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"Damage claims in competition matters: The dawn of a new era?"

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Dr Martin Rauber, LL.M.

Nater Dallafior Rechtsanwälte AG
Hottingerstrasse 21
CH-8032 Zurich
Switzerland
+41 44 250 45 71

rauber@naterdallafior.ch

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QUESTIONNAIRE

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CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

   Although it is generally acknowledged that the Federal Act on Cartels and Other Restraints of Competition (Cartel Act)[1] does not only protect competition itself but also the individual interests of competition participants[2], the importance of private enforcement of the Cartel Act in Switzerland is rather moderate.

   Even though the Cartel Act provides several claims for an undertaking injured by a restraint of competition, it is more opportune for a potential claimant to file a complaint with the Swiss Competition Commission. This situation is due to the difficulties a potential claimant faces in order to substantiate and prove the damage

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[1] Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (status as of 1 December 2014) (SR 251), available at https://www.admin.ch/opc/en/classified-compilation/19950278/index.html (accessed 26 October 2015).

[2] Decision of the Swiss Federal Tribunal dated 14 August 2002 (BGE 129 II 18), consideration 5.2.1; Decision of the Swiss Federal Tribunal dated 19 December 2013 (BGE 130 II 139).

suffered due to a restriction of competition and the potential procedural costs of antitrust based civil litigation or arbitration[3]. In addition, the costs for a claimant to prove an unlawful restraint of competition on his own are very high. It is rather necessary for a claimant to rely on the investigation of the Swiss Competition Commission with regard to proving the illegality of the defendant's actions. The lack of possibilities to collectively redress antitrust based claims is another reason for the moderate significance of private enforcement. Moreover, the tendency of the Swiss Competition Commission to investigate cases of competition restriction in which individual interests are clearly preponderant is considered another reason for the current situation[4].

Being aware of the above-mentioned difficulties and deficiencies of private enforcement of the Cartel Act, there is ongoing (political) discussion for improvement.

a. Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)

   If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

   The short answer is *yes*. However, only undertakings in the sense of Article 4 (1) of the Cartel Act are entitled to file the antitrust based claims provided by the Cartel Act (Article 12 of the Cartel Act).

   In particular neither consumers nor consumer protection organisations have the capacity to file antitrust based claims since they do not qualify as undertakings in the sense of the Cartel Act[5]. With regard to trade associations, the question is discussed controversially[6]. Trade associations certainly have the capacity to file antitrust based claims if they are themselves hindered by an illegal restraint of competition from entering or

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[3] Reymond, Jean-Marc, in: Tercier, Pierre/Bovet, Christian (eds.), *Commentaire Romand sur le droit de la concurrence*, Geneva/Basle/Munich 2002, preliminary remarks Art. 12-17 para. 11; Zäch, Roger/Heizmann, in: Kepinski, Martin et al. (eds), *Prawo prywatne czasu przemian*, Poznan 2005, p. 1062 *et seq.*

[4] Jacobs, Reto/Giger, Gion, in: Amstutz, Marc/Reinert, Mani (eds.), *Basler Kommentar zum Kartellgesetz*, Basle 2010, preliminary remarks Art. 12-17 para. 11.

[5] Jacobs, Reto/Giger, Gion, Art. 12 para. 23 *et seq.*; Lang, Christoph, *Die kartellzivilrechtlichen Ansprüche und ihre Durchsetzung nach dem schweizerischen Kartellgesetz*, Bern 2000, p. 72 *et seq.*; Hahn, Anne-Catherine, in: Baker & McKenzie (eds.), *Kartellgesetz*, Bern 2007, Art. 12 para. 13; Borer, Jürg, in: Geiser, Thomas et al. (eds), *Schweizerisches und europäisches Wettbewerbsrecht*, Basle/Geneva/Munich 2005, para. 13.20; Zäch, Roger, *Schweizerisches Kartellrecht*, 2nd ed, Berne 2005, para. 263.

[6] Arguing against a capacity for instance Walter, Regula, in: Homburger, Eric et al. (eds.), *Kommentar zum schweizerischen Kartellgesetz*, Zurich 1997, Art. 12 para. 37; Reymond, Jean-Marc, Art. 12 para. 18; Decision of the Cour de Justice Geneva dated 18 December 1998 (in: RPW 1999/2), p. 351 ff.; arguing in favour of a capacity for instance Hahn, Anne-Catherine, Art. 12 para. 13; Stoffel, Walter, in: Zäch, Roger (ed), *Das neue schweizerische Kartellgesetz* 1996, p. 101 et seq.; Jacobs, Reto/Giger, Gion, Art. 12 para. 24.

competing in a market and therefore qualify as an undertaking in the sense of the Cartel Act[7].

The legal basis for antitrust based claims is codified in Article 12 *et seq.* of the Cartel Act. These provisions apply to stand alone and follow-on actions likewise. However, the provisions of the Cartel Act with regard to antitrust based civil claims constitute mainly procedural rules[8] and do not codify a special substantive antitrust civil law[9]. The substantive law with regard to antitrust based claims are the substantive law provisions of the Cartel Act (Article 5 *et seq.* of the Cartel Act) which are applied by the Swiss Competition Commission as well[10].

Article 12 of the Cartel Act lists the possible claims (*cf.* question 9 below) and refers to the substantive provisions of the Swiss Code of Obligations (CO)[11]. Whoever is hindered by an illegal restraint of competition from entering or competing in a market is entitled to antitrust based claims. Restraints are illegal if they either qualify as unlawful agreements affecting competition in the sense of Article 5 of the Cartel Act or if they result from unlawful practices by market dominant enterprises in the sense of Article 7 of the Cartel Act[12]. Concentrations of undertaking in the sense of Article 9 *et seq.* of the Cartel Act cannot form the basis for antitrust based civil claims, as long as the requirements of Article 5 or Article 7 of the Cartel Act are not met as well[13].

