

March 2020

Revision of the Swiss Civil Procedure Code

On 26 February 2020, the Swiss Federal Council published the draft bill for a light revision of the Swiss Civil Procedure Code ("**CPC**"). The proposed revision aims at further enhancing the practical application of the CPC and facilitating the enforcement of rights while retaining tried and tested concepts and principles, including cantonal autonomy in court organization. Key amendments include the reduction of cost barriers and the introduction of an in-house privilege in civil proceedings, whereas the controversial proposals to strengthen the means of collective redress were removed from the draft bill and will be dealt with separately.

Overview

The CPC entered into force on 1 January 2011 and unified the procedural law for Swiss civil proceedings at federal level for the first time. While the CPC is widely regarded as a legislative success, the purpose of the revision is selectively to correct a few perceived weaknesses of this relatively recent codification.

In particular, the proposed amendments relate to the reduction of cost barriers and the risk of litigation costs, the simplification of the coordination of proceedings as well as the reinforcement of conciliation proceedings. Moreover, the draft bill introduces an in-house privilege in civil proceedings and provides the legal framework for cantons to create international commercial courts.

The draft bill was preceded by a preliminary draft published on 2 March 2018. During the subsequent consultation procedure, the affected public was invited to provide comments on the preliminary draft. The reactions were mixed, especially with regard to the previously proposed amendments concerning protection in case of mass damages (namely the introduction of a reparatory group action and group settlement proceedings).

Taking into account the submitted comments, the Federal Council decided to remove the issue of collective redress and to pursue it separately in order not to jeopardize the otherwise fairly uncontroversial revisions.

The key proposed amendments include:

In-house Privilege in Civil Proceedings

Under the CPC, (third) parties have a duty to cooperate in the taking of evidence in civil proceedings and, in particular, to produce the pertinent physical records. While there is a right to refuse cooperation for attorneys working in private practice with regard to activities specific to their profession, and documents forming correspondence between such attorneys and (third) parties need not be produced, no equivalent exceptions currently exist in relation to in-house legal services.

This situation has faced heavy criticism because it entails potential procedural disadvantages for Swiss companies compared to entities incorporated in jurisdictions with broader concepts of legal privilege.

With respect to foreign proceedings, in particular, Swiss companies currently have no legal basis to refuse the production of internal documents by its in-house legal service (e.g. memoranda containing legal analysis or legal advice), whereas their counterparty might – resulting in unequal treatment of the parties.

In an attempt to level the international playing field, the draft bill provides that a (third) party is under no obligation to cooperate in the taking of evidence in civil proceedings with regard to the activity of its in-house legal service if: (i) the respective activity would be regarded as specific to the profession of an attorney in private practice and (ii) the respective in-house legal service is headed by a person who is admitted to a cantonal bar or fulfills the professional requirements for practicing law in his/her country of origin (Art. 160a para. 1 draft CPC).

Moreover, pertinent documents and correspondence exchanged with an in-house legal service shall be privileged and thus need not be produced (Art. 160a para. 2 draft CPC).

Legal Framework for International Commercial Courts

The draft bill not only specifies the requirements for the ordinary jurisdiction of the cantonal commercial courts (Art. 6 paras. 2, 3 and 6 draft CPC), it also introduces the legal framework for cantons to create international commercial courts, i.e. special *fora* competent to handle international commercial disputes and tailored to the needs of sophisticated parties in terms of expertise, language and efficiency.

In particular, the draft bill provides that cantons may additionally assign cases to their respective commercial court which meet the following conditions: (i) the dispute concerns the commercial activity of at least one party, (ii) the amount in dispute is at least CHF 100'000, (iii) the parties consent to the jurisdiction of the commercial court, and (iv) at the time of such consent, at least one of the parties does not have its domicile, habitual residence or registered office in Switzerland (Art. 6 para. 4 lit. c draft CPC).

Importantly, the proposed amendment allows parties to cases which fulfill the above-noted requirements to contractually agree on the material jurisdiction of a cantonal commercial court, irrespective of whether or not the parties are registered as entities in the commercial register. This is in contrast to the current legal situation which excludes agreements on material jurisdiction.

The proposal recognizes Switzerland's potential as an international hub for the resolution of commercial disputes. It also fosters the ongoing efforts of the working groups for the creation of international commercial courts in the cantons of Zurich and Geneva. However, as things stand, it is difficult to assess if and when the first of such courts will be established. Switzerland currently has four ordinary commercial courts (cantons of Zurich, Berne, Aargau and St. Gall).

