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## Uniform Civil Procedure for All of Switzerland

**On January 1, 2011**, the new Swiss Code of Civil Procedure (CCP) entered into force as the final step in the judicial reform that was passed by the people and the cantons on March 12, 2000.

The new CCP applies in particular to **all civil matters that are in dispute before Swiss courts**, with the exception of proceedings before the Swiss Federal Supreme Court, for which the procedure was already updated through the Swiss Federal Supreme Court Act (Bundesgerichtsgesetz).

The new CCP does not break with tradition, but instead incorporates proven elements of cantonal procedural practices. Basic responsibility for **the organization of the courts** is still borne by the

cantons. It is anticipated that the cantonal courts will give up their cherished practices and adapt to the new CCP only reluctantly and under pressure from the ongoing standardization of law through the rulings and judgments of the Swiss Federal Supreme Court.

Still, much has changed as of January 1, 2011. In the following, we have selected a few topics that are important in practice: **“Highlights,”** as well as **stumbling blocks**, but in any event points that influence the parties’ tactical considerations before, during, and after a civil case. Please do not hesitate to contact the WENGER PLATTNER Practice Team with questions or for consultation relating to litigation or arbitration matters.



## Where do I file suit? Jurisdiction *ratione loci*

The new CCP largely incorporates **the regulation on jurisdiction *ratione loci* as standardized** by the Swiss Civil Jurisdiction Act. But it also introduces innovations that are important in practice:

The obligee can now choose whether to sue the obligor at his domicile/seat or at the **place of performance of the characteristic service**. The place of performance is the place where the service that characterizes the contract in question is to be carried out. The characteristic service is the action that comprises the typical attribute of the respective contract type: performance by the seller in the case of a sales contract, work performance in the case of a service contract, etc. The place at which this performance is to be done is stipulated by contract, or alternatively by law.

In practice, **agreements on jurisdiction** are very important: An agreement on jurisdiction is an agreement whereby the parties specify – usually in advance – which court is to have jurisdiction over their dispute. As in the past, the stipulated court and the choice of the law that is to govern the agreement must be identified precisely. What is new is that the stipulated court can no longer deny its jurisdiction, but must accept the case. An agreement on jurisdiction is valid if it is provable by text. Thus, for example, it is possible to enter into an agreement on jurisdiction via a website if the customer expressly consents (“tick the box”).

In the absence of a provision to the contrary in the agreement on jurisdiction, an action may be brought at the agreed place of jurisdiction only. If the plaintiff is to be given a choice between the ordinary court and the agreed court, this must be expressly stated in the stipulation of venue.

## Conciliation attempt and interruption of the statute of limitations

The rule under the new CCP is: **“first conciliate, then adjudicate.”** In order to reduce the courts’ workload and facilitate the parties’ first step in the legal arena, proceedings must, as a matter of principle, be preceded by an attempt at conciliation or mediation. This has consequences for the interruption of the statute of limitations:

**Requests for conciliation or mediation** interrupt the statute of limitations, although this holds true of the latter only if the mediation is requested from the conciliation authorities.

With disputes for which only one cantonal authority has jurisdiction (e.g., the commercial court), there is no possibility of a conciliation attempt. This means that interrupting the statute of limitations requires the filing of a (complex) **suit** instead of a (simple) conciliation request.

If a claim is on the verge of becoming statute-barred, the competent court must be identified quickly, accompanied by a quick assessment as to whether an attempt at conciliation is required. Otherwise it is a good idea to begin drafting the suit at an early stage, especially if the statute of limitations cannot be interrupted through debt enforcement for lack of a place of debt enforcement in Switzerland.

However, the new CCP has also introduced a significant relief in the area of statute of limitations: Under the old law, a claim could become statute-barred **“under the judge’s hand”** (especially with short – e.g., one-year – limitation periods). The limitation period could be restarted only through judicial action by the parties or else through an order or decision by the court. Now, the limitation period that has been interrupted by a conciliation request, the filing of suit, or the raising of a defense begins running again only after the litigation before the competent instance has been concluded.

## New to the procedure: The “fitness principle”

A quick perusal of the new CCP makes it immediately clear that “harmonizing” 26 codes of procedure necessitated a typically Swiss compromise. Nevertheless, it is evident from the wording of the law, the explanatory report of the Federal Council, and the genesis of the changes that the objective pursued by lawmakers was to make the procedure **flexible, quick, simple, lay-friendly as well as cost effective**. In reference to other process principles we contend, therefore, that the new Code of Civil Procedure is governed by the “fitness principle”.