CHAPTER II: COURT AND PROCEDURE

2. What is (are) the court(s) in charge of antitrust private enforcement?

    a) Is there a specialized court specifically for antitrust based claims?
    If No: are there specific chambers for antitrust claims within the civil/commercial courts?
    If Yes: is the court composed only by judges, also economic experts and/or other persons?

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[7] Jacobs, Reto/Giger, Gion, Art. 12 para. 24. Pursuant to Lang, Christoph, p. 75, the same is valid for consumer protection organisations.

[8] Jacobs, Reto/Giger, Gion, preliminary remarks Art. 12-17 para. 5.

[9] Walter, Regula, preliminary remarks Art. 12-17 para. 10; Decision of the Commercial Court of the canton of Aargau dated 13 February 2003 (in : RPW 2003/2), consideration 4/b (p. 463).

[10] Hahn, Anne-Catherine, Art. 12 para. 2.

[11] Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (status as of 1 January 2016) (CO; SR 220), available at https://www.admin.ch/opc/en/classified-compilation/19110009/index.html (accessed 31 January 2016).

[12] Decision of the Commercial Court of the canton of Aargau dated 13 February 2003 (in : RPW 2003/2), consideration 4/b (p. 463); Jacobs, Reto/Giger, Gion, preliminary remarks Art. 12-17 para. 5.

[13] Lang, Christoph, p. 82 *et seq.*; Jacobs, Reto/Giger, Gion, preliminary remarks Art. 12-17 para. 6 ; Hahn, Anne-Catherine, Art. 12 para. 10.

In Switzerland, civil law claims are enforced in a federal structure. Since 1st January 2011, the Swiss Code of Civil Procedure (CPC)[14] provides a uniform codified procedural law. The cantons remain, however, competent with regard to the organisation of their courts.

The provisions regulating the jurisdiction for antitrust based claims are included within the Swiss Code of Civil Procedure. Article 5 (1) lit. b CPC only obliges the cantons to designate one court that has jurisdiction as sole cantonal instance for antitrust law disputes. Other than that, it lies within the general competence of each canton to determine which court has to deal with antitrust based claims.

There are special commercial courts in the cantons Bern, Zurich, St. Gallen and Aargau which are designated as sole cantonal instance in the above-mentioned sense. These commercial courts, however, do not have specific chambers for antitrust based claims. These commercial courts are composed by judges and other experts, e.g. economic experts, as expert judges. Cantons with no commercial court designate the higher cantonal court as sole cantonal instance in antitrust based claims. These higher cantonal courts do not have specific chambers for antitrust based claims either and are usually composed only by judges.

It results from the above that there is *not one* specialized court for antitrust based claims in Switzerland. Since each canton has to designate a sole instance, there are in total 26 different courts competent to decide such claims. Since these courts are only occasionally occupied with applying the Cartel Act, a uniform application of the substantive provisions of the Cartel Act in civil proceedings is not guaranteed, even though civil court are obliged to submit the matter to the Swiss Competition Commission (*cf.* question 2/c below).

b) May the court impose interim measures?

The short answer is *yes*. Pursuant to Article 261 (1) CPC, the competent court for antitrust based claims may grant interim measures, provided the applicant demonstrates credibly that (i) an antitrust based claim to which he is entitled has been violated or that violation is anticipated; and that (ii) the violation threatens to cause not easily reparable harm to the applicant.

Applications of interim measures are conducted more often than ordinary proceedings. The effect of decisions on interim measures as precedents is not to be underestimated. Such decisions provide indications on how the decision in the ordinary proceedings is likely to be. Moreover, they indicate

[14] Swiss Code of Civil Procedure of 19 December 2008 (status as of 1 January 2016) (CPC; SR 272), available at https://www.admin.ch/opc/en/classified-compilation/20061121/index.html (accessed 31 January 2016).

to the claimant where the court found the argumentation to be weak. Moreover, parties often settle their dispute once the court has ruled on the request for interim measures.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

The short answer is *yes*. Although the Swiss Competition Commission and the civil courts apply the same substantive law provisions of the Cartel Act, both proceedings are independent from each other and may therefore be conducted in parallel. Article 15 (1) of the Cartel Act provides a certain connection between the civil court and the administrative authority. Pursuant to this provision, the civil court shall submit the matter to the Swiss Competition Commission for an opinion, if the permissibility of a restraint of competition is at issue in a civil proceeding. In interim measures proceedings, the civil courts are not obliged to submit the matter for an opinion[15]. The assessment of the Swiss Competition Commission is, however, not binding for the civil court[16] but will nevertheless still be of significant relevance when the court assesses the claim[17].

The civil court can, however, suspend proceedings if this is appropriate, in particular if the decision depends on the outcome of a different action (Article 126 (1) CPC. It is therefore possible that a civil court suspends civil proceedings if a parallel investigation is conducted by the Swiss Competition Commission involving the same parties[18]. Suspending the civil proceedings is, however, not appropriate with regard to applications on interim measures[19].

d) Is the decision subject to appeal?
If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

The short answer is *yes*. Since the Swiss Code of Civil Procedure provides that antitrust based claims must be assessed by a sole cantonal instance (*cf.*

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[15] Jacobs, Reto/Giger, Gion, Art. 15 para 9 with further references; Borer, Jürg, para. 13.73 and para. 13.74; Hahn, Anne-Catherine, Art. 15 para. 9.

[16] Lang, Christoph, p. 168; Jacobs, Reto/Giger, Gion, Art. 15 para 28 with further references.

[17] Schleiffer, Prisca, in: Baker & McKenzie (eds.), *Kartellgesetz*, Bern 2007, Art. 15 para. 28; Jacobs, Reto/Giger, Gion, Art. 15 para 28 with reference to a decision of the commercial court of Zurich.