Regardless of whether proceedings are initiated before commercial or ordinary courts, the draft bill further allows cantons to provide that, upon joint request of the parties, English shall be the language of the proceedings (Art. 129 para. 2 draft CPC). If implemented by a canton, this option could additionally facilitate international litigation in Switzerland, without requiring the establishment of a special court.

Reduction of Cost Barriers

The perceived cost barriers under the CPC – including the fact that claimants may be required to advance the entire amount of the presumed court fees, or that advances on costs are set off against the actual court fees regardless of who has to bear the latter – have been one of the main reasons for the proposed revision. The draft bill essentially seeks to improve and ensure access to justice for persons who are neither wealthy nor entitled to legal aid and contains a number of provisions to this end.

For instance, the draft bill generally cuts the currently applicable maximum amount for advances on costs to be paid by claimant in half, by stating that the advance may not exceed half of the presumed court fees. A few discretionary exceptions apply, however,

notably with respect to conciliation, appellate and most summary proceedings (Art. 98 draft CPC).

Moreover, the draft bill provides that, upon conclusion of the court proceedings, advances on cost will, with certain exceptions, only be set off against the actual court costs if the advance was paid by the party who bears these costs, thus shifting the collection risk for court fees from the party who paid the advance to the state (Art. 111 draft CPC).

Simplification of Procedural Coordination

To further improve the efficient coordination of proceedings, the draft bill contains a number of amendments to already existing procedural instruments, many of which codify established case law by the Swiss Federal Tribunal.

Concerning the combination of actions (*Klagenhäufung*), the draft bill provides that this shall now be permitted even if the individual actions are subject to different material jurisdictions or types of procedure, provided this is solely the case because of disparate amounts in dispute. In situations where different types of procedure apply, all claims will be assessed jointly in ordinary proceedings (Art. 90 para. 2 draft CPC).

Similarly, the draft provisions on counterclaims (*Widerklage*) introduce two exceptions to the general rule that a counterclaim shall be subject to the same type of procedure as the principal claim:

First, a counterclaim is permissible and to be assessed together with the main claim in ordinary proceedings if the principal claim is subject to ordinary proceedings and simplified proceedings would apply to the counterclaim solely based on the value in dispute (Art. 224 para. 1^{bis} lit. a draft CPC).

Second and as an alternative, the main claim and the counterclaim are to be assessed jointly in ordinary proceedings if the counterclaimant requests negative declaratory relief regarding a right or legal relationship in response to a corresponding partial action

(*Teilklage*) to which simplified proceedings would apply solely because of the amount in dispute (Art. 224 para. 1^{bis} lit. b draft CPC). This provision, in particular, is a codification of recent case law by the Swiss Federal Tribunal.

In addition, the draft bill also slightly modifies the provisions on voluntary joinder (*einfache Streitverkündung*; Art. 71 draft CPC) and third party action (*Streitverkündungsklage*; Art. 81 et seq. draft CPC).

Strengthening of Conciliation Proceedings

The draft bill seeks to reinforce conciliation proceedings through a few selective amendments. For example, the draft bill extends the application of conciliation proceedings, especially with regard to disputes for which a court of sole cantonal instance has jurisdiction. Namely, claimants shall have the new option of initiating conciliation proceedings even if a cantonal commercial court has jurisdiction. Among other things, this opens up an easier way for claimants to interrupt limitation periods in cases where they are unable to initiate debt enforcement proceedings against the opposing party in Switzerland (cf. Art. 199 para. 3 draft CPC).

In addition, the threshold for the conciliation authority's power to submit a proposed judgment to the parties shall be increased to encompass any case with a value in dispute of up to CHF 10'000 as opposed to currently CHF 5'000 (Art. 210 para. 1 lit. c draft CPC).

The conciliation authority shall also be able to fine a defaulting party up to CHF 1'000 irrespective of any qualifying circumstances such as disruption of the course of the proceedings (Art. 206 para. 4 draft CPC).

Other Proposed Amendments

The following further proposed adjustments might also be of interest:

- Courts may hear witnesses by video conference, provided the statement is recorded in sound and vision (Art. 170a draft CPC);
- Private expert reports submitted by parties are explicitly considered to be physical records and thus documentary evidence to be assessed by the court (Art. 177 draft CPC);
- Selective changes to proceedings relating to family law matters, including the application of simplified as opposed to ordinary proceedings to actions for divorce (Art. 288 para. 2 and Art. 291 para. 3 draft CPC).

Outlook

As a next step, the draft bill will be discussed in Parliament. It is presently unknown when exactly Parliament is set to deliberate and vote on the revision of the CPC. Accordingly, it is difficult to predict when the new provisions will enter into force.

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