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Current Issues in Dispute Resolution

New rules of civil procedure in Switzerland

On January 1, 2011, the Swiss Code of Civil Procedure (“CCP”) came into effect. As of this date, the CCP is uniformly applicable throughout all 26 cantons of Switzerland and sweeps away Switzerland’s traditional system of every canton applying its own rules of civil procedure. This is not only a historical milestone for Swiss litigators, but also for international business parties who are now confronted with a uniform and standardized procedure irrespective of the place of jurisdiction within Switzerland. This newsletter outlines the most important features of the CCP and provides a general guidance for parties doing business in Switzerland or generally choosing Switzerland as a venue for dispute resolution.

Introduction

Switzerland was the last country in Europe to uphold a unique system of 26 different cantonal codes of civil procedure, including different appellate systems. The differences between all these codes were substantial. Due to Switzerland’s strong federalist political system, unification of laws had long been deemed unachievable. However, practical reasons and the pressure for a unification of laws that emerged from the tightening of relations with the European Union made the move towards a uniform code of procedure inevitable. This move came along with further legislative unifications such as that of the Swiss code of criminal procedure. The CCP is the product of a long legislative process which involved feedback from all stakeholders participating in the Swiss judicial system.

Given that most civil cases in Switzerland are handled in the canton of Zurich, one might expect that the Zurich code of civil procedure would have served as

the basic model for the CCP. This is not, however, the case. On the contrary, the CCP was noticeably inspired by principles governing civil procedure in the French speaking cantons of Switzerland. The CCP is a completely new and modern code, which has sought to preserve and combine established and traditional elements of Swiss and continental European civil procedure. Pre-trial discovery and class actions remain unavailable in Switzerland. One of the most important characteristics of the CCP is its high procedural flexibility, which offers judges the possibility of tailoring proceedings in accordance with the specific requirements of each case.

Transition period

The CCP applies to all civil proceedings filed in Switzerland as of January 1, 2011. Proceedings already pending at this date remain subject to the former cantonal codes of procedure until a final decision of first instance is rendered. With regard to appeals, however, the CCP now applies to all

proceedings, regardless of the filing date. Hence, the 26 cantonal procedural rules will remain applicable, in parallel with the CCP, for a few more years.

Residual cantonal competencies

Although civil procedure is now harmonized at the federal level, each canton retains sole competency in the organization of its own court system and sets its own guidelines as to the costs of the judicial proceedings. The advantage of this system is that the cantons are able to maintain their own specialized courts, such as for instance, the commercial court of Zurich, which is equipped to handle complex commercial and international cases.

Alternative (or “Appropriate”) Dispute Resolution (ADR)

Switzerland has a long-standing and proud tradition of settling disputes by “justices of the peace”. This tradition has demonstrated that it is possible to settle a high percentage of cases before they even get to trial. The CCP abides by this tradition by further enriching it with other methods of dispute resolution. Except in a limited number of situations, parties must first undergo a formal settlement conference with a *conciliation authority* before they are able to file a claim with a court. If requested by the plaintiff, disputes below the amount of CHF 2’000 may be directly adjudicated by the conciliation authority and will thus never reach a judge’s desk. With regard to disputes below CHF 5’000, the conciliation authority is further empowered to propose a solution which turns into a binding decision unless one party objects to it within 20 days. At the mutual request of the parties, the conciliation or judicial proceedings can be replaced by a *mediation* at any time. Finally, the court may hold *settlement hearings* during which it presents its provisional opinion on the dispute and encourages the parties to settle.

Types of civil proceedings

The CCP offers three different proceedings adapted to the subject matter and the amount in dispute. The classic, *ordinary proceeding* applies to high value claims with amounts in dispute above CHF 30’000. Claims below such amounts and disputes related to social matters (e.g. lease and labour disputes, consumer protection issues etc.) are

handled in a *simplified proceeding*. The desired simplicity is achieved by oral pleadings instead of written briefs and the court playing a more active role in ascertaining the facts. Finally, the CCP offers a *summary proceeding* for specific administrative issues and matters requiring a rapid decision (e.g. provisional measures, urgent requests and “clear” matters). Greater expediency is attained through limited pleadings and restrictions on evidence (basically only documents are accepted).