[18] Several scholars advise the civil court to suspend proceedings as long as the Swiss Competition Commission conducts its investigation, *cf.* for instance Spitz, Philippe, *Das Kartellzivilrecht und seine Zukunft nach der Revision des Kartellgesetzes 2003*, SZW 2005, p. 118; Hangartner, Yvo, *Das Verhältnis von verwaltungs- und zivilrechtlichen Wettbewerbsverfahren*, AJP 2006, p. 50.

[19] Lang, Christoph, p. 174 and p. 206.

question 2/a above), the decision of such a cantonal court may only be appealed to the Swiss Federal Tribunal.

The Swiss Federal Tribunal may assess both the merits of the case and the law. With regard to the merits of the case, however, the requirements are very strict. The Swiss Federal Tribunal does assess the merits of the case only, if either the cantonal court's assessment is obviously inaccurate, i.e. arbitrary, or if the assessment is based on a violation of law[20].

3. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

   The conflict of law rules are included in the ninth chapter, third segment of the Federal Act on Private International Law (PILA)[21] or – with regard to member states of the Lugano Convention[22] – in Article 2 (1) or Article 5 (3) of the Lugano Convention concerning unlawful acts.

   Antitrust based claims can be submitted with Swiss courts at the defendant's domicile or, if the defendant has no domicile, at the defendant's usual place of residence. In addition, the Swiss courts at the place where the behaviour against the Cartel Act took place or where its results occurred also have jurisdiction. Moreover and for antitrust based claims based on the activities of a business establishment in Switzerland, the courts at the place where such business establishment is located also have jurisdiction[23].

4. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

   Ordinary proceedings usually take around two to two years and six months. Interim measures proceedings take between one and five months. Ex-parte interim measures, i.e. interim measures ordered by the civil court immediately and without hearing the defendant[24], are usually ordered within days.

5. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

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[20] *Cf.* for instance Decision of the Swiss Federal Tribunal dated 19 March 2013 (4A_598/2012), consideration 2.2; Schott Bertrand, *Basler Kommentar zum Bundesgerichtsgesetz*, 2nd ed, Basle 2011, Art. 97 para. 9 *et seq.*

[21] Federal Act on Private International Law of 18 December 1987 (status as of 1 July 2014) (PILA; SR 291), available at https://www.admin.ch/opc/de/classified-compilation/19870312/ (in German, French or Italian only; accessed 31 January 2016).

[22] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) of 30 October 2007 (status as of 1 July 2014) (SR 0.275.12), available at https://www.admin.ch/opc/de/classified-compilation/20082721/index.html/ (in German, French or Italian only; accessed 31 January 2016).

[23] Art. 129 PILA.

[24] Art. 265 CPC.

Initiating legal proceedings against the infringer of the Cartel Act goes along with costs risks. Each canton determines on its own the costs of litigation that occur when filing an action[25]. The cantonal court usually demands that the claimant makes an advance payment up to the amount of the expected court costs[26]. The amount of the expected court costs depends in general upon the amount in dispute.

The court in its final decision decides on the merits and on the procedural costs[27]. The procedural costs include the aforementioned court costs as well as the party costs, i.e. the reimbursement of necessary outlays, the costs for professional representation by a lawyer[28] or – if a party is not professionally represented and in justified cases – a reasonable compensation for personal efforts[29]. These party costs are usually lower than the actual representation costs of a party. As far as its own representation costs are not covered by the party costs set by the court, the respective party needs to bear them on its own.

As a general rule, the court charges the aforementioned procedural costs to the unsuccessful party. If no party succeeds entirely, the costs are usually allocated in accordance with the outcome of the case[30].

6. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?

Undertakings may assign their antitrust based claims to associations, other individuals or undertakings[31]. If such assignor receives by this way several antitrust based claims against the same defendant, he is entitled to address them collectively. There is, however, not yet much experience in Switzerland with regard to assignment and bundling of antitrust based claims. There is, in particular, no experience with regard to professional associations which have as a business model the purchase and enforcement of such claims.

Moreover, Article 15 (2) CPC provides for several parties the possibility to join their claims and raise them against one and the same defendant (joinder of parties; *Streitgenossenschaft*). Another option is that one claimant conducts a "test case" (*Musterprozess*) for several injured parties that – via a separate agreement outside of the Swiss Code of Civil Procedure – jointly bear the costs of this test proceeding. It

25 Art. 96 CPC provides that the cantons set the tariffs for the procedural costs.

26 Art. 98 CPC.

27 Art. 104 (1) CPC.

28 Several cantons provide tariffs to determine these costs.

29 Ar. 95 (1) to (3) CPC.

30 Art. 106 (1) and (2) CPC.

31 Lang, Christoph, p. 138 et seq.; Reymond, Jean-Marc, Art. 12 para. 19; Spitz, Philippe, p. 120.

has to be noted, however, that the result of this test case is legally binding only between the parties involved into this test proceedings. There is therefore no guarantee that the same or another civil court would come to the same conclusion and decision in a follow-on case. It is, in particular, possible that the defendant will address the same arguments of the claimant with other and/or further counterarguments and/or evidence.

An alternative funding option may be litigation funders who provide the financial resource to enable costly antitrust based litigation or arbitration and who receive an agreed share of the proceeds of the claim. There is, however, not yet much experience with regard to litigation funders in Switzerland.

Other than the above-mentioned possibilities, there are no other alternative funding options or fee arrangements which can be considered as settled in Switzerland.

7. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?
   - If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?
   - Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?
   - How is it coordinated with the individual actions' framework?

The short answer is *no*. In particular, class action claims are not available in Switzerland[32].

It is, however, possible that undertakings assign their antitrust based claims to associations, other individuals or undertakings. Moreover, several parties may jointly raise their claims against one and the same defendant (*cf.* question 6 above).

