

## REVISION OF SWISS CODE OF CIVIL PROCEDURE (CPC)

**The final approval of the revised provisions of the CPC by the Swiss parliament is imminent. This newsletter provides an overview of the main changes relevant to commercial litigation.**

Since its entry into force in 2011, the CPC has not undergone significant amendments. The current revision aims to improve the suitability of the CPC for practice; the main objective is to facilitate access to the courts.

In the parliamentary fall session, the Council of State and the National Council were able to settle most of their differences, so the key points are now set.

The main changes are:

### Basis for International Commercial Courts

The revision adds new provisions on the jurisdiction of the commercial courts and sets the basis that English can be chosen as language of the proceedings.

These amendments originate from efforts in the Canton of Zurich to create a «Zurich International Commercial Court» (ZICC). The idea is to create a special division at the Commercial Court of Zurich responsible for dealing with international commercial disputes. At the request of the parties, such proceedings may be conducted in English. With these amendments, for example small and mid-sized companies may implement jurisdiction clauses in contracts with their foreign customers or suppliers which declare that the Commercial Court of the Canton of Zurich (or the ZICC) shall have jurisdiction and that the language of the proceedings shall be English. This is intended to make Switzerland more attractive as a place of jurisdiction for international commercial disputes before state courts.

In detail, the following changes will be implemented:

#### *Jurisdiction of Commercial Courts (Art. 6 D-CPC)*

Previously, parties could only agree on the place of jurisdiction without being able to choose a specific competent court. Now, the parties can agree on the jurisdiction of a commercial court if:

- ◆ the dispute concerns the business activity of at least one of the parties;
- ◆ the amount in dispute is at least CHF 100,000;
- ◆ the parties agree on the jurisdiction of the commercial court; and
- ◆ at least one party is not seated or domiciled in Switzerland.

#### *English as Language of Proceedings (Art. 129 D-CPC)*

The option to conduct proceedings in English is a vital element for establishing international commercial courts.

This innovative topic was highly controversial in the legislative process. The revised provision allows the cantons to provide for the use of English as the language of proceedings in commercial court disputes, provided all parties agree, namely in a jurisdiction clause.

Such a jurisdiction clause could read, for example:

*«The exclusive place of jurisdiction is Zurich. The parties agree that the Zurich International Commercial Court shall have exclusive jurisdiction. The proceedings shall be conducted in English.»*

Establishing international commercial courts will now require legislative action at the cantonal level. In the major business centers, Zurich and Geneva, preparatory work is already underway.

### Inhouse Counsel Privilege (Art. 167a D-CPC)

The revised CPC creates an inhouse counsel privilege. A party may refuse to cooperate and in particular refuse to produce documents which are connected to the activities of its legal department. The prerequisites are:

- ◆ the party is registered in a commercial register;
- ◆ the party's legal department is headed by a person admitted to the bar in Switzerland or in his or her country of origin; and
- ◆ the activity in question would be considered typical work for a lawyer.

Not only the company itself may refuse to cooperate but also the employees of the legal department, even if they are not party to the proceedings.

The inhouse counsel privilege is intended to grant Swiss companies a right to refuse cooperation in (civil) proceedings abroad; in particular in litigation in the US, where the parties are subject to comprehensive disclosure obligations in discovery. Depending on the foreign procedural law, in order to invoke the privilege, it must also exist in the party's «homeland law». The revision is therefore intended to eliminate a disadvantage for Swiss companies in (civil) proceedings abroad.

In civil proceedings in Switzerland, the right to refuse cooperation will be less significant, as Swiss procedural law has no comprehensive production obligations.

### Advance on Costs (Art. 98 and 111 D-CPC)

Under the revised law, plaintiffs will only have to advance half of the expected court costs. However, in certain proceedings, including commercial disputes before the

international commercial courts (yet to be created), the court may still demand a full advance on costs (as is the general rule today).

If the plaintiff wins, it will be reimbursed the advance and does not have to collect it from the losing defendant. This means that the state bears the risk that the losing defendant does not pay up.

This new cost regime is intended to facilitate access to the courts. It can be very significant in individual cases.

### Enhancement of Conciliation Proceedings (Art. 199 D-CPC)

Previously, there were no conciliation proceedings in commercial court disputes. Now, the plaintiff may choose between filing a claim directly with the commercial court or first initiating conciliation proceedings.

This makes sense: if a plaintiff only wants to interrupt the statute of limitations, to file a conciliation request is a simple and costeffective measure, which was not previously available in commercial court disputes. In addition, a plaintiff can now seek a settlement in conciliation proceedings – if the plaintiff considers this to be a realistic option.

### Interim Measures Against the Media (Art. 266 D-CPC)

The revision clarifies that interim measures against the media can be ordered not only when an infringement is imminent, but also when it already exists (and can be eliminated).

In addition, it is no longer required that the plaintiff must be threatened by a «particularly severe» disadvantage if the measure is not granted. The imminent disadvantage must only be «severe». This amendment was heavily criticized by media companies. It remains to be seen, however, whether it will really make it easier for plaintiffs to obtain interim measures against the media.

## Outlook

Due to minor remaining differences between the National and the State Council, the National Council will once again deal with the revision. It is therefore not yet known when the revised CPC will enter into force. Realistically, this may be on 1 January 2024.

Not part of this revision were class actions – this topic will be dealt with in a separate legislation project.

If you have any questions regarding the revision of the CPC or its impact on your business, do not hesitate to contact us.



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