VISCHER

Explaining

The New Swiss Civil Procedure Code (CPC)

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Contents

I Introduction

1 On January 1, 2011 the new Swiss Civil Procedure Code (CPC) entered into force and replaced the 26 different cantonal (state) codes of civil procedure. The CPC is an amalgamation of the 26 pre-existing cantonal codes and regulates all issues of civil procedure in domestic cases initiated before the cantonal courts on or after January 1, 2011.

2 The new unified civil procedural law ensures that the substantive federal law is applied uniformly throughout Switzerland and thus marks a major milestone in the civil procedure landscape of Switzerland.

3 The CPC has significantly amended certain procedural topics previously contained in the individual cantonal rules. The aim of this paper is to briefly introduce the CPC and to highlight the most important changes.

II Procedure

A

Jurisdictions (art. 4–46 CPC) and court organization

4 The territorial jurisdiction in domestic civil proceedings before cantonal authorities is now specified in art. 9–46 CPC. The Federal Act on Jurisdiction in Civil Matters *(Gerichtsstandsgesetz, GestG)* has been abolished.[1]

5 Art. 9–46 CPC coincide to a large extent with the provisions of the GestG.[2] The CPC, however, also establishes new forums, such as, for example, a forum at the place of the characteristic performance of a contract (art. 31 CPC),[3] a forum which was already well known in the Euro-international context.[4] A forum can be inferred, if none is mandatory or partially mandatory in the CPC (art. 9 CPC). Accordingly, the new forum does not apply to all contracts, *e.g.,* not to employment contracts, leases, or consumer contracts.[5]

6 To a large extent the court organization still rests with the cantons which had to adapt their respective legislation to the CPC. For example, the Zurich Court Composition Act (*Gerichtsverfassungsgesetz ZH, GVG ZH*) was replaced by the Zurich Court Organization Act *(Gerichtsorganisationsgesetz ZH, GOG ZH).*[6]

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[1] Addendum I, Title 1 CPC (abrogation of previous law).
[2] Sutter-Somm/Klingler in Sutter-Somm/Hasenböhler/Leuenberger, N 1 to art. 9 CPC.
[3] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 34 et seq.
[4] Spühler/Dolge/Gehri, p. 43.
[5] Haas/Strub in Oberhammer, N 3 to art. 31 CPC.
[6] Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess vom 10. Mai 2011, (GOG ZH; ON 211.1); cf. Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 19 et seq.

B

Forum selection agreements (art. 17 CPC)

7 The prerequisites for the validity of a forum selection have not changed substantially, neither in form nor content, from those under the old GestG.[7] Under art. 17(1) CPC, a stipulation of forum is permissible provided that no mandatory or partially mandatory forums have to be observed.[8] The stipulation must be made in writing or in another form that allows it to be evidenced by text. The previous enumeration of examples in the GestG – "telex, fax, e-mail," etc., is not included in art. 17 CPC, but those forms remain permissible.[9]

8 Whether an oral agreement with subsequent written confirmation still satisfies the validity requirement, is disputed.[10] A mere oral agreement remains insufficient, even in commercial transactions[11] (but see art. 23(1) (a) to (c) of the Lugano Convention (LugC), under which forum requirements in international trade were largely abolished).[12]

9 Forum selection provisions in pre-formulated contracts (form contracts) remain permissible under the CPC as long as such pre-formulated terms have

[7] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 1 to art. 17 CPC; Gasser/Rickli, N 1 to art. 17 CPC.
[8] Haas/Schlumpf in Oberhammer, N 9 to art. 17 CPC.
[9] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 6 to art. 17 CPC; Berger in Güngerich I, N 34 et seq. to art. 17 CPC.
[10] Courvoiser in Baker & McKenzie, N 17 to art. 17 CPC; Meier, Schweizerisches Zivilprozessrecht, p. 116; Haas/Schlumpf in Oberhammer, N 18 to art. 17 CPC.
[11] Courvoisier in Baker & McKenzie, N 17 to art. 17 CPC.
[12] Berger in Oetiker/Weibel, N 48 to art. 23 LugC.

been validly incorporated into the contract. For example, a reference in the main contract to the general terms of business is sufficient.[13]

10 What is new under the CPC is, that the elected forum no longer has the right to deny jurisdiction on the grounds that the dispute has insufficient connection to the forum. Under art. 17 CPC, a valid forum selection agreement is binding on the court of conferred jurisdiction.[14] As a consequence, Swiss litigants are free to agree on a specific place of jurisdiction within Switzerland, even if the place has no connection whatsoever with the domicile/seat of the parties or the obligations under the contract.

11 While the place of jurisdiction can be freely chosen, the same does not apply with regard to subject matter competence which is, under the CPC, outside the parties' disposition.[15] Under some previous cantonal codes of procedure, jurisdiction could be conferred on the higher courts.[16] However, now under art. 8 CPC, conferral of jurisdiction on the higher cantonal court is permissible only in the case of financial disputes with disputed values of at least CHF 100,000. In addition, a forum selection may also be made under the CPC in cases for which legislation has specified that special courts have subject matter jurisdiction (*e.g.,* with employment law disputes). Apart from these options, the parties cannot provide for a specific court.[17] Two natural persons can, therefore, for example, not validly agree to submit their dispute to the Zurich Commercial Court.[18]

12 Intertemporal aspects also need to be taken into account when considering the validity and effects of forum selection agreements. The validity of forum selections that were agreed to before the CPC came into effect is judged under the law that was in force when the agreement was concluded (art. 406 CPC).[19] In forum selection agreements, a distinction must be made between these time periods with respect to validity:

- Forum selection agreements under the new law, *i.e.,* ones that were stipulated after January 1, 2011, fall under the regime of the CPC.[20]
- The validity of forum selection agreements made under the old law is reviewed either
  - according to the GestG, if they were stipulated between January 1, 2001 and December 31, 2010, or
  - according to the cantonal law of civil procedure if they were made before the GestG entered into force, *i.e.,* prior to January 1, 2001 (art. 39 GestG; in this case, however, it is necessary to observe the case law of the Swiss Federal Tribunal, under which a forum selection under the old law remains valid only until a contract adjustment has taken place, which includes the provision of new general terms of business).[21]

13 The effects of forum selection agreements are exclusively governed by the CPC (art. 404(2) CPC). Thus, the right of refusal provided in art. 9(3) GestG no longer applies and the court of conferred jurisdiction has jurisdiction without exception.[22]

14 Finally, it is to be noted that forum selection agreements unfavorable to consumers are not permitted (art. 35(1)(a) CPC). This means that a consumer will be entitled to file a claim at his domicile in spite of the existence of a forum selection agreement providing for a forum at the place of business of the supplier (art. 32(1)(a) CPC).[23]

c
Forum-running

15 The previous cantonal codes of procedure provided for different rules concerning pendency of a claim. In certain cases, this allowed for so called forum-running, *i.e.,* the parties' race to attain the preferred forum.[24]

16 Art. 62(1) CPC now contains a uniform rule regarding *lis pendens.* It provides that pendency begins with the filing of a request for conciliation, a claim, a motion, or a joint request for divorce. With pendency, the procedural effects of blockage (art. 64(1)(a) CPC) and the fixing of the forum (*perpetuatio fori,* art. 64(1)(b) CPC) are established. The filing date of a request for conciliation or a claim is de-

[13] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 22 to art. 17 CPC.
[14] Haas/Schlumpf in Oberhammer, N 24 to art. 17 CPC; Botschaft, p. 7264.
[15] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 61.
[16] Schwander, p. 74 et seq.
[17] Spühler/Dolge/Gehri, p. 62.
[18] Schwander, p. 73 et seq.
[19] Fischer in Baker & McKenzie, N 2 to art. 406 CPC.
[20] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 6 et seq. to art. 406 CPC.
[21] BGE 132 III 268, p. 271; Meier, Schweizerisches Zivilprozessrecht, p. 118.
[22] Courvoisier in Baker & McKenzie, N 25 to art. 17 CPC.
[23] Walther in Güngerich I, N 1 et seq. to art. 35 CPC.
[24] Müller-Chen in Brunner/Gasser/Schwander, N 1 et. seq. to art. 62 CPC.

fined as the mailing date, *i.e.,* the date of postmark.[25]