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

8. Are National Competition Authority decisions relevant for individual antitrust claims, in particular
   - as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)
   - in terms of the *quantum* of the compensation?

[32] The possibility to file class actions was discussed but clearly rejected in the course of introducing the CPC, *cf.* Dispatch of the Federal Council concerning the Swiss Code of Civil Procedure dated 28 June 2006, in: BBl (Federal Gazette) 2006 7221, p. 7290, available at https://www.admin.ch/opc/de/federal-gazette/2006/7221.pdf (in German, French, Italian or Romansh only; accessed 29 January 2016).

- for the limitation period?
- else?

Whether a decision of the Swiss Competition Commission is binding for the civil court in a follow-on case is discussed controversially. The majority of scholars argue that civil courts are bound by decisions of the Swiss Competition Commission[33]. However, even those scholars who argue against the binding character admit that decisions of the Swiss Competition Commission still are of significant relevance in follow-on proceedings[34].

The aforementioned binding effect concerns the assessment whether the impairment of competition in question is illegal or not. In terms of the other conditions that have to be proven by the claimant, there are usually neither presumptions nor proofs that can be drawn from the decision of the Swiss Competition Commission, since the Commission does not investigate these facts. This is in particular valid for the damage suffered by the claimant and the causality between the defendant's illicit act and the damage suffered.

In any case, the decision of the Swiss Competition Commission does not shift the burden of proof from the claimant to the defendant. If, following the majority of scholars, the decision of the Swiss Competition Commission is binding, the claimant is exempted to prove the illegality of the act. If, following the other part of the doctrine, the decision is not binding, the claimant bears, in addition to the other conditions, the burden of proof for the illegality of the defendant's acts. A claimant can, however, refer to the Swiss Competition Commission's decision and has very good chances that the civil court concurs with the conclusions of the Swiss Competition Commission.

Besides the question whether decisions of the Swiss Competition Commission are binding, the substantive law provides that certain agreements between actual or potential competitors are presumed to lead to the elimination of effective competition and are therefore illegal if the defendant cannot prove otherwise (Article 5 (3) and (4) of the Cartel Act). Agreements to directly or indirectly fix prices or agreements to allocate markets geographically or according to trading partners are two examples of such presumptions a claimant can rely on. In such cases, the burden of proof is shifted to the defendant[35].

9. What are the relevant limitation periods (taking into account question 9 above)?

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[33] *Cf.* for instance Hangartner, Yvo, p. 49; Reymond, Jean-Marc, preliminary remarks to Art. 12-17 para. 32; Hahn, Anne-Catherine, Art. 12 para. 7; for the opposing opinion *cf.* for instance Jacobs, Reto/Giger, Gion, preliminary remarks to Art. 12-17 para. 23; Lang, Christoph, p. 208 *et seq.*

[34] *Cf.* for instance Spitz, Philippe, p. 126; Jacobs, Reto/Giger, Gion, preliminary remarks to Art. 12-17 para. 24.

[35] Hahn, Anne-Catherine, Art. 12 para. 20; Walter, Regula, Art. 12 para. 95.

Pursuant to Article 12 of the Cartel Act, whoever is hindered by an illegal restraint of competition from entering or competing in a market shall have a claim to:

- elimination or desistance of the hindrance (whereby request for desistance of a hindrance may also result in ordering an undertaking to a certain behavior[36]; *cf.* in particular Article 13 lit. b of the Cartel Act, whereas the court may, upon request of the claimant, order in particular that the person responsible for the hindrance of competition must conclude contracts with the person hindered on terms that are in line with market conditions or are customary in the industry in question);
- damages and reparation for moral damage according to the Swiss Code of Obligations;
- restitution of unlawfully realized profit pursuant to the provisions on agency without authority (Geschäftsführung ohne Auftrag; Article 419 *et seq*. CO).
- Even though not mentioned expressly any more in the Cartel Act, the claimant is – pursuant to one part of the doctrine[37] – entitled besides the general action for a declaratory judgment in the sense of Article 88 CPC (*allgemeiner Feststellunganspruch*) to a "antitrust-specific" action for a declaratory judgment with which the claimant may request the court to declare that a restraint of competition is illegal (*kartellrechtlicher Feststellungsanspruch*).

With regard to the above-mentioned claims, the relevant limitation period has to be assessed separately:

- The claims for elimination or desistance of the hindrance are not subject to a limitation period[38]. They can rather be filed as long as the claimant has a legal interest in these claims[39].
- As far as the claimant is entitled to actions for a declaratory judgment, they are not subject to limitation periods either[40].
- Damage and reparation for moral damage claims become time-barred from the date on which the claimant as the injured party became aware of the damage and of the identity of the person liable for it. In any event, these claims become time-barred ten years after the date on which the damage was caused[41].

[36] Jacobs, Reto/Giger, Gion, Art. 12 para. 51 and Art. 13 para. 6 et seq.; *cf.* for instance the prayer for relief that had to be assessed by the commercial court of Zurich in its decision dated 6 March 2015 (in: RPW 2015/3), p. 724.

[37] Arguing in favour for instance Jacobs, Reto/Giger, Gion, Art. 12 para. 41 *et seq.*; Reymond, Jean-Marc, Art. 12 para. 151 and para. 154; Walter, Regula, Art. 12 para. 53; Hahn, Anne-Catherine, Art. 12 para. 33 et seq.; arguing against such a claim for instance Borer, Jürg, *Kartellgesetz*, Zurich 2005, Art. 12 para. 8.

[38] Reymond, Jean-Marc, Art. 12 para. 67; Walter, Regula, Art. 12 para. 65.

[39] Jacobs, Reto/Giger, Gion, Art. 12 para. 45.

[40] Borer, Jürg, para. 13.37; Walter, Regula, Art. 12 para. 55.

