

court or arbitral tribunal might decide that, unless and until the mediation is initiated, conducted in good faith and fails, arbitration is premature because the right to arbitrate has not yet arisen. This would be an issue as to the validity of the arbitration agreement (*ratione temporis*). This assumes that the complaining party objects to arbitration from the outset and does not proceed on the merits, and that it participated in good faith in the mediation; any objection would otherwise be considered abuse of right.

Whether the agreement to mediate can be enforced and a failure to mediate in good faith or at all give rise to a damages claim is a highly controversial issue. As a rule, it can be said that the clearer the mediation undertaking, the more likely it will be enforced and its (clear) breach sanctioned.

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## The Unified Swiss Code of Civil Procedure: A Major Development in Swiss Litigation

BY SANDRINE GIROUD | LALIVE

The unified Swiss Code of Civil Procedure (“SCCP”) will enter into force on 1 January 2011. It will mark one of the most important developments in the Swiss legal order since the unification of the substantive law in civil, commercial, and criminal matters at the beginning of the twentieth century.

Currently, each of the twenty-six cantons has its own code of civil procedure. These codes can differ substantially from each other given the varying influence of the Germanic and French legal traditions prevailing in Switzerland. In addition, the Federal Constitution and several federal statutes also contain procedural rules. Finally, the Swiss Federal Supreme Court has developed unwritten civil procedural law on several basic issues. This multiplicity of rules makes it both onerous and complex to take legal action in Switzerland and has been a source of legal uncertainty. The SCCP aims to eliminate these obstacles by way of a uniform civil procedural law. It is a relatively concise code of 408 articles regulating civil procedure and domestic arbitration. It largely draws on the existing cantonal codes, in particular those of the Swiss-German cantons. Its key features are as follows.

### **Residual Cantonal Competence: Judicial Organisation**

While the regulation of civil procedure is now a federal competence, the judicial organisation remains in the hands of the cantons which are each autonomous in the administration of justice. Cantonal law will thus continue to determine the composition and the jurisdiction of the civil courts, as well as the cost of proceedings. Under the SCCP, cantons are also allowed to create specialised courts, e.g., commercial courts, courts in employment matters, or courts for landlord/tenant disputes. As a result of this cantonal judicial autonomy, it is likely that the existing cantonal practices, e.g., the use of laypersons as judges, will impact the further development of the SCCP.

### **Jurisdictional Provisions: Place of Jurisdiction in Contractual Matters**

The Federal Act on the Place of Jurisdiction in Civil Matters enacted in 2001 now forms part of the SCCP with some minor changes. One of these changes worth noting relates to the introduction of a place of jurisdiction in contractual matters which has been formulated in similar terms to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Accordingly, proceedings can be commenced before the courts of the place of domicile of the defendant or before the courts of the place of performance of the characteristic obligation under the contract. This ends the distinction that has prevailed in Switzerland between domestic contractual matters and international contractual matters.

### **Alternative Dispute Resolution Mechanisms: Conciliation and Mediation**

The SCCP encourages the settlement of disputes out of court by supplying the parties with two options: conciliation and mediation.

Conciliation proceedings are elevated to a formal procedural step and are now mandatory except in a limited number of cases, e.g. competition or IP matters. The plaintiff can also unilaterally reject conciliation in certain cases, e.g. when the defendant is domiciled abroad. Commencement of conciliation proceedings interrupts any statutory limitation period. Moreover, for disputes below CHF 5,000, the conciliation authority can submit a proposition of decision to the parties which will become final and binding unless one party objects to it within a period of twenty days.

Upon request of all the parties, conciliation proceedings can be replaced by mediation, before or during the course of proceedings that are already pending. Because neither the mediation proceedings nor the qualifications required to be a mediator are regulated by the SCCP, the parties are left to decide upon the mediator and the procedural rules applicable through a mediation agreement. Finally, the SCCP allows the parties to jointly apply for court approval of an out-of-court settlement agreement reached through mediation which, as a result, will have the effect of an enforceable judgment.

These novelties are of a great value and should help relieve the burden on the courts in civil proceedings.

### **Types of Proceedings: Ordinary, Simplified, and Summary**

The SCCP provides for three types of proceedings. Ordinary proceedings apply to pecuniary disputes of high monetary value and to “economic” disputes, i.e., commercial, IP, or competition disputes. Conversely, simplified proceedings apply to small cases, i.e., with a value inferior to CHF 30,000, as well as to matters concerning “social issues”, e.g., landlord/tenant disputes, employment disputes and consumer protection. The simplified proceedings are less formal, put greater emphasis on oral submissions and foresee a more active role of the courts. Finally, the SCCP provides for summary proceedings which go even further in terms of simplification and expediency. They apply, in particular, to urgent requests, requests for provisional measures, and also to “clear-cut cases”, i.e., cases in which the facts are not in dispute or can be immediately proven, or cases in which the legal issues are straightforward.