17 Due to this new uniform regulation on pendency, forum running in the Swiss domestic context will lose importance.[26] In contrast, the question of forum running may become more important, and favor the Swiss courts, in the Euro-international context. The revised LugC entered into force simultaneously with the CPC. In art. 30(1) LugC, the convention now states that the respective national law is no longer determinative for the beginning of pendency; the submission of the document instituting the proceedings is now uniformly recognized as the commencement date. According to the LugC dispatch *(Botschaft),* the submission of a request for conciliation pursuant to art. 202 CPC qualifies as a document instituting proceedings. The conciliation request, therefore, causes pendency within the meaning of art. 30(1) LugC. Accordingly, pendency in Switzerland now occurs at a very early stage, without the need to work out full reasoning for the claim and without the burden of continuation being established.[27]

D

Initiation of action (art. 197–218 CPC)

18 As a general rule litigation is to be preceded by a conciliation attempt before a conciliation authority (art. 197 CPC). This rule applies to all civil cases in ordinary and simplified proceedings, which, thus, includes for example cases under employment law and those in which the defendant has his seat in a LugC country.[28]

19 What is new under the CPC is that conciliation may be substituted with mediation. Mediation must be requested either in the request for conciliation or at the conciliation hearing (art. 213(2) CPC).[29]

20 The conciliation attempt is essentially mandatory. Art. 198 CPC gives an exhaustive list of the (relatively narrow) exceptions.[30] Of significance here is that

- conciliation proceedings are not held if a commercial court is competent (art. 198(f) in conjunction with art. 6 CPC),
- in financial disputes with a value in dispute of at least CHF 100,000, the parties may mutually agree to renounce the conciliation proceedings (art. 199(1) CPC),
- the plaintiff may unilaterally renounce conciliation if the defendant's seat or domicile is abroad (art. 199(2)(a) CPC), and
- if all the parties so request, the conciliation proceedings are replaced by mediation (art. 213 CPC).

21 The request for conciliation triggers pendency (art. 62 CPC). However, the burden of continuation takes effect only when the statement of claim is served on the defendant (art. 65 CPC).[31]

22 Under the CPC, the competence of the conciliation authority has been increased. At the plaintiff's request, the conciliation authority may render decisions in financial disputes with a value in dispute of up to CHF 2,000 (art. 212 CPC).[32]

23 If the parties do not reach an agreement in the conciliation attempt, the conciliation authority issues an authorization to proceed (art. 209(1) and (2) CPC). Usually the plaintiff must file the statement of claim within three months of receipt of the authorization to proceed (art. 209(3) CPC). Shorter deadlines can apply, for example in disputes concerning the lease of residential and business property (art. 209(4) CPC).[33] Whether the respective time limit is suspended during court holidays was disputed,[34] until the Swiss Federal Tribunal recently settled the issue with its ruling in favor of suspension.[35]

[25] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 9 to art. 62 CPC; Schleiffer Marais in Baker & McKenzie, N 4 to art. 62 CPC.
[26] Botschaft, p. 7277; Schleiffer Marais in Baker & McKenzie, N 7 to art. 62 CPC.
[27] Schleiffer Marais in Baker & McKenzie, N 12 et seq. to art. 62 CPC.
[28] Gloor/Umbricht in Oberhammer, N 1 et seq. to art. 197 CPC.
[29] Ruggle in Spühler/Tenchio/Infanger, N 1 et seq. to art. 213 CPC.
[30] Infanger in Spühler/Tenchio/Infanger, N 1 to art. 198 CPC.
[31] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 13 to art. 65 CPC.
[32] Infanger in Spühler/Tenchio/Infanger, N 1 et seq. to art. 210 CPC and N 1 et seq. to art. 211 CPC.
[33] Alvarez/Peter in Spühler/Tenchio/Infanger, N 3 and 9 et seq. to art. 209 CPC.
[34] In favour of the application of the court holidays: Infanger in Spühler/Tenchio/Infanger, N 25 to art. 209 CPC; Gasser/Rickli, N 5 to art. 209 CPC; against: Honegger in Sutter-Somm/Hasenböhler/Leuenberger, N 10 to art. 209 CPC (edition 2010).
[35] Decision of the Swiss Federal Tribunal 4A_391/2012, September 20, 2012, consid. 2.4.

E

Advance of costs/ party compensation (art. 98–99 CPC)

24 Contrary to some of the previous cantonal procedure codes, the CPC provides for a general duty to advance court fees (art. 98 CPC). Although the provision is worded as a discretionary clause, there is a clear tendency towards it becoming the general rule.[36]

25 There is also a duty to pay advances in the case of counterclaims and when decisions are challenged.[37]

26 The plaintiff not only has to advance the court fees, but must also bear the collection risk.[38] The court draws the court fees from the advance. The party against whom costs are awarded must reimburse the other party for the advances paid (art. 111 CPC).

27 Security for party costs continues to be provided only upon request and in the presence of special reasons for security. Certain proceedings are exempted from the duty to secure party costs (art. 99 CPC).[39]

28 The new duty to advance court fees has made litigation in Switzerland more cumbersome.[40]

F

Course of an ordinary financial dispute

29 The provisions pertaining to ordinary proceedings (art. 291 et seq. CPC) give the courts a relatively large degree of latitude in structuring the course of the proceedings.[41] The parties can exert influence on the course of the proceedings as well, *e.g.* by renouncing to a main hearing (art. 233 CPC). A second round of written briefs takes place only if the circumstances so require (art. 225 CPC) and many scholars are in favor of this remaining an exception. In a typical commercial case, though, it can be expected that, as per previous practice, a second exchange of briefs will take place.[42]

30 The court may, at any time, conduct an organizational hearing (also referred to as "instruction hearing") which is a new institution under the CPC. Under the scope of such hearings are informal discussions of the matter in dispute, supplementation of the facts, an attempt at a settlement, preparation for the main hearing, and the taking of evidence (art. 226 CPC).[43]

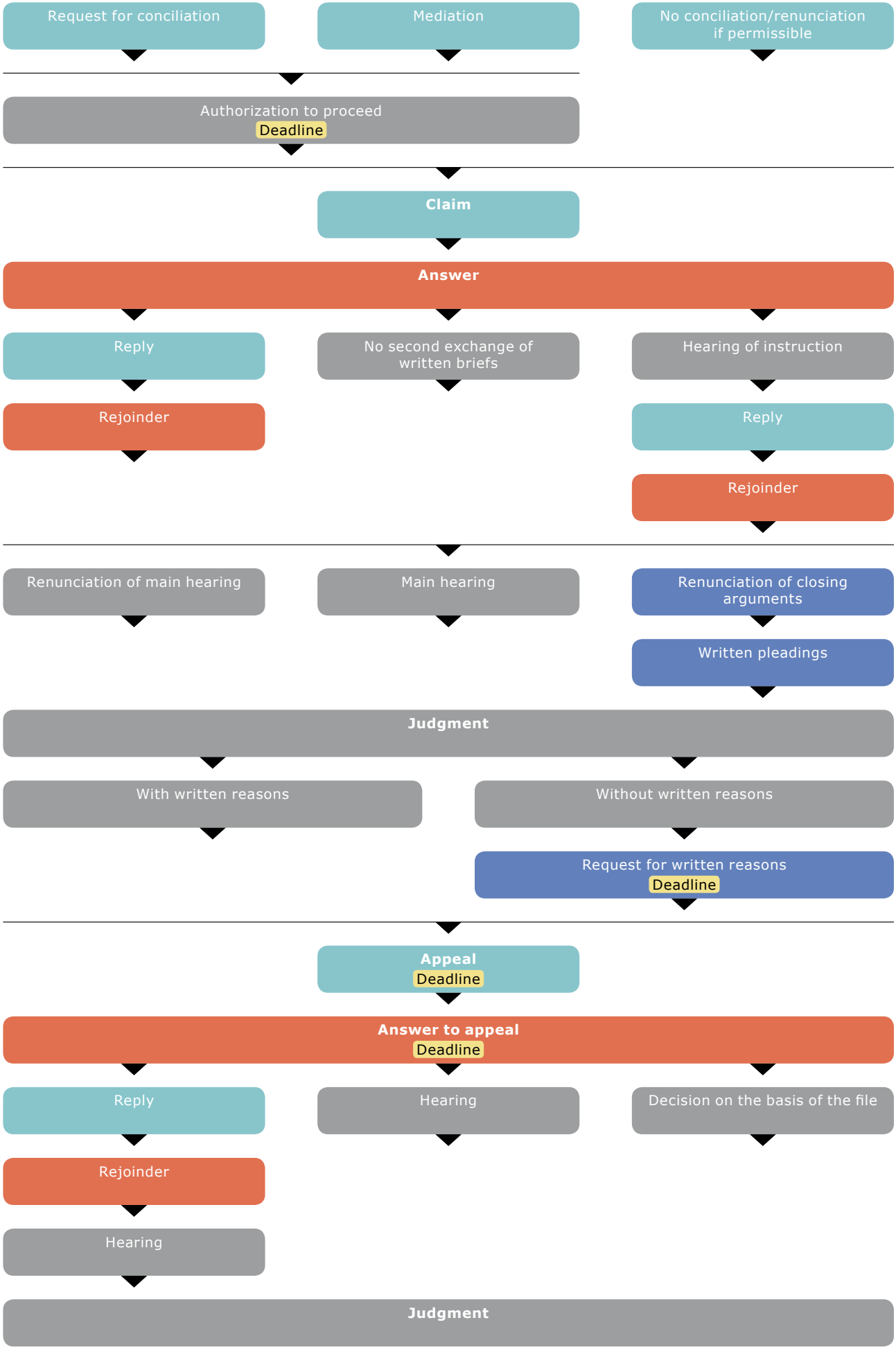
31 The main hearing consists of the first pleadings, the taking of evidence (if not already done) and the closing arguments. In the closing arguments, the merits of the case and the result of the evidence are discussed (art. 228–232 CPC). The parties may mutually dispense with the complete main hearing (art. 233 CPC) or merely the oral closing arguments in favor of written pleadings (art. 232(2) CPC).[44]

