

The new Swiss Code of Civil Procedure aims to unify Switzerland's existing civil code system and boost the country's image as an ideal place for arbitration. Thomas Weibel, Patricia Roberty and Yvonne Pieles report

PROCEEDING IN A CIVILISED MANNER

Although the substantive civil law of Switzerland has long been unified – the Swiss Civil Code recently celebrated its 100th birthday – this small country still affords itself the luxury of no less than 27 different systems of civil procedure. On many issues, the various civil procedure rules differ substantially from one another, making recourse to a local trial lawyer almost inevitable, and constituting a technical barrier to litigation.

To date, the federal legislator has only enacted a limited number of civil procedural provisions, including in tenancy law, labour law and divorce law, and unified provisions on

jurisdiction. Even the Swiss Supreme Court was unable to put an end to the legal fragmentation in the area of civil procedure since it is essentially barred from reviewing the application of cantonal law and is only able to determine minimum standards with which cantonal proceedings are required to comply.

On 19 December 2008, the federal legislator adopted a unified Swiss Code of Civil Procedure (SCCP), which is set to come into force on 1 January 2011. The current cantonal legislative competence is widely viewed as outdated. The SCCP comprehensively governs proceedings before Swiss civil

courts, regardless of whether domestic or international issues are involved.

General principles of the new SCCP

The new SCCP aims to strike a balance between the interests of the plaintiff and those of the defendant. In particular, one area it addresses is the provision of new facts and evidence, including the contentious issue of when new facts may be introduced into the proceedings. The provisions governing this issue represent a compromise between the desire to determine the substantive truth on the one hand, and, on the other, the need to organise – in the interests

of all parties to proceedings – procedures in an orderly manner.

This latter point often turned out to be a stumbling block for non-local attorneys, since the differences in the various cantonal provisions are particularly conspicuous. Under the new SCCP, new facts and evidence are permitted without restriction up until the time of the parties' opening addresses. Any facts which occur thereafter (or facts which occurred earlier but, despite all reasonable care, could not be introduced in time) may only be afforded due consideration if they are subsequently introduced without any further delay.

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An issue related to the introduction of new facts and evidence is the possibility to amend a petition once proceedings have commenced. Under the SCCP, a petition can be amended up until the time of the parties' opening addresses, provided the amended or new petition bears some contextual relationship to the original and can be adjudicated in the same proceedings. In addition, any amendment of a petition must either result from admissible new facts and evidence, or come with the consent of the opposing party. A limitation of petition is admissible at any time, since it amounts to a partial withdrawal.

Alternative dispute resolution

The SCCP places great emphasis on pre-trial proceedings and alternative dispute resolution. Conciliation proceedings are elevated to a formal procedural step, which can be organised along the lines of an attempt to settle the dispute or – subject to a joint motion by the parties – as mediation proceedings. Up to now, this was only mandatory in certain cantons, and could often be dispensed with entirely when foreign parties were involved. Under the new rules, conciliation proceedings are, as a rule, mandatory, thus rendering the filing of an action directly with a court only admissible subject to certain conditions.

Should conciliation proceedings fail to lead to a settlement, the plaintiff is granted leave to file an action which entitles him to initiate court proceedings within three months. Should this deadline lapse without the plaintiff availing himself of this authorisation, he is required to recommence conciliation proceedings. Commencement of conciliation proceedings interrupts any forfeiture or limitation of actions and affords the matter in dispute pendency; however, the legal burden of continuation only takes effect once an action has been filed before the court.

In the event of mediation, a settlement may be confirmed by a court, in which case it becomes enforceable.

Simplified proceedings

Simplified proceedings are applicable to property disputes

involving assets valued at up to CHF30,000 (£18,700) and for disputes in areas of social private law (including tenancy law, labour law and family law). Such proceedings are characterised by a relaxation of formal requirements, verbal proceedings, greater participation by the court, accelerated proceedings, open admissibility of new facts and evidence and, to a certain extent, cost reduction. A limited number of cases even require – contrary to the principles underlying orderly civil proceedings – that the court establishes the facts *ex officio*.