[41] Art. 60 (1) CO; Hahn, Anne-Catherine, Art. 12 para. 46.

- For claims for restitution of unlawfully realized profit, the same limitation periods as for the aforementioned damage claims apply[42].

Decisions of the Swiss Competition Commission have no effect on antitrust based claims with regard to limitation periods. Undertakings who suffered damages by infringements of the Cartel Act can therefore not await the final decision of the Swiss Competition Commission but need to take the necessary measures to interrupt the limitation period.

10. What is the liability regime as regard parents for the infringement of their subsidiaries?

The liability regime illustrates again that antitrust based claims are separate and independent from investigations conducted by the Swiss Competition Commission. From an antitrust law point of view, a group of companies is considered as one undertaking and can therefore be subject of an investigation if it participates in an agreement or abuses its dominant market position[43]. With regard to proceedings at the civil courts, however, the question whether a group of companies is capable of being sued is discussed controversially[44]. It is rather the acting group member against which the claimant must file his antitrust based claim.

A parent company is, however, capable of being sued if it instructs its subsidiaries to behaviour that infringes antitrust law by restricting competition. In such a case, the capacity of the parent company of being sued results from its participation to restraints of competition and not from its group affiliation[45].

11. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

Liability for antitrust infringements varies with regard to the different claims the Cartel Act provides (*cf.* question 9 above). Claims to elimination or desistance of the hindrance can be addressed individually or collectively against any undertaking that participates in the illegal agreement in the sense of Article 5 of the Cartel Act or that abuses its dominant market position. The civil court's decision affects, however, only these undertakings which were involved in the civil proceedings.

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[42] Decision of the Swiss Federal Tribunal dated 17 July 2000 (BGE 126 III 382), consideration 4/b/ee; Jacobs, Reto/Giger, Gion, Art. 12 para. 119; Borer, Jürg, para. 13.62.

[43] Schmidhauser, Bruno, in: Homburger, Eric et al. (eds.), *Kommentar zum schweizerischen Kartellgesetz*, Zurich 1997, Art. 4 para. 51.

[44] Arguing against such capacity for instance Jacobs, Reto/Giger, Gion, Art. 12 para. 32 and para. 35; Lang, Christoph, p. 92 with regard to damage claims; arguing in favour of such capacity for instance Lang, Christoph, p. 89 with regard to claims for elimination or desistance of the hinderance; Hahn, Anne-Catherine, Art. 12 para. 18; decision of the Commercial Court of the canton of Aargau dated 9 May 1997 (in: RPW 1997/2),consideration 3/e (p. 293).

[45] Lang, Christoph, p. 89 *et seq.*; Jacobs, Reto/Giger, Gion, Art. 12 para. 32; Walter, Regula, Art. 12 para. 41.

Damage and reparation for moral damage claims need to be addressed against the undertaking that caused the damage suffered by the claimant due to an infringement of the Cartel Act. Claims for restitution of unlawfully realized profit are directed against the agreement that earned such profit. In case two or more undertakings are liable, they are jointly and severally liable to the injured party (Article 50 (1) of the Swiss Code of Obligations).

The aforementioned liability regime differs insofar from the liability vis-à-vis the authorities that a claimant must prove in civil proceedings that he suffered as an individual from the infringement of the Cartel Act, whereas the Swiss Competition Commission in its investigation assesses the effects of these infringement on competition itself.

CHAPTER IV: DISCLOSURE OF EVIDENCE

12. What evidence is admissible in individuals' actions for antitrust infringements?

    - Is there any pre-trial discovery procedure available?
    - Is there any evidence protected by legal privilege?

Pursuant to Article 168 (1) CPC, the following evidence is admissible in antitrust based claims before a civil court: testimony, physical records, inspection, expert opinion, written statements and questioning and statements of the parties. The Swiss Code of Civil Procedure does not provide for a pre-trail discovery procedure.

A party has the general duty to cooperate in the taking of evidence. In particular, every party has to produce the physical records in its possession. The Swiss Code of Civil Procedure, however, expressly protects legal privilege. A party is not obliged to produce documents forming its correspondence with a lawyer who is entitled to act as a professional representative (Article 160 (1) lit. b CPC). The term "correspondence" covers all documents and objects which were prepared in the course of the typical activity of a lawyer. This legal privilege applies independently from the date these documents were prepared and independently from the place they are located[46].

13. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

The short answer is *yes*. Pursuant to the aforementioned Article 160 (1) lit. b CPC, the civil court may order defendants or third parties to produce any evidence which is necessary to decide the case at hand. The civil court is, however, not entitled to request the discovery of evidence on its own discretion but only upon request of one party.

[46] Nater, Hans/Rauber, Martin, *Umfassender Schutz der Anwaltskorrespondenz*, SJZ 108 (2012), p. 16.

The Swiss Code of Civil Procedure contains several provisions that provide rights to the claimant, the defendant(s) or third parties to refuse to cooperate, including the right to refuse the production of evidence. Apart from the aforementioned legal privilege (*cf.* question 12), a party or third party may in particular[47] refuse to cooperate if the taking of evidence would expose a close associate to criminal prosecution or civil liability of if the disclosure of a secret would be an offence under Article 321 of the Swiss Criminal Code (Article 163 (1) and Article 166 (1) CPC). Other confidants entrusted with legally protected secrets may refuse to cooperate if they credibly demonstrate that the interest in keeping the secret outweighs the interest in finding the truth (Article 163 (2) and Article 166 (2) CPC). The civil court must advise the parties and third parties to their rights to refuse to cooperate (Article 161 (1) CPC).

14. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

The Swiss Code of Civil Procedure does not provide the court with the possibility to access on its own initiative the files of the Swiss Competition Commission. The claimant has access to these files only to the extent he participates as third party in the Swiss Competition Commission's investigation concerning a restraint of competition in the sense of Article 43 of the Cartel Act. Evidence that the claimant gathers as third party in the aforementioned sense can be used in a follow-on or parallel civil court proceedings[48].

