Explaining
The New Swiss Civil Procedure Code (CPC)
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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. 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.4

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).5

In collaboration with Nicole Brauchli-Jageneau, M.A. HSG in Law & Economics, and Giannina Spescha, MLaw.

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.

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 transactions11 (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

Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 19 et seq.
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 Courvoiser 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.\(^\text{13}\)

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.\(^\text{14}\) 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.\(^\text{15}\) Under some previous cantonal codes of procedure, jurisdiction could be conferred on the higher courts.\(^\text{16}\) 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.\(^\text{17}\) Two natural persons can, therefore, for example, not validly agree to submit their dispute to the Zurich Commercial Court.\(^\text{18}\)

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).\(^\text{19}\) Thus, the right of refusal provided in art. 9(3) GestG no longer applies and the court of conferred jurisdiction has jurisdiction without exception.\(^\text{20}\)

13 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).\(^\text{21}\)

14 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).\(^\text{22}\)

15 The effects of forum selection agreements are exclusively governed by the CPC (art. 404(2) CPC). Thus, the right of refusal provided in art. 17 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).\(^\text{23}\)

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-

\(^\text{13}\) Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhl/Leuenberger, N 22 to art. 17 CPC.
\(^\text{14}\) Haas/Schlumpf in Oberhammer, N 24 to art. 17 CPC; Botschaft, p. 7264.
\(^\text{15}\) Leuenberger/Uffer-Tobler, Schweizerisches Zivilprozessrecht, p. 61.
\(^\text{16}\) Schwander, p. 73 et seq.
\(^\text{17}\) Spühler/Dolge/Gehri, p. 62.
\(^\text{18}\) Sutter-Somm/Hasenböhl/Leuenberger, N 6 to art. 406 CPC.
\(^\text{19}\) Fischer in Baker & McKenzie, N 2 to art. 406 CPC.
\(^\text{20}\) Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhl/Leuenberger, N 6 et seq. to art. 406 CPC.
\(^\text{21}\) BGE 132 III 268, p. 271; Meier, Schweizerisches Zivilprozessrecht, p. 118.
\(^\text{22}\) Courvoisier in Baker & McKenzie, N 25 to art. 17 CPC.
\(^\text{23}\) Walther in Güngerich I, N 1 et seq. to art. 35 CPC.
\(^\text{24}\) Müller-Chen in Brunner/Gasser/Schwander, N 1 et. seq. to art. 62 CPC.
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Due to this new uniform regulation on pendency, forum running in the Swiss domestic context will lose importance.\footnote{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.} 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 continuance being established.\footnote{Schleiffer Marais in Baker & McKenzie, N 12 et seq. to art. 62 CPC.}

Initiation of action (art. 197–218 CPC)

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.\footnote{Gloor/Umbrecht in Oberhammer, N 1 et seq. to art. 197 CPC.}

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).\footnote{Ruggle in Spühler/Tenchio/Infanger, N 1 et seq. to art. 213 CPC.}

The conciliation attempt is essentially mandatory. Art. 198 CPC gives an exhaustive list of the (relatively narrow) exceptions.\footnote{Infanger in Spühler/Tenchio/Infanger, N 1 to art. 198 CPC.} 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).

The request for conciliation triggers pendency (art. 62 CPC). However, the burden of continuance takes effect only when the statement of claim is served on the defendant (art. 65 CPC).\footnote{Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhler/Leuenberger, N 13 to art. 65 CPC.}

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).\footnote{Infanger in Spühler/Tenchio/Infanger, N 1 et seq. to art. 210 CPC and N 1 et seq. to art. 211 CPC.}

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).\footnote{Alvarez/Peter in Spühler/Tenchio/Infanger, N 3 and 9 et seq. to art. 209 CPC.} Whether the respective time limit is suspended during court holidays was disputed,\footnote{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).} until the Swiss Federal Tribunal recently settled the issue with its ruling in favor of suspension.\footnote{Decision of the Swiss Federal Tribunal 4A_391/2012, September 20, 2012, consid. 2.4.}
Advance of costs/party compensation (art. 98–99 CPC)

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.\(^\text{36}\)

There is also a duty to pay advances in the case of counterclaims and when decisions are challenged.\(^\text{37}\)

The plaintiff not only has to advance the court fees, but must also bear the collection risk.\(^\text{38}\) 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).

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).\(^\text{39}\)

The new duty to advance court fees has made litigation in Switzerland more cumbersome.\(^\text{40}\)

Course of an ordinary financial dispute

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.\(^\text{41}\) 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.\(^\text{42}\)

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).\(^\text{43}\)

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).\(^\text{44}\)

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).\(^\text{45}\)

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).\(^\text{46}\)

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

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\(^{36}\) 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.

\(^{38}\) Rüegg in Spühler/Tenchio/Infanger, N 1 et seq. to art. 99 CPC.

\(^{39}\) Rüegg in Spühler/Tenchio/Infanger, N 1 to art. 98 CPC.

\(^{40}\) Gasser/Rickli, N 1 to art. 219 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.
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 ineffec-

tive 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

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).

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

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). 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).

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).

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).

49 The extension of the competence of the eviction authority for extraordinary termination was deleted (former art. 274(g) CO). 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).

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.

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).

J

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

K

Remedy in clear cases (art. 257 CPC)

55 Infanger in Spühler/Tenchio/Infanger, N 2 to art. 211 CPC. Rickli in Brunner/Gasser/Schwander, Kommentar ZPO, N 16 to art. 211 CPC. For general information on the simplified proceeding Leuenberger/Uffer-Tebler, Schweizerisches Zivilprozessrecht, p. 341 et seq.

