N

Monthly Newsletter December 2024

Dispute Resolution

Schellenberg Wittmer

Entry into force of the revised CPC and the Hague Convention on Choice of Court Agreements

Stefan Leimgruber, Urs Hoffmann-Nowotny, Matthis Peter

Key Take-aways

1.
On 1 January 2025, the revised provisions of the CPC and the Hague Convention on Choice of Court Agreements will enter into force.

2.
The amendments to the CPC concern, among other things, the provisions governing procedural costs, evidence, conciliation proceedings and the possible introduction of Swiss international commercial courts.

3.
The Hague Convention on Choice of Court Agreements strengthens the binding nature of exclusive choice of court clauses in international civil and commercial matters.

1 Introduction

On 1 January 2025, the revised provisions of the Swiss Code of Civil Procedure (**CPC**) and the Hague Convention on Choice of Court Agreements (**CCCA**) will enter into force. There will be no ground-breaking changes to the CCP, as no provisions on collective redress will be introduced at this time (see our Newsletter of February 2022). Nevertheless, Switzerland's domestic and international civil procedure rules will undergo multifaceted and, in some cases, unexpected developments at the beginning of next year.

The stated aim of the CPC's partial revision is the "improvement of practicability and enforcement of the law". Over 75 provisions of the CPC are affected. In addition to codifying or in some places rectifying Swiss Supreme Court case law, the revised CPC introduces new rules on costs, conciliation proceedings, in-house counsel privilege, and the establishment of Swiss international commercial courts.

Furthermore, by enacting the CCCA, concluded in The Hague almost 25 years ago, the Swiss legislator reinforces the binding nature of exclusive choice of court agreements in international civil and commercial matters.

On the occasion of its entry into force, this newsletter will highlight key changes to the CPC that are particularly relevant from a business perspective. It will also outline the CCCA's scope of application and core elements.

2 Important changes to the CPC

2.1. Reduction of cost barriers and risks

Under the revised CPC, courts may now require the plaintiff to pay an advance on costs of up to **half of the estimated court fees, rather than the full estimated amount**. This reduction in the initial cost barrier is intended to improve **access to justice**. However, there are notable exceptions, particularly in summary proceedings (except for interim measures) and in appeal proceedings. In addition, cantonal sovereignty over tariffs remains unaffected, meaning the substantial differences in cantonal fees will continue to exist.

The plaintiff's position is further improved with regard to the **liquidation of procedural costs.** Previously, courts could offset their costs against the advance on costs paid by the plaintiff, even if the plaintiff won the case in whole or in part. The plaintiff thus bore the risk of the defendant's default. Under the new CPC, the advance on costs is reimbursed to the successful plaintiff, thereby shifting the burden of recovering court costs to the state.

Another significant development related to the advance and the amount of court costs concerns the new provision on the amount in dispute of counterclaims. If the plaintiff has filed a **partial action**, the procedural costs and thus also the advance on costs – at least if the partial action is countered **with an action for a (negative) declaratory judgement** regarding the full claim – are calculated exclusively on the basis of the value in dispute of the partial action (Art. 94 para. 3 CPC). This provision, which was only introduced during parliamentary deliberations, reduces the cost risk for the plaintiff in partial actions, while at the same time facilitating the defendant's ability to raise a defence. Defendants can now bring a countersuit to establish the non-existence of the alleged full claim without having to pay any advance on costs.

The advance on costs now amounts to a maximum of half of the estimated court costs.

2.2. Right to refuse cooperation for in-house counsel

In addition to (external) attorneys, **in-house counsel**, i.e. employees of a company's internal legal department, can now also invoke a **right to refuse cooperation** in civil proceedings, provided that the activity in question is typical for an attorney and the legal department is headed by a person admitted to the bar (Art. 167a CPC). Under this provision, in-house counsel may refuse to testify or to produce documents. However, the duty of disclosure imposed by the CPC is limited. This new right to refuse cooperation is therefore primarily aimed at foreign proceedings in which Swiss companies were previously exposed to procedural disadvantages, insofar as the duty of cooperation of the affected employees was assessed under Swiss law. Whilst the position of Swiss companies in civil proceedings abroad is strengthened, there are still no corresponding rights to refuse cooperation in Swiss criminal and administrative proceedings, which remain equally significant for the companies concerned.

2.3. Strengthening of conciliation proceedings

Conciliation proceedings may be useful also in cases that fall within the jurisdiction of the commercial court or another cantonal court of sole instance. Apart from offering a quick and cost-effective means of dispute resolution, an application for conciliation enables creditors to promptly and effectively **interrupt the statute of limitation** where debt enforcement is not available in Switzerland or where the claim is exempt from such enforcement. Art. 199 para. 3 CPC addresses this practical need by introducing **voluntary conciliation proceedings** in cases that were previously excluded.

However, while voluntary applications for conciliation will establish lis pendens in domestic disputes, the situation remains uncertain in international matters. According to Art. 9 para. 2 of the Federal Act on Private

International Law (**PILA**), lis pendens is established based on the date of the first act necessary to initiate the proceedings. Strictly speaking, voluntary applications for conciliation do not fulfil this requirement. Under the Lugano Convention, too, this issue is yet to be finally settled.