Actually, the court possesses a large degree of **flexibility** when it comes to how the proceeding is to be structured: Depending on the amount in dispute and the complexity of the case, a simpler or a more refined proceeding can be ordered. As a matter of principle, a civil case begins with a written statement of claim followed by a written statement of defense. If less than CHF 30,000 is in dispute, parties may present their respective positions orally. The case continues with oral arguments at the beginning of the hearing phase. However, the court can also order a second exchange of written submissions and, moreover, summon the parties to a preparatory hearing (Instruktionsverhandlung) prior to the main hearing.

This flexibility has **advantages and drawbacks**: Because the court has considerable leeway in how the proceeding is to be conducted, for example, the parties cannot know at the beginning of the proceeding what the deadline is for their presentation of allegations and facts and for submission of the corresponding evidence. In particular, it is no longer possible – as the former law allowed in some cantons – to wait until the court requests evidence before submitting it.

Parties are advised to present the entirety of their allegations in their very first submission and to submit all available documents at the same time.

Turning away from a rigid solution for all cases should result in an overall improvement in efficiency, and thus lead to the swifter handling of cases. It remains to be seen how the individual courts are going to implement this flexibility. As a general trend, however, it can be assumed that the courts will try to “accommodate” their previous procedure under the new CCP so that they are forced to change their practices as little as possible.

## Precautionary measure against precautionary measures: The protective brief

In the area of precautionary legal protection, the new CCP does not introduce **substantive innovations**, but is instead heavily founded on the existing law. One new element, however, is the “protective brief” (Schutzschrift), which has not been widely used in the past and was not addressed in the cantonal codes of civil procedure.

The protective brief is a **preventive means of defense** against an expected petition for the issuance of an interim injunction ex parte, an attachment under the Debt Enforcement and Bankruptcy Act, or another interim measure concerning which the respondent is for once not heard in advance. This is conceivable if the petitioner can credibly rely on particular urgency. The protective brief gives the respondent a means for presenting his position in advance all the same.

The protective brief reduces the risk that an interim injunction will be approved with undue haste.

The anticipatory brief is **valid** for six months from its submission; after that time, it may no longer be considered by the court. It is sent to the opposing party only if and when that party institutes a corresponding proceeding.

If **multiple venues** are available for an interim injunction, it is recommended that the protective brief be filed with all of the courts.



## When a judgment goes the wrong way: Legal remedies

Under the new CCP, essentially any decision handed down by a cantonal court of first instance can be challenged before a higher cantonal court (cantonal court of appeal or cantonal supreme court), after which it can go before the Swiss Federal Supreme Court. An exception is made for commercial courts (of the sort that exist in the cantons of Zurich and Bern, for example) and for actions in specific areas of law (such as intellectual property law): These decisions must be appealed directly with the Swiss Federal Supreme Court.

The new CCP has two principal legal remedies: the appeal (Berufung) and the request for setting-aside (Beschwerde); the three further remedies of

revision (Revision), interpretation (Erläuterung) und correction (Berichtigung) play a subordinate role.

Both the appeal and the request for setting-aside must be filed with the appellate instance within 30 days, in writing and with arguments. The deadline may not be extended. This means that a party that has been unsuccessful before the first instance (district court, county court, municipal court, local court, cantonal court, civil court) must decide quickly whether to challenge the lower court's decision before the higher cantonal instance.

The challenge filing deadline of 30 days from the issuance of the lower court's decision is not the only thing that must be considered: If the lower court issues its decision without giving written reasons, the defeated party must request written reasons within 10 days, barring which the law assumes that the right to challenge the decision has been waived.

The main distinction between the appeal and the request for setting-aside is that the appeal is intended for cases with an **amount in dispute of at least CHF 10,000**, whereas the request for setting-aside covers "smaller" cases as well as decisions concerning the enforcement of civil judgments. Decisions handed down during a first-instance proceeding are subject to appeal if they are actually **procedural or substantive interim decisions** (e.g., the dismissal of a plea under the limitation of actions). In contrast, procedural orders (e.g., an order for the taking of specific evidence) are - where applicable - to be challenged through a request for setting-aside.

Of cardinal practical significance is the question as to what new facts and evidence a party may still submit to the higher cantonal instance if such materials were not presented to the court of the first instance (known as the so-called "Novenrecht"). The new CCP is strict: New facts and evidence cannot be presented to the higher cantonal instance if they could have been previously introduced before the lower court through the application of reasonable care. **"Forgotten in the first instance – lost and gone forever."**

Thus, the client and the attorney must carefully consider at the outset what facts and evidence they want to introduce to the proceeding.