32 The court can provide notification of its decision with or without a written statement of the grounds (art. 238 and 239 CPC). In the latter case, either party may request such a written statement of the grounds within ten days. In order to be able to challenge the decision by appeal or objection the parties must have received a written statement of the grounds (art. 239(2) CPC).[45]

33 The deadlines for the appeal, answer to appeal, objection *(Beschwerde),* and answer to objection are statutory deadlines and may not be extended (art. 144(1) CPC).[46]

34 The following diagram shows the usual course of an ordinary financial dispute (with variants):

[36] Suter/von Holzen in Sutter-Somm/Hasenböhler/Leuenberger, N 10 to art. 98 CPC; Botschaft, p. 7293; Meier, Schweizerisches Zivilprozessrecht, p. 421.
[37] Botschaft, p. 7293.
[38] Meier, Schweizerisches Zivilprozessrecht, p. 421.
[39] Rüegg in Spühler/Tenchio/Infanger, N 1 et seq. to art. 99 CPC.
[40] Rüegg in Spühler/Tenchio/Infanger, N 1 to art. 98 CPC.
[41] Gasser/Rickli, N 1 to art. 219 CPC.
[42] Botschaft, p. 7340; Frei/Willisegger in Spühler/Tenchio/Infanger, N 1 to art. 225 CPC; Leuenberger in Sutter-Somm/Hasenböhler/Leuenberger, N 7 to art. 225 CPC.
[43] Killias in Güngerich II, N 1 et seq. to art. 226 CPC.
[44] For a specific illustration of the course of an ordinary case: Meier, Schweizerisches Zivilprozessrecht, p. 341 et seq.
[45] Staehelin in Sutter-Somm/Hasenböhler/Leuenberger, N 30 to art. 239 CPC.
[46] Benn in Spühler/Tenchio/Infanger, N 1 to art. 144 CPC.


Request for conciliation
Mediation
No conciliation/renunciation if permissible
Authorization to proceed
Deadline
Claim
Answer
Reply
No second exchange of written briefs
Hearing of instruction
Rejoinder
Reply
Rejoinder
Renunciation of main hearing
Main hearing
Renunciation of closing arguments
Written pleadings
Judgment
With written reasons
Without written reasons
Request for written reasons
Deadline
Appeal
Deadline
Answer to appeal
Deadline
Reply
Hearing
Decision on the basis of the file
Rejoinder
Hearing
Judgment

G

Proceedings before the Zurich Commercial Court

35 It is to be noted that in proceedings before the (Zurich) Commercial Court, there are no conciliation proceedings (art. 198(f) CPC). If the Zurich Commercial Court has jurisdiction, a fully formulated statement of claim must be filed to initiate an action. For defendants with foreign domicile, this is often the only possibility to interrupt the limitation period under Swiss law (i.e., art. 135 Code of Obligations; CO).

36 The CPC contains a uniform definition of "commercial dispute". It makes a distinction between "commercial" in the narrow sense (art. 6(2) CPC) and "commercial" in the broad sense (art. 6(4) CPC). While the Commercial Court is always competent in the commercial disputes in the narrow sense, it only has jurisdiction on commercial disputes in the broad sense if the cantonal law so provides (art. 6(4) CPC).[47]

37 A dispute is classified as commercial in the narrow sense, if it concerns the commercial activity of at least one party, the parties are registered in the Swiss or an equivalent foreign commercial registry and, usually, if the value in dispute exceeds CHF 30,000 (art. 6(2) CPC).[48]

38 If only the defendant is registered in the commercial registry, but the commercial activity of a party is affected and the value in dispute is at least CHF 30,000, the plaintiff can choose between the ordinary court and the commercial court (art. 6(3) CPC). It must be mentioned that the interpretation of this provision is disputed. It could be interpreted as meaning that the Commercial Court is to decide consumer disputes as well but some judges of the Zurich Commercial Court reject such an interpretation.[49]

39 If a dispute is not "commercial", no forum selection in favor of the Commercial Court or acceptance by appearance is possible. Accordingly, caution must be exercised when deciding on forum selection clauses with the designation "commercial court". Such selection will, for example, usually be ineffective as against private (*i.e.,* non-corporate) defendants.[50]

40 Under the CPC, the Commercial Court is now competent to order interim measures before the main case is pending (art. 6(5) CPC).[51]

H

Employment law proceedings

41 Art. 343 CO previously contained procedural provisions regarding employment disputes. The regulation has been deleted with the entry into force of the CPC.[52]

42 New "simplified proceedings" apply where the value in dispute does not exceed CHF 30,000 (instead of previous "simple and quick proceedings"), no court fees are payable (art. 113(2)(d) CPC) and new facts and evidence are permissible until the court's deliberation phase (*ex-officio* establishment of facts, art. 247(2) and 229(3) CPC).

43 It is to be noted that conciliation proceedings are mandatory (art. 197 *et seq.* CPC).

I

Tenancy law proceedings

44 The joint conciliation authority *(Mietschlichtungsstelle)* is competent only with respect to residential and business properties (art. 200(1) CPC). For other tenancy and lease agreements, the regular conciliation authority has jurisdiction. In these latter cases, there is no exemption from costs before the conciliation authority (art. 113 CPC).[53]

45 The time limit for submission of the statement of claim after receipt of the authorization to proceed is 30 days (instead of three months, art. 209(4) CPC). The deadline is suspended during court holidays.[54]

[47] Staehelin/Staehelin/Grolimund, N 8a to § 6.
[48] Berger in Güngerich I, N 6 et seq. to art. 6.
[49] Brunner in Brunner/Gasser/Schwander, N 23 et. seq. to art. 6 CPC.
[50] Vock in Spühler/Tenchio/Infanger, N 15 to art. 6 CPC.
[51] Vock in Spühler/Tenchio/Infanger, N 17 to art. 6 CPC.
[52] Addendum I, Title 2 CPC (alteration of previous law).
[53] Disputed, Honegger in Sutter-Somm/Hasenböhler/Leuenberger, N 4 to art. 200 CPC.
[54] Infanger in Spühler/Tenchio/Infanger, N 25 to art. 209 CPC; cf. para. 23.

46 The conciliation authorities may submit a proposed judgment in cases of termination and extension, deposit of rent, and abusive rent (art. 210(1)(b) CPC). The time limit for the rejection of the proposed judgment is 20 days (previously 30 days, art. 211(1) CPC) and is not suspended during court holidays (art. 145(2)(a) CPC).[55] Upon receiving the rejection, the conciliation authority shall grant the authorization to proceed and the statement of claim must be filed within 30 days. Otherwise the proposition of judgment becomes binding (with *res iudicata* effect) (art. 211(3) CPC).[56]

47 Under the old law, no court costs were imposed and no party costs were awarded in tenancy conciliation proceedings. With the proposed judgment (art. 210(1)(b) CPC), this is no longer clear. Opinions differ as to whether the general rule on court costs applies in the case of a proposed judgment (art. 104 *et seq.* CPC).[57]

48 Proceedings under tenancy law are generally simplified proceedings (except for claims, *e.g.,* damages or claims for rent in which the value in dispute exceeds CHF 30,000; art. 243(2)(c) CPC). In simplified proceedings, there is no requirement to allege facts and substantiate the claim. In the case of an unreasoned statement of claim, the court summons the parties for the hearing (otherwise the court sets a deadline for the defendant to respond in writing; art. 243–245 CPC).[58]

49 The extension of the competence of the eviction authority for extraordinary termination was deleted (former art. 274(g) CO).[59] If it is uncertain whether a clear case is present, it is becoming increasingly common for the lessor to file a request for eviction in the ordinary proceeding before the conciliation authority (and not before the eviction judge) to be on the safe side. In clear cases, nothing changes (art. 257 CPC).[60]

[55] Infanger in Spühler/Tenchio/Infanger, N 2 to art. 211 CPC.
[56] Rickli in Brunner/Gasser/Schwander, Kommentar ZPO, N 16 to art. 211 CPC.
[57] Rickli in Brunner/Gasser/Schwander, Kommentar ZPO, N 22 to art. 210 CPC.
[58] For general information on the simplified proceeding Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 341 et seq.
[59] Addendum I, Title 2 CPC (alteration of previous law).
[60] Sutter-Somm/Lötscher in Sutter-Somm/Hasenböhler/Leuenberger, N 38 to art. 257 CPC; Jent-Sørensen in Oberhammer, N 17 et seq. to art. 257 CPC; cf. para. 54 et seq.

