Swiss civil procedure to be amended

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On 2 March 2018, the Swiss Federal Council has opened a formal consultation on a number of proposed amendments to the Swiss Code of Civil Procedure ("CCP"). The federal government is thereby reacting to various parliamentary initiatives primarily aimed at improving access to justice, expanding collective redress mechanisms, introducing in-house counsel privilege, and strengthening the conciliation procedure.

Seven years after its entry into force, the CCP is virtually universally considered to be a balanced and fine-working piece of national legislation. In order to further improve its practicability, the Swiss Federal Council has proposed a draft bill with a number of selective adjustments. Cantons, civil society institutions, practitioners, and others are invited to submit their respective comments on the draft bill by 11 June 2018. At this stage, it is yet uncertain whether the draft bill will enter into force as parliamentary debates will follow after consultation. This Pestalozzi Legal Update provides an overview of the most relevant proposals.

1. Reduction of Litigation Cost Barriers

In order to facilitate access to justice, the draft bill proposes that a claimant's advances on costs shall be capped to one half of the prospective court costs. Today, the courts may and often do demand an advance in the amount of the full prospective court costs.

Furthermore, collection risks should shift from the claimant to the state. Currently, a successful claimant may recover its advances on court costs exclusively from the losing respondent, bearing the risk of the respondent's insolvency. According to the draft bill, courts will refund successful claimants in the future and collect the court costs from the losing respondent, thereby assuming the risk of its insolvency.

2. Collective Redress Mechanisms

Even though the CCP established the possibility of collective redress in 2007, no filing of any group action has become known until today.

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Against this background, the Federal Council proposes three amendments for cases in which a number of persons are harmed in the same or a similar way by the same unlawful action, namely:

- the extension of group actions by civil society organizations of national or regional importance, currently limited to violations of personality rights, to any kind of civil claim, including claims for damages and disgorgement of profits;
- the creation of a new group settlement procedure between civil society organizations representing the harmed persons and the person or company who caused the harm. The settlement will be binding upon all harmed persons who do not opt out;
- the strengthening of procedural options in individual actions which may facilitate collective redress, such as, e.g., voluntary joinders of parties.

3. Right of Refusal to Cooperate for In-House Counsel

Today, the CCP grants the attorney-client privilege only to registered attorneys. The attorney-client privilege includes the attorney's right of refusal to cooperate with the court (in particular the right to refuse testimony and to produce physical records). The proposed bill would extend this right to lawyers employed in the legal department of companies, provided that the legal department is headed by an attorney registered in Switzerland or authorized to practice as an attorney in his foreign home jurisdiction. This amendment would compensate a disadvantage experienced by Swiss companies in international disputes.

4. Strengthening of Conciliation Procedure

One of the most appraised features of the CCP has been its remarkably successful conciliation procedure, which has led to settlement of approx. 50-80% of all (mostly smaller) cases before they could go to court. The federal government now advocates further expanding and strengthening selected features of the procedure. In particular, claimants shall be able to voluntarily opt into a conciliation procedure in cases heard by the Commercial Courts, which currently do not require a prior conciliation procedure.

More generally, the conciliators' competence to submit a judgment proposal to the parties shall be extended to cases with up to CHF 10,000 in dispute (instead of CHF 5,000 under the current system). In contrast, the conciliators' competence to render binding decisions will continue to be limited to very small cases with no more than CHF 2,000 in dispute.

5. Further Amendments

The above is not an exhaustive list of proposed amendments. Among other things, the draft bill also envisages to codify certain case law of the Swiss Federal Supreme Court on specific aspects of the CCP in order to improve legal certainty.

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