

# LITIGATION BRIEFING

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## Preventive Taking of Evidence to Assess Risks and Chances of Litigation



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therefore not be able to assess risks and chances of litigation prior to legal proceedings. Thus, the best lawyer with special competence in building issues cannot exactly predict the judge's decision. Further ambiguity exists for example regarding the question of how the supervising employee will testify. It is even possible that the supervising employee intends to move abroad and can only, if at all, give evidence via the formal proceedings after a request to the authorities, which is a very time consuming procedure. This adds another incalculable risk to the litigation.

### Introduction

Litigation is not primarily costly due to court and lawyers fees, but first and foremost due to rather uncertain chances of success. If risks and chances of a litigation have been misjudged at the beginning of the legal proceedings, the legal costs for the court as well as the legal fees for the lawyers cannot be transferred to the counterparty at the end of the legal proceedings. However, until now, even for the most diligent legal adviser it is hardly possible to consider every single objection and argument prior to the procedure, as the facts presented by the client to the legal advisor naturally only show one point of view. Unexpected twists due to the introduction of new evidence during the legal proceedings are therefore nothing unusual.

A builder for example has to assess risks and chances of litigation in case of defective construction work prior to a trial against the responsible contractor. The expertise of the builder, even if it provided by an expert, would only be considered as an opinion of a party in legal proceedings, which means that it can be devalued or at least equalised by expertise of the counterparty. Notwithstanding the expertise, the builder will

### Preventive Taking of Evidence – A new Legal Instrument

The new Swiss Civil Procedure Code (CPC) entered into force on 1 January 2011 and established a new instrument in Switzerland to assess risks and chances



of future litigations. According to Art. 158 CPC, evidence may be taken preventively if (i) there is a legal entitlement to request evidence, if (ii) the evidence is at risk or if (iii) such a preventive taking of evidence is generally necessary to protect the legitimate interests of the claimant. According to the Federal Assembly, the basic assessment of risks and chances of litigation is considered as such a legitimate interest.

This – almost revolutionary – amendment is similar to the US pre trial discovery procedure (where both parties have to disclose all of their evidence). Parties considering a claim may now, in a summary and therefore efficient fast track procedure, request the preventive taking of evidence. The cost of the procedure has to be paid in advance by the applicant. Costs are, however, considerably lower than in ordinary proceedings (even though they do depend on the future amount in dispute).

### Limits of the Preventive Taking of Evidence

In contrast to many former civil procedure codes, thanks to 158 CPC it is no longer necessary to argue that evidence is at risk. A general legitimate interest is sufficient to request the taking of evidence. The evidence need only be generally capable of proving the claim. A legitimate interest however must be asserted by the applicant.

This legitimate interest is missing if (i) the evidence is obviously incapable of proving the claim, (ii) the fact to be proven is irrelevant or inadmissible, (iii) the evidence may be taken by other means or (iv) the claim has already been judged between the parties.

Preventive taking of evidence naturally does not allow the taking of more or other evidence than during the ordinary proceedings. The instrument also does not enable the parties to discover true business secrets. The counterparties' procedural rights may not be circumvented.



### New Legal Instrument for the Preparation of Legal Proceedings

Based on the new CPC, the above mentioned builder now has the possibility to request independent expertise from the court regarding the defects in the construction work. Such expertise will be given considerably more weight in a potential procedure than any expertise from an expert chosen by a party. The builder may further request a witness that intends to move abroad to be interrogated prior to the judicial proceedings and prior to the witness leaving Switzerland. The information gained by this procedure allows the builder and his lawyers to assess the chances and risks of litigation much more precisely. Based on the preventive taking of evidence, a new situation in pending negotiations can be created and the general contractor can be forced (back) to the negotiations.

Thanks to this new procedural instrument, it will in the future be possible to avoid hopeless trials and to assess risks more precisely. The preventive taking of evidence opens a window for negotiations and might lead to serious settlement talks. Any diligent legal advice now has to take the opportunities of preventive taking of

evidence into consideration. The legal advisor has to prepare the trial also through the preventive taking of evidence as effectively as possible and he has to think of ways to obtain the best negotiating position using the means of the preventive taking of evidence.

### **Pending Judicial Concretisation**

The new instrument's effectiveness will naturally depend largely on how it is applied by the courts. Should the courts insist on further unwritten requirements – such as the requirement that the applicant has to substantiate its request, meaning that although the client is still unsure whether to initiate a litigation he would be obliged also to reveal all his evidence – the new juridical instrument's area of application would be significantly restricted and its tactical applications extensively hampered. However, in the meantime, it will be necessary to find the new instrument's limits; particularly as its field of application is extremely wide and could bring in its wake tremendous advantages for clients.

### **The Litigation Practice Group**

Wherever our clients' rights have to be enforced or defended nationally or internationally, be it in courts, including the Swiss Federal Supreme Court, or before other judicial authorities, the members of our litigation team are called in. With our four offices in Switzerland and with one of them in Lausanne, where the Swiss Federal Supreme Court has its seat, we are in a position to act locally in all of Switzerland's regions in all instances.

The litigation team takes care of both civil and criminal cases and is equally experienced in acting in an offensive or a defensive capacity. As all of our litigators are highly specialised but also active in other fields of law, they have a deep understanding of the commercial and personal grounds for court proceed-

ings and the repercussions such proceedings have. This understanding allows them to find practical solutions where appropriate and to hit hard where needed.

The diverse cultural and educational background of the team members, and broad experience in varied fields ensures that their understanding of our client's needs is always excellent.

International judicial assistance in both civil and criminal matters and regulatory enforcement works form a significant portion of our litigation team's work. An in-depth knowledge of and experience with the procedural instruments involved guarantee reliable and efficient advice to our clients.

The litigation team members regularly and successfully represent our clients in time-critical ex-parte proceedings where decisions without a hearing of the counterparty are either sought or sought to be prevented. Here, the team has repeatedly proven its ability to deliver quality and to work highly efficiently within the shortest of time limits.

Our practice in criminal law cases is mainly focused on cases of white collar crime including issues of money laundering and its prevention, corporate crime prevention in general, criminal liabilities of corporate directors and board members and, in relation to regulators, work to ensure that reputational risks are minimised.

## Froriep Renggli in Short



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### The Firm

Froriep Renggli is a leading Swiss law firm with offices in Zurich, Geneva, Zug, Lausanne, London and Madrid. For more than 40 years Froriep Renggli has been offering Swiss and foreign companies and individuals a broad range of legal services.

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