczonych 61a
04-028 Warsaw
Poland
t +48 22 516 26 00
f +48 22 516 26 01
e modrzejewski@modiw.pl

RUSSIA
Andrey Astapov, Oleh Beketov &
Natalia Konovalova
AstapovLawyers International Law
Group
Svyatogor-2 Business Centre
10 Letnikovskaya Street, building 2,
8th floor
Moscow, 115114
Russian Federation
t +7 495 987 12 10
f +7 495 987 12 11
e astapov@astapovlawyers.com
e beketov@astapovlawyers.com
e konovalova@astapovlawyers.com
w www.astapovlawyers.com

SINGAPORE
Lok Vi Ming, SC & Germaine Tan
Rodyk & Davidson LLP
80 Raffles Place
#33-00 UOB Plaza 1
Singapore 048624
t +65 6225 2626
f +65 6557 2522
e lok.viming@rodyk.com
e germaine.tan@rodyk.com
w www.rodyk.com

SOUTH AFRICA
George van Niekerk
ENSafrica
1 North Wharf Square
Loop Street
Foreshore
Cape Town 8001
South Africa
t +27 21 410 2500
f +27 21 410 2555
e gvanniekerk@ensafrica.com
e info@ensafrica.com

SOUTH KOREA
Young Seok Lee, Sae Youn Kim &
Stephen Sukjoon Pak
Yulchon LLC
Textile Center 12F
518 Teheran-ro
Daechi-dong, Gangnam-gu
Seoul 135-713
Korea
t +82 2 528 5200
f +82 2 528 5228
e mail@yulchon.com
w www.yulchon.com

SPAIN
Jorge Angell
LC Rodrigo Abogados
Lagasca, 88 – 4th floor
28001 Madrid
Spain
t +34 914 355 412
f +34 915 766 716
e jangell@rodrigoabogados.com
w www.rodrigoabogados.com

SWEDEN
Erik Wernberg & Jens Tillqvist
Advokatfirman Cederquist KB
PO Box 1670
SE-111 96 Stockholm
Sweden
t +46 8 522 06500
f +46 8 522 06700
e erik.wernberg@cederquist.se
e jens.tillqvist@cederquist.se
w www.cederquist.se

CONTACT DETAILS

SWITZERLAND
Dieter Hofmann
Walder Wyss Ltd
Seefeldstrasse 123
PO Box 1236
8034 Zurich
Switzerland
t +41 58 658 58 58
f +41 58 658 59 59
e dieter.hofmann@walderwyss.com
w www.walderwyss.com

Stefano Codoni
Walder Wyss Ltd
Via F Pelli 12
PO Box 5162
6901 Lugano
Switzerland
t +41 58 658 40 00
f +41 58 658 59 59
e stefano.codoni@walderwyss.com
w www.walderwyss.com

TURKEY
Dr Zeynep Çakmak & Elif Demiröz
Çakmak Avukatlık Bürosu
Piyade Sokak, Portakal Çiçeği
Apt. No. 18
C Blok Kat: 3
Çankaya
Ankara 06550
Turkey
t +90 312 442 4680
f +90 312 442 4690
e z.cakmak@cakmak.av.tr
e e.demiroz@cakmak.av.tr
w www.cakmak.av.tr

UAE & DIFC
Jasamin Fichte & Walid Batisha (UAE)
Alessandro Tricoli & Teresa Starr (DIFC)
Fichte & Co Legal Consultancy
19th floor, Prism Tower
Sheikh Zayed Road, Business Bay
Dubai, UAE
t +971 4 43 57 577
f +971 4 43 57 578
e jasamin.fichte@fichtelegal.com
e walid.batisha@fichtelegal.com
e alessandro.tricoli@fichtelegal.com
e teresa.starr@fichtelegal.com
w www.fichtelegal.com

UKRAINE
Andrey Astapov, Oleh Beketov &
Igor Semenov
AstapovLawyers International Law
Group
Sophia Business Centre
6 Rylskiy lane, 6th floor
Kyiv, 01601
Ukraine
t +380 44 490 7001
f +380 44 490 7002
e astapov@astapovlawyers.com
e beketov@astapovlawyers.com
e semenov@astapovlawyers.com
w www.astapovlawyers.com

UNITED STATES
Andrew Rhys Davies & Justin L Ormand
Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
USA
t +1 212 610 6300
f +1 212 610 6399
e andrew.rhys.davies@allenovery.com
e justin.ormand@allenovery.com
w www.allenovery.com