J

Third-party claim (art. 81 et seq. CPC)

50 There are two possibilities to involve a third party in proceedings, on the one hand, by a third-party notice (*einfache Streitverkündung,* art. 78 CPC) and on the other hand, by a third-party claim (*Streitverkündungsklage,* art. 81 CPC). While the third-party notice already existed in most cantonal procedure codes, the third-party claim is a new instrument that previously only existed in a few French-speaking cantons.[61]

51 Art. 81 CPC provides that the notifying party may sue the notified third party in the court that is dealing with the main claim and assert the rights it believes to have against the third party in the event they are unsuccessful.

52 The request for the admission of the third party claim must be made with the answer or the reply in the main proceedings. The notifying party sets out the claims to be raised against the third party and briefly states the reasons (art. 82(1) CPC).

53 If the third-party claim is admitted, the court determines the respective procedure, *i.e.,* the time and extent of the exchange of written submissions (art. 82(3) CPC).

K

Remedy in clear cases (art. 257 CPC)

54 "Remedy in clear cases", which was previously known in most German-speaking cantons has now been applied on a federal level (art. 257 CPC).[62] The courts grant remedy in clear cases in summary proceedings if the facts are undisputed or immediately provable and the legal situation is clear (art. 257(1) CPC). A clear legal situation exists, if the plaintiff's position corresponds to the prevalent doctrine and case law and there is no controversial "discretionary standard". In addition, it is necessary that the opposing party is unable to offer a defense and/or objections or its defense and/or

[61] Domej in Oberhammer, N 1 to art. 81 CPC; cf. for further information: Gross/Zuber in Güngerich I, N 1 et seq. to art. 81 CPC.
[62] Koslar in Baker & McKenzie, N 1 to art. 257 CPC.

objections are groundless.[63] If these requirements are fulfilled, the court approves the claim and issues a judgment with full substantive *res iudicata* effect. If the requirements are not met, the court issues a declaration of non-admissibility (art. 257(3) CPC). The applicant then has the option of pursuing ordinary proceedings[64] but in order to preserve pendency in that case, he must take the first procedural step (generally the filing of the request for conciliation) within the statutory deadline of one month set in art. 63 CPC.[65]

55 It is disputed whether the court is entitled to dismiss the claim with prejudice in the proceeding on clear cases. However, it can be expected that dismissal of a claim with *res iudicata* effect will only occur in exceptional cases, if at all – specifically, only when the opposing party can furnish liquid counter-evidence, *e.g.,* by producing evidence of payment.[66]

56 What is new under the CPC is that remedy in clear cases also now applies to the enforcement of monetary claims. To set aside an objection to a payment demand *(Rechtsvorschlag),* a creditor now has – besides the clearance to proceed *(Rechtsöffnung)* pursuant to art. 82 *et seq.* of the Debt Collection and Bankruptcy Act (DCBA)[67] and ordinary civil or administrative proceedings pursuant to art. 79 DCBA – the option of an action for recognition of rights in the procedure for clear cases under art. 257 CPC, with which he can directly obtain a definitive clearance to proceed instead of an interim one. Thus, where the facts and legal situation are clear, this new institution constitutes an option for the applicant to obtain a final and enforceable court decision without going through an ordinary proceeding.[68]

57 This procedure is also of particular interest to creditors who have an acknowledgment of debt, but not one that satisfies the form requirements of art. 82 DCBA (*e.g.,* acknowledgment of debt in the form of an e-mail).[69]

[63] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 351.
[64] Sutter-Somm/Lötscher in Sutter-Somm/Hasenböhler/Leuenberger, N 23 et seq. to art. 257 CPC.
[65] Jent-Sørensen in Oberhammer, N 15 to art. 257 CPC.
[66] Jent-Sørensen in Oberhammer, N 14 to art. 257 CPC.
[67] Bundesgesetz über Schuldbetreibung und Konkurs (SchKG; SR 281.1).
[68] Meier, Schweizerisches Zivilprozessrecht, p. 375 et seq.; Hofmann in Spühler/Tenchio/Infanger, N 29 to art. 257 CPC.
[69] Sutter-Somm/Lötscher in Sutter-Somm/Hasenböhler/Leuenberger, N 44 et seq. to art. 257 CPC.

L

Non-extendable deadlines

58 The CPC makes the already familiar distinction between statutory deadlines and those set by the court.[70] Unlike deadlines set by the court, statutory deadlines cannot be extended (art. 144 CPC).

59 The CPC, *inter alia,* recognizes the following statutory and, thus, non-extendable deadlines:[71]
- Re-filing of a claim withdrawn for good cause or non-admissibility within one month (art. 63(1) CPC).
- After the authorization to proceed is granted, a claim may be filed with the court within three months following the receipt of the authorization (art. 209(3) CPC).
- In disputes concerning the tenancy or leasing of residential or business property or the leasing of agricultural property, the deadline for filing a claim is 30 days and not 90 days (art. 209(4) CPC).
- The request for a written statement of grounds within 10 days of notification of the decision (art. 239(2) CPC).
- An appeal *(Berufung)* must be filed in writing with reasons within 30 days of service of the reasoned decision (art. 311(1) CPC).
- The deadline for the answer to appeal is 30 days from service of the appeal (art. 312(2) CPC).
- In summary proceedings, the deadline for filing the appeal and the answer to appeal is 10 days (art. 314 CPC).
- An objection *(Beschwerde)* must be filed in writing with reasons within 30 days of service of the reasoned decision (art. 321(1) CPC).
- In summary proceedings, the objection must be filed in writing with reasons within 10 days of service of the reasoned decision (art. 321(2) CPC).
- The answer to the objection must be filed within the same time limits as apply to the objection, *i.e.,* 30 or 10 days (art. 322(2) CPC).

60 The deadline of 30 (respectively 10) days for filing an appeal or an objection recourse is extremely short (art. 311(1) CPC) and the situation is made

[70] Marbacher in Baker & McKenzie, N 1 et seq. to art. 144 CPC.
[71] For further examples Hoffmann-Nowotny in Oberhammer, N 4 to art. 144 CPC.

even more difficult if complicated legal issues are in dispute and/or if the client is located abroad. The client will almost immediately need to take a decision regarding the filing of a legal remedy. If too much time is lost in the decision taking, there is a risk that the legal remedy cannot be drafted diligently due to lack of time. In order to ensure that the already short deadlines do not start to run during an absence from the office, attorneys are recommended to inform the courts of any prolonged absences.[72]

M

Interruption of limitation periods (art. 135 et seq. CO)

61 According to art. 135 CO, the limitation period can, *inter alia,* be interrupted by a request for conciliation. It must be noted, however, that an interruption of the limitation by a conciliation request is only possible where the conciliation is mandatory. Therefore, in cases which are exempt from conciliation, *e.g.,* disputes for which the Zurich Commercial Court is competent (art. 198 CPC), a conciliation request will not interrupt the limitation period.[73]

62 With the entry into force of the CPC, art. 138 CO has been amended. It now provides that a limitation period that has been interrupted by a conciliation request, a statement of claim or defense, does not resume until the dispute is over before the instance concerned (art. 138 CO).[74]

N

Protective letter (art. 270 CPC)

63 The institution of the protective letter (maybe better referred to as "precautionary defense statement") is not entirely new, but it is now applicable Switzerland-wide.[75] The aim of a protective letter is to avoid the issuance of *ex-parte* interim measures. In order to achieve its aim, the protective letter must be submitted at the "right time" and certainly prior to a request for *ex-parte* interim measures. This requires the attorney to be well prepared in advance. The protective letter should be submitted to courts where the opposing party could file a request for *ex-parte* interim measures. In practice, a large number of courts could come into question, so that a selection of the most probable forums must be made.[76]

64 The main areas of application are intellectual property law, protection of privacy, attachments, contractors' rights of lien, etc.[77]

65 It is important to note that the protective letter is served on the other party only if it submits a request for *ex-parte* measures (art. 270(2) CPC).