### **Third-Party Interventions**

The SCCP offers a wider range of options for third-party interventions. Not only can a party call a third party into the proceedings for assistance, but it can now also join a party by filing a third-party notice. Already in existence

in the cantons of Vaud, Valais, and Geneva, this last form of intervention is being introduced at the federal level for the first time. This should foster time and cost efficiency by avoiding contradictory judgments, making use of procedural synergies and avoiding multiple places of jurisdiction. A typical case for third party notice is where a seller is sued for damages by the buyer and wishes to join the distributor.

### **Class Action**

The Swiss legislator has decided not to introduce the Anglo-American concept of class action. The view was taken that it is contrary to the Swiss legal system which rests on the fundamental principle that only the holder of a legal right can assert that right. It is thus up to the courts to deal with proceedings involving multiple parties by relying on existing procedural instruments, in particular the “association” claim for clubs and organisations and the general consolidation of claims, both of which have a bundling effect.

### **Provisional Measures: Pre-Emptive Brief**

The SCCP now provides a powerful preventive measure for a party fearing the filing of an *ex-parte* injunction against it. The so-called pre-emptive brief allows a party to submit its position in advance to the court. This brief will only be communicated to the opposing party if and when it effectively requests an *ex-parte* injunction and shall remain in effect six months after being filed, after which period it must be renewed or extended if it is to have continued effect. This device will be particularly important in IP and competition matters, but is available in all areas where the issuing of an *ex parte* injunction is to be feared, e.g. freezing order proceedings, exequatur proceedings in relation to a foreign judgment under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), or enforcement proceedings of a foreign arbitral award (see Domitille Baizeau, “Enforcement of foreign arbitral awards: the Swiss pro-enforcement framework and judicial approach” and Werner Jahnel “Freezing of assets held by foreign parties in Swiss banks”).

### **Recognition and Enforcement of Decisions: Enforceable Deed**

Besides the ordinary procedure for the enforcement of judgments, the SCCP now introduces the concept of the enforceable deed. Such deed entitles its holder to directly seek enforcement of the claims it contains in a similar manner to a judgment. This is especially important for creditors who can now benefit from simplified enforcement proceedings. This puts Switzerland in line with the other Contracting States to the Lugano Convention.

Indeed, the recognition and enforcement of foreign court decisions in Switzerland will also be improved by the simultaneous entry into force of the provisions implementing the revised Lugano Convention. These will provide a much needed clarification as to the form of provisional measures under the Lugano regime and will end the divergent cantonal practices in this respect.

### **Domestic Arbitration**

The SCCP also replaces the Intercantonal Concordat on Arbitration which governs domestic arbitration, by providing much needed amendments based on the rules contained in the Swiss Private International Law Act (“PIL Act”) which governs international arbitration (Chapter 12), such as the arbitral tribunal’s jurisdiction to issue provisional measures, the facilitation of set-off claims, and the possibility to challenge the award directly before the Federal Supreme Court. Furthermore, parties to a dispute subject to domestic arbitration now have

the possibility to directly opt for the application of Chapter 12 of the PIL Act and, conversely, parties to a dispute subject to international arbitration and thus in principle governed by Chapter 12 of the PIL Act can opt for the application of the SCCP and the rules governing domestic arbitration.

## Conclusion

The unification of civil procedure in Switzerland, which was first envisaged in 1872 by the Swiss legislator, is finally about to become reality. The SCCP will remove today's barriers which hinder the Swiss legal market in civil matters. Swiss lawyers will be able to provide their services in civil proceedings throughout Switzerland without facing procedural and legal obstacles. In turn, clients will largely benefit from the simplification and increased expediency of the new civil procedure. This historical development will help Switzerland enter the twenty-first century with the necessary tools to make it a competitive forum for litigation.

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## Freezing of Assets Held by Foreign Parties in Swiss Banks

BY WERNER JAHNEL | LALIVE

Switzerland is without a doubt among the world's leading banking nations, holding a significant volume of foreign assets in its banks and financial institutions. The freezing of those assets by a creditor might become necessary in order to secure its monetary claims, either through the enforcement of a foreign judgment or arbitral award or by way of a freezing injunction granted as a provisional measure in ongoing court proceedings abroad or in contemplation of proceedings in Switzerland. In the majority of the Swiss cantons, the available measure for securing monetary claims is a freezing order (*séquestre*) obtained under the Federal Debt Enforcement and Bankruptcy Act 1889 ("DEB Act").

### Conditions for Obtaining a Freezing Order from the Swiss Courts

The application for a freezing order against monies held in a bank account must be filed before the court at the place where the assets are located. Such place is deemed to be that of the bank's headquarters or that of the bank's subsidiary if the bank's headquarters are not located in Switzerland.