Protection of creditors

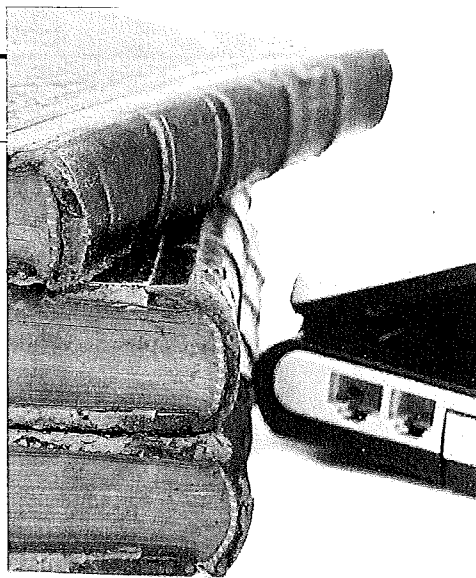
Protection of creditors has been strengthened by the fact that proceedings are particularly rapid in clear cases. The possibility – already existing in many European countries – to enforce, on a provisional basis, judgments that are not yet final, as well as the introduction of the legal institution of enforceable public deeds, serve the same purpose.

The enforceable public deed is something completely new to Switzerland. It was introduced to relieve the workload of courts while at the same time – due to the Lugano Convention (LC) – facilitating the enforcement of Swiss titles abroad. To be enforceable, a deed must fulfil certain formal and substantive requirements. An enforceable deed entitles its holder to directly seek enforcement of the claim it embodies; thus, it can be enforced similarly to a judgment. However, the party it obligates may always have the deed reviewed by a court even during the course of its enforcement.

In terms of enforcement proceedings, no fundamental changes are foreseen. However, the new SCCP enters into force simultaneously with the revised LC. It is planned that the Swiss Federal Act on Debt Enforcement and Bankruptcy will be amended at the same time.

Law of evidence

The new SCCP contains a definitive catalogue of all



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admissible evidence. However, the definitions are so vaguely worded that it will be readily possible to include new forms of evidence.

The formal affidavit of a party as admissible evidence will be new to many cantons.

By determining the principle of free consideration of evidence and regulating the examination of illegally acquired evidence by the court, the SCCP codifies and clarifies procedural principles that were already in use.

Proceedings involving multiple parties

The legislator strived to include those instruments which have proven their worth and, in doing so, codified the '*acquis communautaire*' of Swiss procedural law. At the same time, the legislator declined to make really radical innovations, such as, for example, introducing the possibility of class action law suits. He thus leaves it up to the courts to deal with proceedings involving multiple parties by relying on existing procedural instruments.

Pre-emptive briefs

The relatively new instrument of pre-emptive briefs has been explicitly included in the SCCP. It serves as a preventive defensive measure against any feared *ex parte* injunction. Pre-emptive briefs are possible in all areas where the issuing of an *ex parte* injunction is to be feared, and are thus not limited to intellectual property disputes, but rather can be sought in all areas of substantive law and also, for example, against a freezing order or *exequatur* proceedings under the LC.

Up to now, pre-emptive briefs were not handled in a unified

manner even within the same canton. Some courts even refuse outright to accept pre-emptive briefs. Whereas others do accept them, then they notify the presumed opposing party, which largely defeats their purpose in the first place. The duration for which pre-emptive briefs may remain in effect also lacked unified rules up until now. The SCCP now provides that a pre-emptive brief is only to be sent to the opposing party where it effectively initiates the proceedings in question. In addition, it also sets out a unified period of six months during which a pre-emptive brief shall remain in effect, after which it must, where necessary, be renewed or extended.

Procedural costs

The SCCP also unifies the diverging cantonal rules governing the provision of collateral for procedural costs. The court is entitled to require the plaintiff, assuming he does not benefit from free legal assistance, to furnish a retainer of up to the amount of the presumed procedural costs. Upon a motion by the defendant, the court can furthermore require a foreign plaintiff, subject to certain requirements, to provide collateral for any claim the defendant may have for compensation of his attorney's fees in the event of a successful defence. In this context, however, any diverging rules contained in international treaties shall prevail.

Arbitration

The SCCP further strengthens the choice of Switzerland as a place to seek arbitration. It contains contemporary provisions governing arbitration proceedings, which are based on the rules contained in the Swiss Private International Law Act. However, contrary to the other provisions of the SCCP, these provisions are only applied domestically.

Due to the new SCCP, Switzerland will be in possession of a contemporary and unified procedural code. This will promote the popularity of Switzerland as a forum for litigation – whether the jurisdiction of Swiss courts is founded on international treaties, statutory provisions, or a choice of forum by the parties.

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