Evidence

The taking of evidence is characterized by a high degree of flexibility that offers the judge the possibility to hear evidence not only after but also prior to or during the pleading stage. In some restricted cases, one may even request the taking of evidence (including document production) prior to the start of the proceedings which may well serve as a risk analysis tool for a claim. This latter system, however, is not to be confused with pre-trial discovery. Discovery, as known in US and other common law proceedings, is not available under the CCP. In line with Swiss tradition, the judge is not bound by a set of rules when assessing and weighing evidence and benefits from a broad discretion. The types of admissible evidence, however, are stipulated in the CCP and may basically not be amended, neither by the parties nor by the court (documents, witnesses, inspections, expert reports, written statements, interrogations of the parties).

Legal remedies

One of the most important provisions of the CCP is the unification and simplification of the system of legal remedies that used to be rather complicated in some cantons. In general, a final decision rendered by a court of first instance may be appealed before a cantonal court of appeal. The appellate court can fully review both findings of fact and law if the amount in dispute is above CHF 10’000. If the amount is below this figure, however, decisions may only be brought to the cantonal court of appeal by claiming a false application of the law or a manifest error of fact. The appeal must be filed within 30 days after receipt of the reasoned decision by the court of first instance. If the amount in dispute is above CHF 30’000 the decision of the cantonal court of appeal may again be challenged before the Federal Supreme Court.

Domestic arbitration

The CCP also replaces the provisions relating to domestic arbitration, previously governed by the Concordat, a convention entered into between Switzerland's cantons on March 27, 1969. The new rules on domestic arbitration in the CCP reflect the flexible and liberal approach that already exists in Switzerland for international arbitration (Chapter 12 of the Swiss Private International Law Act ("PILA"), enacted in 1989). The parties in a domestic arbitration may also jointly agree in writing for it to be treated as an international arbitration under Chapter 12 of the PILA. The new rules on domestic arbitration only regulate certain core issues relating to arbitral proceedings and leave all other matters to the parties. In the absence of an agreement of the parties on such matters, the arbitral tribunal may decide. A domestic arbitration award may only be appealed on very limited grounds before the Federal Supreme Court or before a designated cantonal court (if expressly requested by both parties). This modernisation of domestic arbitration renders it as flexible and efficient as international arbitration and further increases the attractiveness of Switzerland as a seat for arbitration. It reinforces Switzerland's status as a worldwide, recognized, highly efficient and reliable jurisdiction in which to conduct arbitration proceedings.

Practical impacts

The CCP is expected to have a considerable impact on Swiss law firms offering dispute resolution services. Even though Swiss qualified lawyers were able to appear not only before the local cantonal courts but before all Swiss courts as of 2002, it nevertheless remained advisable in extra-cantonal proceedings to refer to a specialized local lawyer who was familiar with the applicable cantonal rules of procedure. These remaining barriers have now been dismantled, thus enabling litigators to act more freely throughout Switzerland on the basis of the same uniform code of civil procedure. This is an important advantage for international clients who wish to work with their preferred specialized litigation firm (e.g., in Zurich or Geneva) even if the place of jurisdiction is in a different canton. The CCP will also have a great practical impact on foreign and domestic parties and Swiss lawyers in terms of having to understand the new ADR options that the

CCP has to offer, and thinking strategically about the parties' procedural choices and options.

Contacts

The content of this newsletter is for information purposes only and does not constitute a legal advice or opinion. Should you require specific advice in this matter, please get in touch with your usual contact at ALTENBURGER or with the below author of this newsletter:

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