The Swiss Competition Commission is obliged to limit the third parties' rights to access the files. Pursuant to Article 25 of the Cartel Act, for instance, the competition authorities must protect any business secrets. It results from this duty that the competition authorities must exclude any possibility that third parties receive knowledge of this information[49].

Moreover, the Swiss doctrine as well as the Swiss Competition Commission argue that documents which were produced by an undertaking in the course of its cooperation in uncovering and eliminating the restraint of competition (*leniency notice*; Article 49a (2) of the Cartel Act) are exempted from the third parties' rights to access the files[50]. It is argued that the effectiveness of the leniency regulation would be limited, since undertakings would be reluctant to file a leniency notice if

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[47] The CPC provides in particular to third parties further rights to refuse to cooperate, cf. Art. 165 and 166 CPC.

[48] Jacos, Reto/Giger, Gion, preliminary remarks Art. 12-17 para. 28.

[49] Bangerter. Simon, in: Amstutz, Marc/Reinert, Mani (eds.), *Basler Kommentar zum Kartellgesetz*, Basle 2010, Art. 25 para. 47.

[50] Heinemann, Andreas, *Evaluation Kartellgesetz, Strukturberichterstattung Nr. 44/4: Die privatrechtliche Durchsetzung des Kartellrechts*, Bern 2009 (available at http://www.seco.admin.ch/dokumentation/publikation/00004/02367/index.html?lang=de (in German only; accessed 29 January 2016), p. 119 with further reference.

they must fear that the documents they submit can be used by third parties in damage claims[51].

Chapter V: The Passing-On of Overcharges

15. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Indirect purchasers are entitled to claim compensation, if they qualify as undertakings in the sense of Article 4 (1) of the Cartel Act. Their claims are limited insofar as they need to prove all the conditions for damage claims on their own. They must, in particular, have suffered and prove damages. Moreover, indirect purchasers must prove as well that the defendant's illicit act, i.e. that the agreement he entered into restricts competition or that his practices as dominant market undertaking are unlawful, caused the damaged suffered[52].

The same is valid with regard to claims for restitution of unlawfully realized profit. Indirect purchasers have, as long as they qualify as undertakings, the capacity to file such claims. Such a claimant must prove the profit that the defendant gained at his expense. Moreover, an indirect purchaser may only restitute the unlawfully realized profit as far as such profit has not yet been restituted by claims of an undertaking that was directly hindered by an illegal restraint of competition[53].

16. Are victims of "umbrella damages" entitled to protection against antitrust infringements and to compensation in court?

The short answer is *yes*. There are, however, no specific provisions with regard to umbrella damages. Victims of umbrella damages are rather entitled to protection and to compensation within the general damage claims provided by the Cartel Act (*cf.* question 9 above). Once again, it has to be noted that such victims must qualify as undertakings in the sense of Article 4 (1) of the Cartel Act in order to have the capacity to file these claims. Elimination or desistance of the hindrance claims may be brought in order to protect victims from suffering further umbrella damages. Damage claims may be filed in order to compensate damages.

17. Is the passing-on defence allowed?

The short answer is *yes*. As a general rule, an undertaking is only entitled to claim the damages that actually remain with the respective undertaking. An undertaking does not suffer damages to the extent it was actually able to pass them on. The infringing undertaking can rely only to this extent on the passing-on defence. It

[51] Jacobs, Reto/Giger, Gion, preliminary remarks to Art. 12-17 para. 28.
[52] In the same sense Heinemann, Andreas, p. 64.
[53] Jacobs, Reto/Giger, Gion, Art. 12 para. 114.

cannot, however, derive anything in his favour if the undertaking that suffered damages omits to pass on the damage[54]. An undertaking who committed a breach of the Cartel Act bears the burden of proof for the passing-on defence[55].

With regard to claims for restitution of unlawfully realized profit, however, the passing-on defence is – pursuant to the Swiss doctrine – not allowed[56].

CHAPTER VI: DAMAGES

18. What form of compensation can be granted by national courts for antitrust violations?

    In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

The civil courts may grant the claimant compensation for the damages suffered. Pursuant to Article 43 (1) CO, the court determines the form and extent of the compensation provided for loss of damage incurred, with due regard to the circumstances and the degree of culpability. The court generally can choose between compensation in money or restitution in kind[57]. In practice, restitution in kind is only of minor importance. It could involve, for instance, publishing the decision[58]. A civil court is, however, not entitled to accord punitive damages or treble damages to the claimant[59].

The claimant injured by a restriction of competition may also claim a sum of money as compensation for "moral tort" from the defendant (Article 49 CO). Such claims are, however, in practice of minor importance and there are hardly any cases in which courts have ordered a defendant to pay substantial compensation[60]. Moreover, the civil courts may order that satisfaction be provided in another manner instead of or in addition to monetary compensation (Article 49 (2) CO), for instance by publishing the decision or by communicating the decision to third parties[61].

In addition, the civil courts may at the request of the claimant order the defendant to restitute unlawfully realized profit (*cf.* question 9 above). Such a claim aims at

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[54] Jacobs, Reto/Giger, Gion, Art. 12 para. 74

[55] Von Büren, Roland, *Zur Zulässigkeit der "passing-on defence" in kartellrechtlichen Schadenersatzverfahren nach schweizerischem Recht*, in: SZW 2007, p. 192; Jacobs, Reto/Giger, Gion, Art. 12 para. 72; other opinion Spitz, Philippe, *Gewinnherausgabe und sonstige Gewinnabschöpfung im Kartellrecht*, in: Jusletter dated 9 October 2006, para. 82.

