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New Landscape of Civil Procedure in Switzerland as of 1 January 2011



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On 1 January 2011, a legislative "big bang" will fundamentally change the landscape of civil procedure in Switzerland: The new Swiss Code of Civil Procedure will replace the current system of 26 different cantonal codes, and the revised Lugano Convention will align Switzerland with the EU system of jurisdiction and enforcement of judgements throughout Europe.

One Unified Swiss Code Instead of 26 Cantonal Codes

The new Swiss Code of Civil Procedure ("CPC") will replace the current structure of 26 cantonal civil procedural codes.

Currently, Swiss procedural law is rather multi-faced: each Canton has its own code of civil procedure, and there are a number of material procedural issues that are regulated by the Swiss Constitution, the Federal Code on Jurisdiction, and a number of procedural regulations in federal acts. The CPC will simplify matters and bring more overall clarity.

As a matter of principle, the CPC will regulate all issues of civil procedure in cases brought before cantonal courts (civil proceedings before the Swiss Federal Supreme Court – in essence appellate proceedings – are subject to the Code on the Swiss Federal Supreme Court). The organisation and administration of the cantonal courts will, however, remain in the competence of cantonal law-making.

The unified civil procedural law throughout Switzerland brought about by the CPC will also ensure that the substantive civil law (which is federal law) is applied throughout Switzerland in the same way and to the same degree.

The CPC is essentially a synthesis of the cantonal civil procedural codes. Since these codes differ from each other quite a lot, there are, depending on the issue, some important changes made by the CPC when compared with a concrete cantonal civil procedural code.

The CPC does not really adopt legal concepts from foreign (i.e. non-Swiss) legal systems. Therefore, the CPC does not, for example, provide for a class action mechanism or for discovery/disclosure in the US/English sense.

The CPC will be applicable to all civil proceedings that are made pending with the court as from 1 January 2011. Proceedings that were already pending at that point in time will be subject to and conducted under the old civil procedural law.

The CPC limits the number of cantonal instances to two, so that there is normally a lower and a higher cantonal court, with the Swiss Federal Supreme Court as the court of last instance. However, the CPC still allows for special commercial courts, so that, for example, the Commercial Court of the Canton of Zurich will continue to function.

For a number of reasons, under the CPC more emphasis will be placed on the first written brief, which will make most cases much more front-loaded than is currently the practice in many cantons.

The CPC contains a number of new features, which include the following:

Jurisdiction Clause in Domestic Disputes

Under the current Federal Code on Jurisdiction, a Swiss court has the right to decline jurisdiction in cases where the parties have chosen a court but there was an insufficient connection between the case and the court. Under the CPC, the parties may choose any court in Switzerland and the court will have to accept the case. Accordingly, as has long been the case for disputes within the scope of the Lugano Convention, the Swiss courts will also have to accept the parties' choice of forum in domestic disputes, regardless of whether the court has a connection with the parties and their case or not.

Attorney Client Privilege
Under the CPC, the parties to a dispute as well as third parties may not be obliged to produce documents that represent a party's communications with its external legal counsel. This is a new development as, strictly speaking, under the current regime there is no general privilege for communications between an external counsel and his or her client. There is still no privilege for communications within a company, in particular between in-house counsel and management.

Extension of the Scope of Freezing Orders
As of 1 January 2011, a creditor in possession of an enforceable judgement, be it from a Swiss court or from a court of a member state of the European Union (or of the Lugano Convention, such as Norway or Iceland), will have the right to request a freezing order ("Arrest") against the debtor in Switzerland.

In other words, a creditor may also request a freezing order against a party that is domiciled in Switzerland, and it is not necessary to show *prima facie* that there is a risk that the counter-party will not voluntarily comply with the judgement.

Enforceable Public Deed
The enforceable public deed essentially contains a declaration to agree with the direct enforceability of the debtor. In practice, it will be limited to deeds containing an obligation to make a payment. The enforceable public deed is enforceable not only in Switzerland but throughout Europe (within the scope of the Lugano Convention).

Jurisdiction at the Place of Performance
The CPC (as well as the amended Private International Law Act) provide for jurisdiction at the place of performance of the "characteristic performance" in a contractual relationship (which is, in general, the performance that does not consist of the payment of money).

Mandatory Advance on Costs
The CPC imposes a general obligation on the claimant to advance the likely court costs. A claimant may only be requested to provide security for the legal fees of the defendant (in case the latter should win), if certain conditions are met.

Taking Evidence Before Proceedings Are Commenced
The CPC provides for the possibility of taking evidence before the main proceedings are commenced.

Protective Letter
In cases where a party has reason to fear that the counter-party may request an ex parte injunction or a freezing order from the court, that party may file a "protective letter" ("Schutzschrift") with the court.

Revised Lugano Convention
The revised Lugano Convention will enter into force on 1 January 2011.

The revision will bring the Lugano Convention (again) into line with the parallel Brussels I Regulation *("Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters")*.

As a result, Switzerland will take part in the EU system of jurisdiction and enforcement in civil and commercial matters throughout Europe.

The territorial scope of the revised Lugano Convention will be substantially extended, in particular to 11 new European Union member states (i.e., Czech Republic, Cyprus, Slovakia, Slovenia, Hungary, Malta, Estonia, Latvia, Lithuania, Bulgaria and Romania).

The revision of the Lugano Convention brings quite a number of material changes, such as a narrower scope for jurisdiction at the place of performance of contractual obligations, an extension of the scope of consumer disputes and jurisdiction (also) at the place where a company is primarily managed, to name a few. Moreover, the enforcement of decisions throughout the member states will be further simplified under the revised Convention.

The ww&p **News**Letter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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