Revision of the Swiss Civil Procedure Code

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Proposed changes to the Swiss Civil Procedure Code in a nutshell

- **Claimant will, as a rule, have to advance half instead the full expected court costs**
- **Collection risks for court costs will shift from the successful claimant to the state**
- **In-house legal counsels will have a right to refuse to cooperate in civil proceedings**
- **Optional conciliation procedure in cases heard by the commercial courts**
- **Legal basis for cantons to establish international commercial courts and to recognise English as the language of proceedings**
- **Measures to improve collective redress are exempted from the proposed revision and will be addressed in a separate legislative process in the future**

On 26 February 2020, the Swiss Federal Council published the report and the draft bill concerning the revision of the Swiss Civil Procedure Code ("CPC"). The report and the draft bill ends the formal consultation process, during which the cantons, civil society institutions, practitioners, and other stakeholders submitted their comments on the proposed preliminary draft of the CPC published on 2 March 2018 (see our previous Pestalozzi legal update Swiss civil procedure to be amended).

Before the CPC entered into force on 1 January 2011, each Swiss Canton had its own civil procedure rules. The CPC was a major legislative achievement in that it codified and unified the civil procedures in Switzerland. Nine years after its entry into force, the CPC has generally proven successful and effective. The proposed preliminary draft of the CPC identified only a few areas that require improvement, in particular with regard to procedural costs, the possibility to coordinate multiple claims and the collective redress mechanisms. During the consultation procedure, a large majority supported the general direction of the preliminary draft. However, in particular the proposal for collective redress mechanisms was discussed

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controversially. The Swiss Federal Council thus decided to exempt the collective redress mechanism from the current revision of the CPC. The most relevant proposed changes to the CPC are outlined below.

The report and the draft bill are available on the homepage of the Swiss Federal Office of Justice in German, French and Italian. Before entering into force, the draft bill must be considered and adopted by the Swiss Parliament. It is expected that the revision will enter into force no earlier than 2022.

Reduction of procedural cost barriers

In today's Swiss court practice, the claimant is typically requested to advance the entire expected court costs. At the end of the proceedings, the successful claimant bears the collection risk because the final court costs are set-off with the advances. This practice has been widely criticised.

To facilitate access to justice, the preliminary draft proposed that the claimant will only have to advance half of instead of the full expected court costs when initiating civil proceedings. The draft CPC, however, provides for some exceptions that were not yet included in the earlier preliminary draft. In particular, courts can request the full advance if the expected courts costs are low or if there are other objective reasons that justify higher advances (e.g. in conciliation or summary proceedings).

A second measure to improve access to justice is the transfer of the collection risks from the claimant to the state. Under the current CPC, a successful claimant must recover court cost advances from the losing respondent, thus bearing the risk of the respondent's insolvency. This is likely to change in the revised CPC. According to the draft, courts must offset the court costs against the advances made by the party liable to pay costs (typically the losing party). Conversely, courts will refund the advances to the successful claimants and must collect the court costs from the losing respondent directly.

Right to refuse to cooperate for in-house legal counsels

Swiss law grants the attorney-client privilege only to registered attorneys. The attorney-client privilege includes the attorney's right to refuse to cooperate in court proceedings (in particular the right to refuse to testify or to produce physical records). The draft CPC extends the right to refuse to cooperate to in-house counsels provided that the in-house legal counsel's work is specific for the profession of attorneys and that the legal department of companies is headed by an attorney registered in Switzerland or authorised to practice as an attorney in their foreign home jurisdiction. This amendment will compensate for the disadvantage experienced by Swiss companies in international disputes.

Strengthening of conciliation procedure

The mandatory conciliation procedure is an important feature of the CPC. Approximately 50-80% of all (mostly smaller) cases submitted to conciliation are settled before they would go to court. Conciliation procedure is, however, not mandatory for all disputes submitted to courts. For instance, commercial disputes are currently exempted from the conciliation procedure under the CPC. (A dispute is considered commercial if it concerns the commercial activity of at least one party, the decision is subject to appeal to the Swiss Supreme Federal Court, and the parties are registered in the Swiss Commercial Registry or in an equivalent foreign registry.)

The proposed draft will extend and strengthen selected features of the conciliation procedure. In particular, commercial disputes will be preceded by a conciliation procedure unless the claimant decides to submit the dispute to the commercial court directly (opt-out). Similarly, if the amount in dispute is higher than CHF 30,000, disputes concerning intellectual property or the use of a business name have to undergo a conciliation procedure unless the claimant directly refers the case to court.

Furthermore, the conciliators' authority to submit a judgment proposal to the parties in financial disputes will be extended from disputes with a value of CHF 5,000 to disputes with a value of CHF 10,000. The conciliators' competence to render binding and enforceable decisions will remain limited to very small cases with no more than CHF 2,000 in dispute.

Simplification of the coordination of multiple claims

To simplify the coordination and assertion of multiple claims, the provisions on the joinder of parties (Streitgenossenschaft), the action for third-party notice (Streitverkündungsklage), the combination of actions (Klagenhäufung) and the counterclaim (Widerklage) will be amended selectively. A combination of actions in one procedure will be possible even if the type of procedure is different due to a different amount in dispute of the actions. Similarly, a counterclaim can be made in ordinary procedure even if the counterclaim otherwise falls into the simplified procedure due to the value of the dispute.

Legal basis for the establishment of international commercial courts

In the past years, different jurisdictions such as France, the Netherlands, Germany and Singapore have made efforts to establish international commercial courts. In response to these international efforts and to improve the attractiveness of Swiss courts, the draft CPC provides a legal basis for the establishment of international commercial courts in Swiss cantons. The cantons will have the possibility to establish specialised courts or judicial chambers for international commercial disputes. The following conditions must be met to submit an international dispute to such a specialised court: The dispute concerns the commercial activity of at least one party, the value of the dispute is over CHF 100,000, the parties agreed to submit their dispute to the specialised court, and at least one party has its domicile, habitual residence or seat outside of Switzerland. The specific organisation of the courts is left to the cantons.

The cantons can allow the parties to make submission before cantonal courts in another national language of Switzerland (German, French, Italian or Romansh) or in English if all

parties agree.

Further amendments

Other notable changes include the consequences of submissions that will be made to a manifestly incompetent court. Under the revised CPC, submissions that were made to an incompetent court within the deadline will be deemed to have been made in time. If it is obvious that another court is competent, the incompetent court must forward the submission to the competent court ex officio. Further amendments include the admission of private expert reports as evidence and the possibility to examine witnesses by video conference.

The proposals for collective redress mechanisms of mass and scattered damage were discussed controversially in the consultation process. In order not to jeopardise the largely non-controversial parts of the revision, the Swiss Federal Council decided to remove the issue of collective redress from the draft and to address it in a separate legislative process.

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