66 The protective letter does not remain valid for an undetermined period of time but becomes ineffective six months after its filing (art. 270(3) CPC).

O

Cantonal appellate remedies (art. 308–334 CPC)

67 The appellate remedies have also been modified under the CPC. There are now three types of appellate remedies: appeal (art. 308–318 CPC), objection (art. 319–327a CPC) and review (art. 328–333 CPC).[78]

68 The general distinction between appeal and objection is as follows:
- appeal in financial matters with a claim value of CHF 10,000 or more and generally in non-financial matters (art. 308(2) CPC);
- objection against procedural decisions (and in financial matters with a claim value of less than CHF 10,000; art. 319 CPC).

69 The main differences between appeal and the objection are as follows:

[72] Hungerbühler in Brunner/Gasser/Schwander, N 7 to art. 311 CPC; Spühler in Spühler/Tenchio/Infanger, N 5 to art. 311 CPC.
[73] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 17 to art. 64 CPC.
[74] Addendum 1, Title 2 CPC (alteration of previous law).
[75] Hess-Blumer in Spühler/Tenchio/Infanger, N 3 et seq. to art. 270 CPC.
[76] Kofmel Ehrenzeller in Oberhammer, N 1 et seq. to art. 270 CPC.
[77] Hess-Blumer in Spühler/Tenchio/Infanger, N 7 to art. 270 CPC.
[78] For a detailed overview of the appellate remedies Meier, Schweizerisches Zivilprozessrecht, p. 457 et seq.

- the appeal grants a full *de novo* review (art. 310 CPC), while an objection may only be brought against an obviously incorrect establishment of the facts (art. 320(b) CPC);
- the appeal generally has suspensive effect and the decision of first instance is in principle not enforceable (art. 315 CPC). The objection has no suspensive effect and thus, a decision of first instance is enforceable despite an objection (art. 325 CPC).

70 Both a reasoned appeal and an objection must be filed with the appellate court within 30 days (10 days in the case of summary proceedings) of service of the decision and grounds (art. 311(1) and art. 314(1) CPC; art. 321(1) and art. 321(2) CPC). It is not possible to extend these deadlines, which may cause problems in complex cases as well as in large companies where the decision taking is often time consuming.[79]

71 If the court issues its decision without a written statement of grounds (art. 239(1) CPC) and the written statement of grounds is not requested within 10 days, the parties are deemed to have waived their right to challenge the decision and are barred from appellate remedies (except in the case of review under art. 328 CPC), (art. 239(2) CPC).

72 The appellate court can grant early enforcement even if the decision does not yet have *res iudicata* effect and, if necessary, it may order protective measures or the provision of security (art. 315(2) CPC; see also art. 336(1)(b) CPC).

73 In Zurich, the court of cassation has been abolished. Thus, decisions by the Zurich Superior Court *(Obergericht)* or Commercial Court can only be appealed to the Swiss Federal Tribunal.[80]

P

Transitional provisions (art. 404–407 CPC)

74 Proceedings that were pending on January 1, 2011, continue to be governed by the old procedural law until the closing of the proceedings before the respective instance (art. 404(1) CPC).

75 The territorial jurisdiction is generally governed by the new law. However, a competence conferred under the old law continues (art. 404(2) CPC).

76 The appellate remedies are governed by the law in force when notice of the decision is given to the parties (art. 405(1) CPC). Hence, in first instance procedures governed by the old law, the appellate remedies are governed by the CPC if the decision is rendered after January 1, 2011. If the case is remanded to the forum of first instance, it is not entirely clear whether the CPC or the old law applies.[81]

77 In relation to forum selection agreements specific rules apply:
- The *validity* of a forum selection agreement is governed by the law that was in force at the time it was entered into (art. 406 CPC). The term "validity" covers the admissibility and the form of the forum selection agreement only.[82]
- The *effects* of a forum selection agreement do not fall within the definition of "validity". Those effects are judged on the basis of art. 404(2) CPC and, thus, under the new law.[83]
- The ability of a court of conferred jurisdiction to refuse competence under art. 9(3) GestG was abolished when the CPC entered into force.[84]

78 The above can be demonstrated by the following example: In the case of a judicial proceeding with a forum selection clause agreed to under the old law, the court examines, under old law, whether a forum selection clause was permissible (*e.g.,* purchase of real estate) and whether the form requirements were met (written agreement). However, new law applies to the effect of the forum selection clause, which, *inter alia,* means that the chosen court needs to uphold jurisdiction even if the chosen forum has no connection to the parties' domicile/seat or their respective obligations under the contract (*i.e.,* art. 9(3) GestG is no longer applicable).

[79] Mathys in Baker & McKenzie, N 4 to art. 311 CPC; Reich in Baker & McKenzie, N 4 to art. 321 CPC.
[80] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 384.
[81] Frei/Willisegger in Spühler/Tenchio/Infanger, N 10 to art. 405 CPC.
[82] Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 5 et seq. to art. 406 CPC.
[83] Frei/Willisegger in Spühler/Tenchio/Infanger, N 10 to art. 406 CPC.
[84] Haas/Schlumpf in Oberhammer, N 24 to art. 17 CPC.

III Evidence

A

Numerus clausus of admissible evidence (art. 168(1) CPC)

79 Under the CPC, the Swiss legislature decided to provide for a conclusive list *(numerus clausus)* of admissible evidence.[85] Pursuant to art. 168(1) CPC the following evidence is admissible: testimony, physical records, inspection *(Augenschein),* expert opinion, written statements, questioning and deposition of the parties.

80 As there is a statutory (*i.e.,* non-extendable) deadline of three months for filing a claim after the authorization to proceed was granted by the conciliation authority (art. 209(3) CPC), the analysis and documentation of evidence must begin at an early stage. This is especially true in cases where pendency must not be lost, *i.e.,* in cases of securing a specific forum or where a statutory forfeiture deadline needs to be met.[86]

B

Testimony (art. 169–176 CPC)

81 A witness is someone who – as under the old law – has observed a fact with his or her own senses (art. 169 CPC). The "informant" *(Auskunftsperson)* who still existed in some cantonal civil procedure codes no longer exists. Either someone can and must make a statement, in which case he or she is to testify as a witness, or else, no form of interrogation is possible.[87]

82 Written statements *(schriftliche Auskunft)* may be obtained by the court if the examination of a witness does not seem necessary (art. 190(2) CPC). In contrast to the duty to make a truthful deposition pursuant to art. 160(1)(a) CPC, there is no duty to provide such written statement.[88]

83 Independent declarations by third parties (*e.g.,* affidavits under U.S. law, affirmations in lieu of oath under German law) remain arguably inadmissible.[89]

C

Physical records (art. 177–180 CPC)

84 A "physical record" is broadly defined under the CPC. Pursuant to art. 177 CPC the following are considered physical records: papers, drawings, plans, photos, films, audio recordings and electronic files. Accordingly, under the CPC, form, format, and legibility (with or without technical means) are no longer of consequence provided that a document is suitable for proving legally relevant facts.[90]

85 The weight of the evidence of non-traditional documents, however, is unclear at the moment: Under art. 178 CPC, the party submitting a document must prove its authenticity if that is disputed by the opposing party. Adequate grounds must be adduced for disputing the document. For the moment

[85] Hafner in Spühler/Tenchio/Infanger, N 1 to art. 168 CPC.
[86] Cf. Egli in Brunner/Gasser/Schwander, N 17 et seq. to art. 209 CPC.
[87] Schmid in Oberhammer, N 4 to art. 169 CPC; Staehelin/Staehelin/Grolimund, N 88 to § 18.
[88] Weibel/Nägeli in Sutter-Somm/Hasenböhler/Leuenberger, N 5 to art. 190 CPC; other opinion: Müller in Brunner/Gasser/Schwander, N 19 to art. 190 CPC.
[89] Hafner in Spühler/Tenchio/Infanger, N 7 to art. 168 CPC.
[90] Weibel in Sutter-Somm/Hasenböhler/Leuenberger, N 8 et seq. to art. 177 CPC.

at least, it is not clear whether the threshold for disputing authenticity is higher or lower for electronic documents as compared to conventional documents. The available opinions of scholars are diametrically opposed on this point. Ultimately, what matters, as with conventional documents, is how relevant and realistic the possibility is that the document has been manipulated.[91]

D

Expert opinion (art. 183–189 CPC)

86 In expert opinions, the expert is required to ascertain or to clarify factual or (in extremely exceptional cases) legal questions (art. 183 *et seq.* CPC).[92] The party submitting the evidence must advance all costs associated therewith (art. 102 CPC). Such costs can be significant.