[56] Spitz, Philippe, para. 83; Jacobs, Reto/Giger, Gion, Art. 12 para. 113.

[57] Decision of the Swiss Federal Tribunal dated 24 June 2005 (4C.471/2004), consideration 3.3.1; Heierli, Christian/Schnyer, Anton K., *Basler Kommentar zum Obligationenrecht, Band I: Art. 1-529*, 5th ed, Basle 2011, Art. 43 para 1.

[58] Jacobs, Reto/Giger, Gion, Art. 12 para. 87; Lang, Christoph, p. 114 *et seq.* and p. 131

[59] Von Büren, Roland, p. 194.

[60] In the same sense Jacobs, Reto/Giger, Gion, Art. 12 para. 94.

[61] Jacobs, Reto/Giger, Gion, Art. 12 para. 93.

confiscation the net profit that the defendant unlawfully gained by restricting competition. It is discussed controversially whether the claimant is entitled to the entire unlawfully realized profit or only to the part realized by the defendant(s) at the claimant's expense. The Commercial Court of the canton of Aargau considered that multiple undertakings concerned become joint and several creditors[62]. The majority of the doctrine questions this view, since multiple creditors become pursuant to Article 150 (1) CO only joint and several creditors where the debtor states that he wishes to grant each of them the right to receive full performance of the debt or in cases prescribed by law. The provisions on agency without authority, to which Article 12 of the Cartel Act refers, do not contain such a provision[63].

CHAPTER VI: QUANTIFICATION OF HARM

19. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The defendant is liable towards the injured party for *damages* if the following four conditions – for which the claimant as a general rule bears the burden of proof – are met:

- The defendant must have committed an illicit act. Acts which are contrary to the Cartel Act constitute such illicit acts. As stated above, presumptions of the Cartel Act shift the burden of proof to the defendant (*cf.* question 8 above).
- The injured party must have suffered and prove damages.
- The defendant's illicit act must have caused the damaged suffered by the injured party.
- The defendant must have acted intentionally or negligently.

Following the general principle in Swiss law, damage is defined as the reduction of the injured party's net assets and consists, pursuant to the "difference theory" (*Differenztheorie*), in the difference between the injured party's current financial situation and the hypothetical financial situation if no infringement of the Cartel Act had been committed[64]. It is the claimant who has to quantify the damage suffered in the aforementioned sense and who – as a general rule – bears the burden of proof. If the injured party cannot establish the damage or the exact amount of the damage, the court may, however, assess it in its discretion, having regard to the ordinary course of events and the measures taken by the injured party (Article 42 (2) CO)[65].

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[62] Decision of the Commercial Court of the canton of Aargau dated 13 February 2003 (in: RPW 2003/2), consideration 9/c/gg (p. 478).

[63] Jacobs, Reto/Giger, Gion, Art. 12 para. 111.

[64] Decision of the Swiss Federal Tribunal dated 27 June 2006 (BGE 132 III 564), consideration 2; Decision of the Swiss Federal Tribunal dated 19 January 2001 (BGE 127 III 73), consideration 4/a with further references.

[65] Decision of the Swiss Federal Tribunal dated 19 December 2005 (BGE 132 III 379), consideration 3.1; Decision of the Swiss Federal Tribunal dated 4 June 1996 (BGE 122 III 219), consideration 3/a; Lang, Christoph, p. 123.

With regard to claims ordering the defendant to restitute unlawfully realized profit, the reduction of the injured party's net assets due to the competition restraint is – unlike damage claims – not of importance. The civil court must rather assess the profits of the defendant realized due to the infringement against the Cartel Act. As already mentioned, such claims aim at confiscation the net profit of the defendant that he gained by restricting competition (*cf.* question 19 above). The claimant bears in such proceedings the burden of proof for the gross profit (and not for the net profit)[66]. Since it is difficult for the claimant to prove the gross profit of another undertaking for certain activities, the aforementioned Article 42 (2) CO applies in cases of restitution of unlawfully realized profits as well[67]. The defendant must prove its expenses and possible losses which allow the court to calculate the net profit[68]. The defendant itself is, however, not entitled to rely on Article 42 (2) CO[69].

20. Is there a difference between stand alone and follow-on actions?

The short answer is *no*. Antitrust based claims before civil courts may be conducted parallel of the or after an investigation of the Swiss Competition Commission.

Decisions of the Swiss Competition Commission are, however, of significant relevance in follow-on proceedings, in particular since the majority of scholars argue that civil courts are bound by decisions of the Swiss Competition Commission (*cf.* question 8 above). A claimant may therefore benefit in a follow-on action from the Swiss Competition Commission's decision establishing that the defendant illegal restricted competition by concluding an agreement or by abuse his dominant market position.

Moreover, it is very difficult for the claimant to prove the existence of an unlawful restraint of competition in stand alone proceedings. Claimant would have to define the relevant product and geographical market and elaborate and prove the effects a certain behaviour of the defendant(s) has on this market. All this investigations have to be conducted by a potential claimant with the limitation period (*cf.* question 9 above). It is, therefore, rather necessary for a claimant to rely on the investigation of the Swiss Competition Commission with regard to proving the illegality of the defendant's actions.

21. How is damage quantified?

Cf. question 19 above.

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[66] Borer, Jürg, para. 13.58.

[67] Decision of the Swiss Federal Tribunal dated 7 December 2006 (BGE 133 III 153), consideration 3.3; Borer, Jürg, para. 13.58.

[68] Decision of the Swiss Federal Tribunal dated 3 March 2008 (BGE 134 III 306), consideration 4.1.2; Jacobs, Reto/Giger, Gion, Art. 12 para. 104.

[69] Spitz, para. 56; Jacobs, Reto/Giger, Gion, Art. 12 para. 104.

22. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

    Besides the passing-on defence, there are no specific defence measures recognized for defendants in antitrust based claims. In civil court proceedings, the defendant may dispute the claimant's allegations, raise counterarguments and submit evidence in order to support his allegations or to counter-prove the claimant's allegations.

23. What is the role of economic experts, if any?

    Economic experts may be involved in different manner in antitrust based claims:

    - *First*, the claimant may rely on economic experts in order to substantiate its claim, i.e. to sufficiently assert his position. Pursuant to a recent decision of the Swiss Federal Tribunal, private expert opinions, i.e. expert opinions which were not requested by the court but by a party, neither qualify as expert opinion nor as physical record and therefore not as evidence in the sense of Article 168 (1) CPC[70]. Provided that the courts will follow the Swiss Federal Tribunal's interpretation in the future, the claimant filing a private expert opinion must accompany his assertions with evidence.
    - *Second*, the claimant (or the defendant for counterevidence) may request the court to appoint an expert opinion as evidence (*cf.* question 12 above) in order to prove his claim, for instance with regard to the restriction of competition or with regard to the damage suffered.
    - *Third* and as already mentioned (*cf.* question 2/a above), economic experts may act as expert judges in cantons that introduced commercial courts.
    - *Forth* and as already mentioned (*cf.* question 2/c above), the civil courts shall submit the matter to the Swiss Competition Commission for an opinion, if the permissibility of a restraint of competition is at issue in a civil proceeding. The Swiss Competition Commission consists, among others, of economic experts.

24. What other types of experts are typically engaged in your jurisdiction?

    A party may – besides economic experts – appoint other experts as evidence with regard to the specific market in dispute. Nominating such experts may be helpful in order to prove that the damage suffered was caused by the defendant's illicit act.

    Moreover, cantons that introduced commercial courts may appoint expert judges for antitrust based claims that are not necessarily economic experts.

    In addition, the Swiss Competition Commission, which is engaged by the civil courts pursuant to Article 15 (1) of the Cartel Act (*cf.* question 2/c above), does not

[70] Decision of the Swiss Federal Tribunal dated 11 September 2015 (4A_178/2015), consideration 2.5.2 *et seq.*

have to consist only of economic experts. Pursuant to Article 18 (2) of the Cartel Act, the majority of the Swiss Competition Commission must be composed of independent experts. In practice, these independent experts are university professors in the fields of law and economic[71].

25. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

    The short answer is *no*. Since antitrust based claims are independent and separate from investigation (administrative) procedures conducted by the Swiss Competition Commission, fines can be imposed independently from claims of an individual undertaking for damage compensation. Moreover, (one part of) the Swiss doctrine claims that imposing fines is also possible independently from claims for restitution of unlawfully realized profit[72]. It is, however, uncertain how a civil court will assess the defendant's argument in a restitution claim that the fine the Swiss Competition Commission imposed to him reduces his unlawfully realized net profit.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

26. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

    The short answer is *yes*. Antitrust based claims may be resolved by arbitration provided that the parties concluded an arbitration agreement[73]. Arbitral tribunals are, other than civil courts (cf. question 2/c above), not obliged – but have the possibility – to submit the matter to the Swiss Competition Commission for an opinion[74].

CHAPTER VIII: SETTLEMENTS

27. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:
    - settlements requiring court approval;
    - settlements outside of proceedings;
    - timing of settlement;
    - etc.

[71] Bangerter, Simon, in: Amstutz, Marc/Reinert, Mani (eds.), *Basler Kommentar zum Kartellgesetz*, Basle 2010, Art. 18 para 19.

[72] Tagmann, Christoph/Zirlick, Beat, in: Amstutz, Marc/Reinert, Mani (eds.), *Basler Kommentar zum Kartellgesetz*, Basle 2010, Art. 49a para. 40.

[73] Decision of the Swiss Federal Tribunal dated 8 March 2006 (BGE 132 III 389); Weber-Stecher, Urs, *Basler Kommentar zum Kartellgesetz*, Basle 2010, remarks post Art. 12-17 para. 19 with further references.

[74] Weber-Stecher, Urs, remarks post Art. 12-17 para. 53 *et seq.*; Borer, Jürg, Art. 15 para. 5.

Antitrust based disputes may be settled by the parties either with or without the help of the civil court. If a settlement is placed on record in court, it has the same effect as a binding decision (Article 241 (2) CPC). With regard to the timing of settlements, there are no specific provisions that need to be followed by the parties. In theory, the parties may also settle the dispute after the decision of the civil court (the successful party may, however, not be ready to (further) negotiate the dispute after the civil court has issued its decision in his favour).

The civil courts themselves may at any time attempt to achieve an agreement between the parties (Article 124 (3) CPC) and they often use this possibility, in particular after the defendant filed the statement of defence.

Moreover, the courts are – pursuant to Article 126 (1) CPC – usually prepared for suspending proceedings in order to allow the parties to conduct settlement negotiations outside of the civil court proceeding.

CHAPTER IX: RECENT CASE LAW

28. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

There are no noteworthy cases or authorities rendered in the last 18 months. As far as requests for interim measures or ordinary proceedings were filed, they were all dismissed by the courts[75]. The decision of the Commercial Court of the canton of Aargau dated 13 February 2003 remains the only case in which the claimant was successful in receiving damage compensation[76].

[75] *Cf.* the decisions of the Commercial Court of the Canton of Zurich dated 6 March 2015 (in: RPW 2015/3), p. 724 *et seq.* and dated 17 December 2014 (in: RPW 2014/4), p. 825 *et. seq.* regarding requests of interim measures or the decision of the Supreme Court of the Canton of Zug dated 23 August 2013 (in: RPW 2013/3), p. 455 *et seq.* regarding an ordinary proceeding.

[76] Decision of the Commercial Court of the Canton of Aargau dated 13 February 2003 (in: RPW 2003/2), p. 451 *et seq.*