For successful consultation, the client should come up with all the documents that could somehow be related to the case at the very beginning of the first-instance proceeding and make those documents available to his attorney.



## The “new” attorney-client privilege

Attorney-client privilege is primarily covered by the Swiss Penal Code. In the past, the rather peculiar interpretation by Swiss courts relative to elsewhere in Europe meant that **confidential correspondence** was protected only while situated on the attorney’s premises. Once the attorney’s correspondence was received by the client, its surrender could be demanded. This limitation of attorney-client privilege was disastrous with regard to risk assessments and recommendations for future action.

This has now changed with art. 160 CCP, which clearly states that **an attorney’s correspondence** need not be surrendered in an evidentiary proceeding. Thus, the question of whether confidential correspondence is in the possession of the attorney, the client, or a third party is no longer relevant.

It is true that this provision applies to only one element of civil law – albeit an important one – but nevertheless it does represent **significant progress** in the area of protecting the confidentiality of exchanges between client and attorney. It remains to be seen what effect it will have on other areas of law.

As of today, we recommend stamping any attorney correspondence with **“ATTORNEY CORRESPONDENCE - CONFIDENTIAL”**.

## The alternative to litigation: Arbitration

The new Code of Civil Procedure concerns itself not only with civil litigation before state courts, but also – in a separate third section (replacing the Concordat in place until 2010) - with the procedure before private arbitral tribunals established in Switzerland between parties residing in Switzerland (known as **domestic arbitration**).

Arbitral proceedings **are different** from proceedings before a state court; in particular, the parties themselves determine the composition of the arbitral tribunal (with members whom they trust) and define the procedural rules. Nevertheless, a decision by an arbitral tribunal – the so-called arbitral award (Schiedsspruch) – has the same effect as a final and enforceable decision by a state court. Another key difference is that arbitration proceedings are conducted behind closed doors; because of the confidentiality that this ensures, arbitration is often the preferred means of settling disputes arising from articles of association, shareholder agreements, and similar contracts.

Arbitration must be clearly stipulated, barring which the state courts retain jurisdiction. Use of an arbitration institution's standard arbitration clause is recommended, or else legal consultation should be obtained.

The parties are not bound to the (comparatively) rigid rules of the CCP, but can instead specify on their own **how the proceeding is to be structured**. Parties often adopt the procedural rules of an arbitration institution. Within the limits of mandatory procedural rights (such as equal treatment and due process) the arbitral tribunal determines the details on how to conduct the proceedings in close coordination with the parties' wishes.

Unlike a state court, the arbitral tribunal must first be constituted when a dispute has arisen and one party wishes to sue the party to the contract. To the extent that the parties encounter problems in that area, the arbitral tribunal is constituted with the help of the arbitration institutions that the parties may have designated for that purpose (for example, chambers of commerce offer such services), or otherwise with the help of the state court as the appointing authority.

The arbitral award is only subject to an **action for annulment to the Swiss Federal Supreme Court**. However, only in exceptional cases is the Swiss Federal Supreme Court in a position to set aside an arbitral award. In particular, the Swiss Federal Supreme Court does not review as to whether the arbitral tribunal made the right decision: even an arbitral award that is erroneous is overruled only in instances when it would lead to arbitrary results. This "shortcut regarding legal remedies" guarantees a comparatively quick (final) resolution of the case in dispute.



## Introducing the Practice Team

The WENGER PLATTNER Litigation and Arbitration Practice Team relies on profound know-how and many years of experience. We offer the following services:

- Civil litigation before all Swiss courts: representation of parties involved in disputes in all areas of civil and business law.
- Arbitration: we act as both counsel and arbitrator in international and domestic arbitral proceedings.
- Proceedings before Swiss administrative and criminal authorities in all areas of administrative law and selected areas of criminal law.
- Consulting on the resolution of disputes (e.g., selecting foreign trial attorneys, coordinating procedures pending outside Switzerland).

The Litigation and Arbitration Practice Team is made up of the following members in particular:

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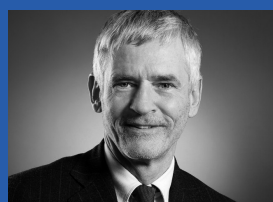
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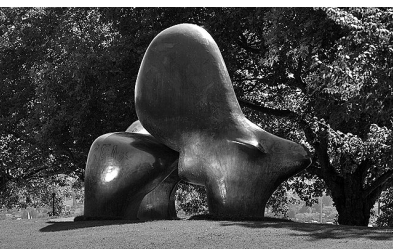
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