87 As under the old law, an expert opinion commissioned by a party does not have the same weight as a court-commissioned one. It is considered merely party allegation, not evidence. [93] However, it can have greater value if the expert is well-known and independent, and he was mandated in a transparent manner.

E

Questioning and deposition of the parties (art. 191–193 CPC)

88 By definition, the status as a party excludes a person from being heard as a witness (art. 169 CPC). Art. 159 CPC now clarifies that the governing bodies of a legal entity can also not be called as witnesses in a proceeding involving the company and are deemed to be parties when taking evidence.[94]

89 Although the questioning of a party *(Parteibefragung)* qualifies as evidence (art. 168(1)(f) CPC), it carries relatively little weight because false statements are only subject to an administrative fine (art. 191(2) CPC). The situation with a formal party deposition *(Beweisaussage)* is different: perjury has criminal consequences (art. 192(2) CPC). Consequently, the court is more likely to assume that a deposition is truthful.[95]

F

Procedure for taking evidence (art. 150–193 CPC)

90 As was the case under the old law, each allegation must generally be supported by corresponding evidence. The only exception being that what is not disputed does not have to be proven (art. 150(1) CPC *e contrario*), unless serious doubts exist as to its truth (art. 153(2) CPC).[96]

91 Under the CPC the statement of claim must include a list of evidence detailing all items of evidence (art. 221(2)(d) CPC).

92 Because a party cannot know in advance whether an instruction hearing will take place and/or whether a second exchange of written submissions will be ordered (art. 225 and art. 226(1) CPC), all evidence should, as a precautionary measure, be listed and submitted at the instruction hearing held after the first exchange of written submissions or in the second pleading at the latest. Further tactical maneuvering can be dangerous.[97]

93 The court has to issue an order to take evidence designating, in particular, the admissible evidence and, for each fact, which party has the burden of proof or counter-proof (art. 154 CPC).

94 The taking of evidence may take place at the main hearing (art. 231 CPC) or at an instruction hearing (art. 226(3) CPC). It may be delegated to one or more members of the court (art. 155(1) CPC).

[91] Dolge in Spühler/Tenchio/Infanger, N 10 et seq. to art. 177 CPC; Lambelet in Baker & McKenzie, N 8 et seq. to art. 177 CPC.
[92] Dolge in Spühler/Tenchio/Infanger, N 4 et seq. to art. 183 CPC.
[93] Schmid in Oberhammer, N 18 to art. 183 CPC.
[94] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 239 et seq.
[95] Schmid in Oberhammer, N 14 to art. 191–193 CPC.
[96] Hasenböhler in Sutter-Somm/Hasenböhler/Leuenberger, N 6 et seq. to art. 150 CPC.
[97] Leuenberger in Sutter-Somm/Hasenböhler/Leuenberger, N 1 et seq. to art. 225 CPC.

G

Cautionary taking of evidence (art. 158 CPC)

95 In cases where evidence is at risk (*e.g.,* dying or relocating witness, building on the verge of collapse, etc.), the risk of loss of the evidence opens up the possibility of asking the court for a precautionary taking of evidence (art. 158(1)(b) CPC). A preventive taking of evidence is also permissible in the presence of an explicit statutory entitlement (art. 158(1)(a) CPC) or another legitimate interest (art. 158(1)(b) CPC).

96 A precautionary taking of evidence can occur prior to the proceeding or else, especially if a risk to the evidence arises suddenly, over the course of the proceeding. If a taking of evidence takes place before a proceeding, there is no time limit within which a claim must be filed after the evidence is taken. Thus, in principle, the evidence taken is perpetual evidence, the existence of which is subject to no time limits.[98]

97 In terms of procedure, the provisions regarding interim measures apply (art. 158(2) CPC) and the proceeding is summary (art. 248(d) CPC). Unlike with interim measures, the applicant is not required to credibly prove the existence of the presumed claim in the main action.[99] It would not be surprising if, in the near future, the Swiss courts are presented with numerous requests for precautionary taking of evidence. Recent experience in practice shows that the courts are willing to grant such requests for precautionary taking of evidence liberally.

H

New facts and evidence (art. 229 CPC)

98 *Proper nova* are facts that occurred or were discovered after the exchange of written submissions or after the last instruction hearing (art. 229(1)(a) CPC). *Improper nova* are facts that could not be submitted earlier despite reasonable diligence (art. 229(1)(b) CPC). In terms of time, the *nova* must be introduced "immediately" (art. 229(1) CPC).

99 In proceedings with a second round of written submissions and/or an instruction hearing, *nova* are permissible without limitation, before the main hearing. In the main hearing, *nova* are admissible only if they are submitted without delay and occurred after the end of the exchange of written submissions *(proper nova)* or earlier *(improper nova),* but could not have been submitted despite reasonable diligence (art. 229 CPC).

100 In proceedings without a second round of written submissions or an instruction hearing, *nova* can be submitted at the beginning of the main hearing (art. 229(2) CPC).

101 Unless the course of the proceedings is clear at the outset, it is recommended that all allegations and evidence be listed in the first filing (art. 221 CPC). In practice, documents must be obtained and compiled as early as possible.

102 In proceedings in which the facts are established *ex-officio, nova* can be submitted until the court begins its deliberations (art. 229(3) CPC).[100]

103 In remedial procedures *(Rechtsmittelverfahren),* the following applies:

- In the case of appeal, in principle the same rules apply as those before the first instance. Thus, here too, *nova* must be submitted without delay; in addition, the affected party must show that it was unable to submit the nova in the first instance despite reasonable diligence (art. 317(1) CPC).
- *Nova* are not possible in objection proceedings (art. 326 CPC).
- In review proceedings, the presence of *improper nova* – leaving aside the other grounds for review (*e.g.,* a punishable offense that has influenced the judgment) – is practically a prerequisite for instituting review (art. 328(a) CPC).

[98] Fellmann in Sutter-Somm/Hasenböhler/Leuenberger, N 24 and N 46 et seq. to art. 158 CPC.

[99] Fellmann in Sutter-Somm/Hasenböhler/Leuenberger, N 23 to art. 158 CPC.

[100] Cf. for more information, Killias in Güngerich II, N 7 et seq. to art. 229 CPC.

I

Duty to cooperate and right to refuse (art. 160–167 CPC)

104 The duty to cooperate *(Mitwirkungspflichten)* and the right to refuse *(Verweigerungsrechte)* were completely reviewed under the new law (art. 160 et seq. CPC).[101]

105 Pursuant to art. 160(1) CPC, the parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful deposition as a party or a witness, to produce public records, with the exception of lawyers' correspondence to the extent it concerns the professional representation of a party or third party, and to allow an examination of their person or property by experts.

106 The rights to refuse are regulated in art. 163 and 164 CPC for parties and in art. 165 to 167 CPC for third parties. Third parties have an absolute right to refuse cooperation if they are in a close personal relationship with the parties (art. 165 CPC). Otherwise they have a limited right to refuse cooperation under art. 166 CPC.

107 An important change has occurred in relation to banking secrecy. Previously some cantons (such as Geneva and Bern) provided for full protection of banking secrecy as against the duty to cooperate, others (such as Thurgau and Appenzell Innerrhoden) provided for a full duty to cooperate and some (such as Zurich and Aargau) left it up to the courts to determine if, and to what extent, a bank and its personnel had to cooperate. Since the entry into force of the CPC, there is now a general duty on banks to cooperate in civil proceedings. Banks can refuse cooperation only if they can prove that the interests of secrecy take precedence over the interests of finding the truth (art. 163(2) and art. 166(2) CPC). While it is not yet clear what effect this new regulation will have, it can be assumed that finding a prevailing interest in protecting the banking secrecy over finding the truth will likely be the exception than the general rule.[102]

108 Third parties, other than banks, can essentially refuse to cooperate by invoking art. 321 of the Penal Code. This is specifically of benefit to clergy, attorneys, and doctors.[103] In contrast, the CPC expressly excludes auditors from the right to refuse (art. 166(1)(b) CPC). In-house lawyers cannot invoke a right to refuse and it should be noted that a company gains nothing by storing documents with outside attorneys.[104] The right to refuse applies only in the core area of a lawyer's activity.[105]

109 The parties have less extensive rights to refuse (art. 163/164 CPC). They may refuse to cooperate if doing so would be a violation of professional confidentiality that is punishable under art. 321 Penal Code or another provision – again, with the exception of auditors (art. 163(1)(b) CPC). If a party rightfully refuses cooperation, the court must not infer from its refusal that the alleged fact is proven (art. 162 CPC). In contrast, a party's unjustified refusal to cooperate is taken into account when appraising the evidence (art. 164 CPC).