2.4. Recognition of private expert opinions as evidences

In technically complex disputes, expert opinions are often indispensable. Until now, under the practice of the Swiss Supreme Court, expert opinions commissioned by the parties, as opposed to those ordered by the court, were not considered as evidence, but merely as statements or allegations by the submitting party.

Under the revised CPC, **private expert opinions will now have the status of documentary evidence,** allowing their evidentiary value to be freely assessed by the court. However, courts must evaluate the evidentiary weight of private expert opinions on a case-by-case basis, considering factors such as the independence and expertise of the expert. This change grants courts greater discretion to take private expert opinions into consideration. However, it remains to be seen whether this development will generally increase the value of private expert opinions in civil proceedings.

There is a particular need for clarification regarding the scope of application of the CCCA.

2.5. Framework for international commercial courts

Switzerland is already renowned as an internationally attractive legal venue, due to its excellent framework for arbitration proceedings. The revised CPC aims to bolster Switzerland's reputation further by establishing it as a preferred **forum for international commercial disputes** before state courts.

To this end, the provisions governing the subject-matter jurisdiction of commercial courts will be amended. Under the new Art. 6 para. 4 lit. c CPC, cantons may now declare their commercial courts to have jurisdiction over international commercial disputes, provided that certain conditions are met. These include: a minimum amount in dispute of CHF 100,000, an agreement between the parties on the jurisdiction of the commercial court, and that at least one party had its registered seat or place of residence abroad when the agreement was concluded. In addition, the requirements of the Lugano Convention, the CCCA (see Chapter 3 below) or the PILA must be respected. Further details are subject to cantonal court organisation law.

In addition, the cantons are authorised to provide for **English as the language of proceedings** in international commercial disputes at the request of the parties. The use of English is also guaranteed - at least for the parties' submissions - across all instances up to the Swiss Supreme Court. Although the establishment of international commercial courts may take time (initiatives have been launched in Zurich and Geneva), these developments mark a significant and commendable step towards further strengthening Switzerland's position as a premier international legal venue.

3 The Hague Convention on Choice of Court Agreements (CCCA)

3.1. Subject matter and scope of application

The CCCA governs **exclusive choice of court agreements** in international civil and commercial matters. The Convention establishes rules for jurisdiction, as well as for the recognition and enforcement of judgments rendered by the chosen courts. In terms of its temporal application, the CCCA applies to choice of court agreements concluded after the Convention has entered into force in the state of the chosen court. The Convention is already enacted in the European Union and – of particular importance following Brexit – in the United Kingdom, as well as Mexico, Singapore, Ukraine, Albania, Montenegro and Moldova. The USA, China, Israel, Kosovo and North Macedonia have signed the CCCA but are yet to put it into force.

3.2. Core elements

The CCCA establishes the mandatory jurisdiction of the exclusively chosen court. Any non-chosen court must, in principle, **suspend the proceedings** or **dismiss** the action as inadmissible, irrespective of where and when lis pendens was first established. The Convention does not leave room for the application of the forum non conveniens doctrine, which would allow a court other than the chosen court to determine if it is better suited to judge an action. Moreover, the Swiss legislator is removing the discretion of chosen courts to decline jurisdiction based on insufficient connection to Switzerland. Art. 5 para. 3 PILA will be annulled as of 1 January 2025.

The formal requirements of the CCCA are not strict: the choice of court agreement must be made **in writing or in another form of communication that makes the information accessible.** Interim measures are expressly excluded from the scope of the CCCA. With regard to the recognition and enforcement of judgements of (exclusively) chosen courts, the CCCA does not allow for a review on the merits. The grounds for refusing recognition and enforcement largely correspond to those of the Lugano Convention and the PILA; in principle, there is no r**eview of the jurisdiction of the court of origin.**

3.3. Questions of application and differentiation

In relation to the CCCA, **the Lugano Convention generally takes precedence**. However, this does not apply if both parties are "domiciled" in states that are parties to the CCCA but are not also both contracting states of the Lugano Convention.

It remains unclear whether the CCCA – contrary to its original intention as reflected in the drafting history – may also apply to **unilaterally exclusive ("asymmetrical") choice of court clauses,** which are commonly found in financing agreements.

4 Outlook

With the revised provisions of the Code of Civil Procedure, which come into force on 1 January 2025, the legislator has undoubtedly come closer to its goal of improving practicability and enforcement of the law in civil proceedings. Many of the changes are welcome, some were overdue. The same applies to the entry into force of the Hague Convention on Choice of Court Agreements, although there are still significant areas requiring clarification. It remains to be seen whether provisions on collective redress will be introduced in a future revision.

Stefan Leimgruber
Partner
stefan.leimgruber@swlegal.ch

Urs Hoffmann-Nowotny
Partner
urs.hoffmann-nowotny@swlegal.ch

Katherine Bell
Partner
katherine.bell@swlegal.ch

Matthis Peter
Senior Associate
matthis.peter@swlegal.ch

Christian Girod
Partner
christian.girod@swlegal.ch

Louis Burrus
Partner
louis.burrus@swlegal.ch

Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P.O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.com

Geneva
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.com

Singapore
Schellenberg Wittmer Pte Ltd
6 Battery Road, #37-02
Singapore 049909
T +65 6580 2240
www.swlegal.sg