The freezing order will be granted if the creditor demonstrates *prima facie* that: (i) the creditor has a claim; (ii) there exists a ground for a freezing order under the DEB Act; and (iii) there are assets in Switzerland belonging to the debtor.

Regarding the existence of a claim and the grounds for a freezing order, the elements to be proven by the creditor will vary.

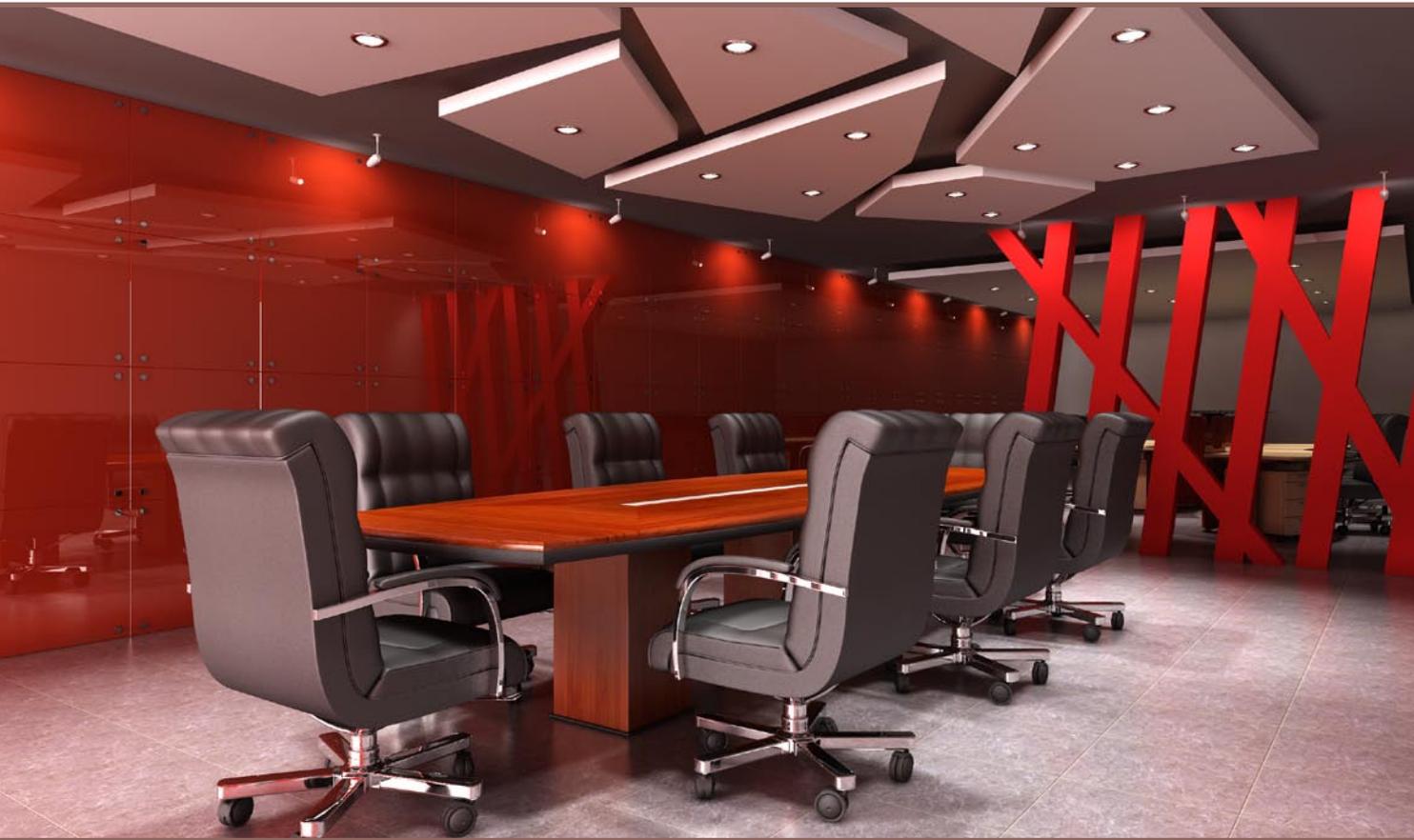
If the application is based on a judgment rendered in a Contracting State to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention) or on

# Litigation, Arbitration & Dispute Resolution

2010 | DIGITAL GUIDE

EXECUTIVE VIEW MEDIA LIMITED

Edited by Oliver Hargreaves



[www.executiveview.com](http://www.executiveview.com)

**Editor** | Oliver Hargreaves  
Published in the United Kingdom  
by Executive View Media Limited  
29th Floor, 1 Canada Square, Canary Wharf  
London, E14 5DY, United Kingdom  
Tel: +44 (0) 207 712 1779

© 2010 Executive View Media Limited  
ISBN: 978-1-907420-06-1

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