[101] Berni in Baker & McKenzie, N 1 to art. 160 CPC.
[102] Cf. Schmid in Spühler/Tenchio/Infanger, N 8 et seq. to art. 163 CPC and N 16 et seq. to art. 166 CPC.
[103] Schmid in Oberhammer, N 5 et seq. to art. 163 CPC.
[104] Schmid in Oberhammer, N 10 to art. 163 CPC.
[105] Decisions of the Swiss Federal Tribunal 112 Ib 608/115 Ia 199.

IV Enforcement

A

Enforcement of decisions (art. 335–346 CPC)

110 The time factor plays an important role in the enforcement of decisions (the CPC consistently uses the term "decisions"). Under the old cantonal laws, there was frequent criticism of the fact that it took too long for a creditor to get his money or secure his claim. In some cases it was necessary to litigate to the last instance and then undergo the execution of judgment process in order to finally achieve one's goal. Securing the claim early was possible only in exceptional cases. In practice, the debtor could delay his payment for a long time and potentially hide assets.[106]

111 Swiss law on enforcement remains characterized by a dualism in the enforcement of monetary claims as against real claims *(Realforderung).* The enforcement of monetary claims continues to be governed by the DCBA,[107] whereas the enforcement of real claims is covered by the CPC (art. 335 CPC).[108]

112 Enforcement ultimately means compulsory execution.[109] Anyone who wishes to enforce a claim needs "title" in the form of an enforceable instrument. In particular, the following instruments constitute an enforceable title: court decisions, court settlements, and acknowledgments of debt made in court (art. 80 DCBA) and now, in addition, the enforceable official record (art. 347 *et seq.* CPC). Finally, the private acknowledgment of debt also remains an enforceable instrument (art. 82 DCBA).[110]

113 In the past, decisions were enforceable as soon as they were legally binding *(formelle Rechtskraft).* A decision could not be enforced as long as a deadline for appellate remedies was running or an appellate remedy was pending.[111] Under the CPC, judgments involving monetary payments need not to be legally binding in order to be enforced. They "only" have to be enforceable (art. 336 CPC/art. 80(1) DCBA).[112] A distinction must, therefore, be made between the formal effect of a legally binding decision and enforceability.[113]

114 Under the CPC, the appellate remedy against a judgment in the first instance does not necessarily have suspensive effect. The appellate instance can now authorize early enforcement at the request of the prevailing party by revoking the suspensive effect of the appeal (art. 315(2) CPC). If early enforcement is authorized, the creditor can enforce the decision immediately and does not have to wait until the appellate instance has decided (art. 336(1)(b) CPC).[114]

115 In decisions with a value in dispute of less than CHF 10,000, there is no recourse to appeal under the CPC. Thus, such decisions can also be enforced immediately, unless the appellate court grants the suspensive effect (art. 325(2) CPC).[115]

116 Accordingly, it is to be noted that under the CPC it is now possible to enforce a first instance decision, if there is no suspensive effect. This is a substantial advantage for the creditor. It remains to be seen

[106] For the aim of an efficient enforcement: Botschaft, p. 7244.
[107] Cf. para. 56.
[108] Ehrenzeller in Oberhammer, N 3 to art. 335 CPC.
[109] Droese in Spühler/Tenchio/Infanger, N 8 to art. 335 CPC.
[110] Droese in Spühler/Tenchio/Infanger, N 19 to art. 335 CPC.
[111] Droese in Spühler/Tenchio/Infanger, N 1 to art. 336 CPC.
[112] Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 427 et seq.
[113] Staehelin in Sutter-Somm/Hasenböhler/Leuenberger, N 10 to art. 336 CPC.
[114] Droese in Spühler/Tenchio/Infanger, N 12 to art. 336 CPC.
[115] Droese in Spühler/Tenchio/Infanger, N 8 to art. 336 CPC.

how the appellate will make use of this possibility. Opinions have been voiced in professional literature that the suspensive effect should always be revoked in clear cases, *i.e.,* in cases where it is obvious that the debtor is primarily attempting to delay his payment obligation.[116]

B

Attachment (art. 271–281 DCBA)

117 Attachment orders are regulated in the DCBA and not the CPC. As they are, however, interim measures to protect money claims and as important changes have entered into force on January 1, 2011, the new legal situation will be briefly addressed.

118 Previously, the only competent attachment judge was the one at the location of the assets which were to be attached. Now, the attachment court at the place of debt enforcement is also competent – *i.e.,* typically the place where the debtor has his domicile or seat *(Betreibungsort,* art. 272(1) and art. 46 DCBA). The result being that the creditor can choose where to file his request for attachment.[117] This ability to choose can be of practical significance, e.g., if the practice of one attachment court is less strict than that of another, or if one court is preferable to another one for reasons of geography or language.

119 The competence of the attachment judge has, moreover, been expanded as of January 1, 2011: Previously, a creditor had to file multiple requests for attachment if the debtor's assets were situated in different locations. Now the competent attachment judge may order the attachment of assets anywhere in Switzerland and not just for assets in his own debt enforcement district. The attachment judge can issue multiple attachment orders and effect multiple executions of attachment in different debt enforcement districts. This is a significant alleviation for the creditor as he is no longer required to file multiple requests, which usually required cumbersome coordination.[118]

120 Another novelty is the new ground for attachment in art. 271(1)(6) DCBA: Anyone who has a title for definitive clearance to proceed *(definitiver Rechtsöffnungstitel)* can now demand an attachment. Previously, foreign judgments occupied a privileged position relative to Swiss decisions because it was only for such judgments that protection measures against a debtor with Swiss domicile could be demanded. This is now also possible for Swiss decisions.[119] The practical effect of this is the following: whoever prevails in an action can immediately effect an attachment and, thus, secure his or her claim if the opposing side does not file an appeal. Even if the opposing side appeals, the claim can be secured through attachment if the suspensive effect of the appeal is revoked (art. 315(2) CPC).[120] This new ground for attachment significantly strengthens the creditor's position and can have drastic consequences for the debtor, since he will suddenly be confronted with an attachment of his assets.[121] This also holds true for foreign decisions, if they are enforceable. This is clear for decisions from LugC states, but was disputed for decisions of non-member states. However, the Swiss Federal Tribunal has recently decided for their admissibility.[122] LugC case law has made it clear that for LugC decisions attachment is the only available protective measure.[123]

121 An attachment based on art. 271(1) (6) DCBA is also possible with an enforceable official record, since it is a title for definitive clearance to proceed.[124] Anyone who assumes an obligation as debtor in an official record (art. 347 *et seq.* CPC) must be aware that the creditor can secure his claim through attachment immediately after it becomes due. The combination of an enforceable official record and an attachment will, thus, become a strong weapon.

[116] Mathys in Baker & McKenzie, N 7 et seq. to art. 315 CPC.
[117] Stoffel in Staehelin/Bauer/Staehelin, N 44 et seq. to art. 272 DCBA.
[118] Lazopoulus, p. 613 et seq.; Stoffel in Staehelin/Bauer/Staehelin, N 44 to art. 272 DCBA.
[119] Stoffel in Staehelin/Bauer/Staehelin, N 107 to art. 271 DCBA.
[120] Meier-Dieterle, p. 1213.
[121] Boller, p. 197.
[122] Cf. in favour of the applicability for non-member states of the LugC: Decision of the Swiss Federal Tribunal SA_355/2012, December 21, 2012; Lazopoulus, p. 610 et seq.; Boller, p. 187; Meier-Dieterle, p. 1213 et seq.; against: Stoffel in Staehelin/Bauer/Staehelin, N 109 to art. 271 DCBA; Staehelin, N 39.
[123] Stoffel in Staehelin/Bauer/Staehelin, N 12 to art. 271 DCBA.
[124] Stoffel in Staehelin/Bauer/Staehelin, N 108 to art. 271 DCBA.