56 Addendum I, Title 2 CPC (alteration of previous law).

57 Sutter-Sommer/Lötscher in Sutter-Sommer/Hasenböhler/Leuenberger, N 38 to art. 257 CPC; Jent-Sorensen in Oberhammer, N 17 et seq. to art. 257 CPC; cf. para. 54 et seq.

58 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.

59 Koslar in Baker & McKenzie, N 1 to art. 257 CPC.
objections are groundless. 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 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.

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.

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) 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.

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).

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

The CPC, inter alia, recognizes the following statutory and, thus, non-extendable deadlines:

- 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).
- In summary proceedings, the objection 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).

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

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.

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.
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– 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).

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

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).

The appellate court can grant early enforcement even if the decision does not yet have res judicata 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).

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

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

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).

Transitional provisions (art. 404–407 CPC)

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).

79 Mathys in Baker & McKenzie, N 4 to art. 311 CPC; Reich in Baker & McKenzie, N 4 to art. 321 CPC.
81 Frei/Willisegger in Spühler/Tenchio/Infanger, N 10 to art. 405 CPC.
82 Sutter-Somm/Hedinger in Sutter-Somm/Hasenböhl/Leeuwenberger, 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.
Numerus clausus of admissible evidence (art. 168(1) CPC)

Under the CPC, the Swiss legislature decided to provide for a conclusive list (numerus clausus) of admissible evidence. 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.

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.

Testimony (art. 169–176 CPC)

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.

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.

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

Physical records (art. 177–180 CPC)

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.

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...
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. 

### Expert opinion (art. 183–189 CPC)

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). The party submitting the evidence must advance all costs associated therewith (art. 102 CPC). Such costs can be significant.

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. However, it can have greater value if the expert is well-known and independent, and he was mandated in a transparent manner.

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

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.

Although the questioning of a party (Parteibefragung) qualifies as evidence (art. 168(1)(f) CPC), it carries relatively little weight because false state-

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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.
Cautionary taking of evidence (art. 158 CPC)

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).

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.

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. 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.

New facts and evidence (art. 229 CPC)

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).

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).

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).

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.

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

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

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

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.

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.

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 Innerhoden) 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

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

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 1a 199.
IV Enforcement

A Enforcement of decisions (art. 335–346 CPC)

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

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

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

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

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

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

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 Lazopoulos, 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.
123 Stoffel in Staehelin/Bauer/Staehelin, N 12 to art. 271 DCBA.
124 Stoffel in Staehelin/Bauer/Staehelin, N 108 to art. 271 DCBA.
Enforceable official record (art. 347–352 CPC)

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).\(^\text{125}\)

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 non-fulfillment 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:\(^\text{126}\)

“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.”

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.\(^\text{127}\)

\(^{125}\) 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.
Since the enactment of the Private International Law Act (PILA) 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.

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.

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.

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.

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.

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.

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.

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. 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).

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 claims are arbitrable, whereas certain financial

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127 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.
128 Girberger in Spühler/Tenchio/Infanger, N 26 et seq. to art. 357 CPC.
129 Dasser in Oberhammer, N 1 to art. 358 CPC.
130 Stacher in Brunner/Gasser/Schwander, N 1 to art. 407 CPC.
131 Frick in Baker & McKenzie, N 16 to art. 353 CPC.
132 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.).\textsuperscript{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.\textsuperscript{136}

In domestic arbitration, it was not possible, in the past, for arbitral tribunals to order interim measures. Only the ordinary courts could do so.\textsuperscript{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.\textsuperscript{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).

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141}

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.\textsuperscript{142}

\textsuperscript{135} Frick in Baker & McKenzie, N 1 et seq. to art. 354 CPC; Dasser in Oberhammer, Kurzkommentar, N 3 to art. 354 CPC.
\textsuperscript{136} Wenger in Sutter-Somm/Hasenböhler/Leuenberger, N 16 et seq. to art. 353 CPC.
\textsuperscript{137} Habegger in Spühler/Tenchio/Infanger, N 1 art. 374 CPC.
\textsuperscript{138} Dasser in Oberhammer, N 4 to art. 374 CPC.
\textsuperscript{139} Brunner in Brunner/Gasser/Schwander, N 2 to art. 377 CPC.
\textsuperscript{140} Habegger in Spühler/Tenchio/Infanger, N 14 et seq. to art. 377 CPC.
\textsuperscript{141} Habegger in Spühler/Tenchio/Infanger, N 4 to art. 377 CPC.
\textsuperscript{142} Mráz in Spühler/Tenchio/Infanger, N 3 et seq. to art. 389 CPC.
The translation of legal terms used in the Civil Procedure Code is to a large extent based on: Valloni/Bloch, Swiss Civil Procedure Code (CPC), English Translation of the new Swiss Civil Procedure Code, Zurich/St. Gallen 2010 and the translation provided by the Official Translation Center of the Federal Department of Justice and Police (for information purposes only): http://www.admin.ch/ch/e/rs/c272.html


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Contacts

At our location in Zurich

Dr. Christoph M. Pestalozzi
cpestalozzi@vischer.com

lic. iur. Felix C. Meier-Dieterle
fmd@vischer.com

lic. iur. Daniele Favalli
dfavalli@vischer.com

At our location in Basel

Dr. Thomas Gelzer
tgelzer@vischer.com

Dr. Thomas Weibel
tweibel@vischer.com

Dr. Christian Oetiker
coetiker@vischer.com