C

Enforceable official record (art. 347–352 CPC)

122 The official enforceable deed, which was previously provided for only in the LugC, has now been introduced into Swiss law by the CPC. The goal of the official record is that a claim be enforceable without the need for litigation (art. 347 CPC). The official record constitutes a title for definitive clearance to proceed (art. 349 CPC/art. 80(2) (1bis) DCBA).[125]

123 An enforceable official record contains a notarial certification of claim subject to the freedom of disposition of private parties, whereby the debtor is subject to immediate execution in the event of nonfulfillment of a promised monetary payment (art. 347 CPC). The main content of the official record is, thus, the declaration of submission, which could be worded as follows:[126]

> *"For the debt acknowledged under no. [•] [specification] I submit to direct enforcement pursuant to art. 347 et seq. of the Swiss Civil Procedure Code."*

or

> *"I acknowledge that I owe [•] the sum of [•] from [specification]. For this debt, I acknowledge immediate enforcement within the meaning of art. 347 et seq. of the CPC and submit thereto."*

124 Meanwhile, it must be assumed that notaries and public officials (*Urkundspersonen*) issuing the official record will adhere to the wording strictly and that, when in doubt, they will refuse to certify a deed. It is, therefore, for example, questionable whether liquidated damages (including penalty damages, *Konventionalstrafen*) can be included into an official record. According to certain scholars, liquidated damages do not satisfy the criterion of sufficient specification (art. 347(c) CPC), since under art. 163(3) CO they may be reduced by the judge. According to these scholars, liquidated damages, can, therefore, not be the subject of enforceable official records.[127]

125 It is to be noted that enforceable official records are not possible in the case of consumer contracts, in employment and job placement law, with tenancy and leases, and under both the gender equality act *(Gleichstellungsgesetz)* and the workers involvement act (*Mitwirkungsgesetz;* art. 348 CPC).

[125] Ehrenzeller in Oberhammer, N 1 to art. 347 CPC.
[126] In general and for other wording examples: Ehrenzeller in Oberhammer, N 8 et seq. to art. 347 CPC.
[127] Visinoni-Meyer in Spühler/Tenchio/Infanger, N 20 to art. 347 CPC; other opinion: Rohner/Lerch in Brunner/Gasser/Schwander, N 19 to art. 347 CPC.

V Domestic Arbitration

126 Since the enactment of the Private International Law Act (PILA)[128] in 1989, Switzerland has had a dualistic system regarding arbitration: Domestic proceedings were governed by the Arbitration Concordat and international ones by the PILA. This dualism remains in force; however, the Concordat has now been replaced by Part 3 of the CPC. The new regulation differs substantially from the Concordat.[129]

127 The CPC assigns a total of 47 articles to arbitration, resulting in a high degree of regulation. There is a significant advantage to the fact that arbitration is now regulated at a federal level: it will, henceforth, be easier to make changes in the rules of arbitration. In the past, all 26 cantons that were party to the Concordat had to agree to a change and at times, this proved to be a stumbling block making it hard to adapt the rules of arbitration to new developments.

128 As previously, arbitration agreements can be contained in general terms of business. In such cases, the relevant general terms of business must have been duly accepted, may not be unusual, and may not bar individual arrangements.[130]

129 The arbitration agreement must be in writing or in another form that allows it to be evidenced by text (art. 358 CPC). A signature is no longer required under the CPC.[131]

130 Pursuant to art. 407(1) CPC the validity of an arbitration agreement is judged according to the law that favors the agreement *(favor negotii).* This is of interest in domestic cases, for example, where under the Concordat simple written form was a requirement for validity but a lack of a signature would have rendered it invalid under the old law.[132]

131 Under art. 407(2) CPC, pending arbitration proceedings are in principle carried through to the end under the old law. However, the parties may informally agree to apply the new law.

132 Finally, art. 407(3) CPC specifies that the appellate remedy is based on the law that was in force when the contested arbitral award was notified to the parties – and not, for example, when the request for arbitration was filed.

133 The rules of the CPC apply to arbitration proceedings in Switzerland to which the provisions of Chapter 12 of the PILA do not apply (art. 353(1) CPC). Expressed positively, they apply to domestic arbitration, *i.e.,* the arbitral tribunal must have its seat in Switzerland, and all parties must have their domicile, usual residence, or seat in Switzerland.[133] However, the CPC grants parties the option of expressly stipulating in the arbitration agreement that the provisions of the CPC do not apply and that the provisions of Chapter 12 of the PILA apply instead ("opting out"; art. 353(2) CPC). The opposite is also possible: in the international context, it is possible to stipulate that the PILA provisions do not apply and to apply the CPC instead ("opting in"; art. 176(2) PILA).[134]

134 Under the CPC, any claim *"over which a party can freely dispose"* is arbitrable (art. 354 CPC). In contrast, under the PILA *"all financial claims"* are arbitrable (art. 177(1) PILA). These two definitions are not identical. Under the CPC, certain non-financial claims are arbitrable, whereas certain financial

[128] Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG; SR 291).
[129] Girsberger/Habegger/Mráz/Weber-Stecher in Spühler/Tenchio/Infanger, N 1 et seq. to art. 353–399 CPC; Wenger in Sutter-Somm/Hasenböhler/Leuenberger, N 18 et seq. to Preliminary Remarks to art. 353 CPC.
[130] Girsberger in Spühler/Tenchio/Infanger, N 26 et seq. to art. 357 CPC.
[131] Dasser in Oberhammer, N 1 to art. 358 CPC.
[132] Stacher in Brunner/Gasser/Schwander, N 1 to art. 407 CPC.
[133] Frick in Baker & McKenzie, N 16 to art. 353 CPC.
[134] Wenger in Sutter-Somm/Hasenböhler/Leuenberger, N 4 et seq. and N 13 et seq. to art. 353 CPC.

claims are barred (*e.g.,* alimony payments, tenancy of residential properties, etc.).[135] The question that arises is whether arbitrability can be expanded in one direction or the other through the "opting out" and "opting in" described in the preceding paragraph. Should it be possible for financial claims that are not freely disposable to be an object of arbitration by opting out of the rules of the CPC? This remains to be decided.[136]

135 In domestic arbitration, it was not possible, in the past, for arbitral tribunals to order interim measures. Only the ordinary courts could do so.[137] The arbitral tribunal is now empowered to issue interim measures. However, it is still possible to apply for such measures in the ordinary courts (art. 374(1) CPC) and this will always happen if the arbitral tribunal has not yet been constituted.[138] The enforcement of interim measures must still take place by way of the ordinary courts (art. 374(2) CPC). This solution in the CPC is based on the provisions of the PILA (art. 183(2) PILA).

136 A fundamental question that arises concerning arbitration proceedings is how to proceed if the defendant raises a set-off defense, *i.e.,* wishes to set off with a counterclaim. Under the Concordat, the arbitral tribunal had to stay the proceedings until the ordinary court had decided on the set-off claim. This caused a delay in the proceedings and was one of the most important points of criticism of the old system.[139] The CPC now allows the set-off defense in arbitration proceedings without restriction. The arbitral tribunal in the main case is competent to judge the merits of the set-off defense independently of whether the set-off claimed is covered by the arbitration agreement (art. 377(1) CPC). If there is a desire to prevent this, a renunciation of set-off must henceforth be expressly stipulated when drafting the contract.[140] The PILA contains no explicit provision and leaves it to the parties to settle this question. Most rules of arbitration contain such a rule, including the Swiss Rules of International Arbitration, which contain a provision comparable to the CPC.[141]

137 The CPC consistently provides for a single stage of objection to the Swiss Federal Tribunal (art. 389 CPC). This streamlines the complaint procedure in terms of time and, thus, makes domestic arbitration more attractive. Previously it was possible to take a nullity complaint or review to the higher cantonal ordinary civil court and then to take the complaint to the Swiss Federal Tribunal. The procedural stages have now been shortened and, as a result, are faster and less expensive.[142]

138 Parties also have the option, instead of taking the objection to the Swiss Federal Tribunal, to stipulate that an award by an arbitral tribunal may be challenged by way of an objection to the higher cantonal court. In such cases, the cantonal court's decision is final (art. 390 CPC).

[135] Frick in Baker & McKenzie, N 1 et seq. to art. 354 CPC; Dasser in Oberhammer, Kurzkommentar, N 3 to art. 354 CPC.
[136] Wenger in Sutter-Somm/Hasenböhler/Leuenberger, N 16 et seq. to art. 353 CPC.
[137] Habegger in Spühler/Tenchio/Infanger, N 1 art. 374 CPC.
[138] Dasser in Oberhammer, N 4 to art. 374 CPC.
[139] Brunner in Brunner/Gasser/Schwander, N 2 to art. 377 CPC.
[140] Habegger in Spühler/Tenchio/Infanger, N 14 et seq. to art. 377 CPC.
[141] Habegger in Spühler/Tenchio/Infanger, N 4 to art. 377 CPC.
[142] Mráz in Spühler/Tenchio/Infanger, N 3 et seq. to art. 389 CPC.

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