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ONLINE COMMENTARY
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COMMENTARY ON

Art. 6 CPC

A commentary by Andreas Schneuwly

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Art. 6 Commercial court

[1] The cantons may designate a special court that has jurisdiction as sole cantonal instance for commercial disputes (commercial court).

[2] A dispute is considered commercial, if:

a. it concerns the commercial activity of at least one party;

b. the value in dispute exceeds CHF 30,000 or the dispute is not a property dispute;

c. the parties are registered as legal entities in the Swiss Commercial Register or in an equivalent foreign register; and

d. it is not a dispute arising from a employment relationship, under the Recruitment Act of 6 October 1989[21], under the Gender Equality Act of 24 March 1995, or relating to the renting or leasing of residential and commercial premises or to agricultural leases.

[3] If only the defendant is registered as a legal entity in the Swiss Commercial Register or in an equivalent foreign register, but all the other conditions are met, the plaintiff may choose between the commercial court and the ordinary court.

[4] The cantons may also assign to the commercial court:

a. the disputes mentioned in Article 5 paragraph 1;

b. the disputes relating to the law of commercial companies and cooperatives;

c. disputes in which all the following conditions are met:

The dispute concerns the business activities of at least one party.
The value in dispute is at least CHF 100,000.
The parties agree to the jurisdiction of the commercial court.
At the time of this agreement, at least one party has its domicile, habitual residence or registered office abroad.

[5] The commercial court is also competent to order interim measures before an action is pending.

[6] If actions concern joint parties that are not all registered as legal entities in the Swiss Commercial Register or in a comparable foreign register, the commercial court shall only have jurisdiction if all actions fall within its jurisdiction.

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I. GENERAL

A. History of origins

The only commercial courts still existing in Switzerland today are found in the cantons of Zurich, Aargau, Bern and St. Gallen. In this order, the commercial courts were founded in the second half of the 19th century and in the first half of the 20th century. This was always triggered by the needs of the business community and, in particular, by the assumption that so-called specialized judges would be better able to classify the facts of the dispute and that the proceedings could be more flexible, more expeditious and less expensive. 1

It is true that before the introduction of the CPC, there were sometimes considerable differences in the subject-matter jurisdiction of the cantonal commercial courts. Nevertheless, when creating the CPC, the federal legislator was guided by the previous cantonal provisions. 2

B. Purpose of the Norm

The provision of Art. 6 CPC would in itself be superfluous if the commercial courts were not the only cantonal instances. This is because the regulation of subject-matter jurisdiction is in principle the responsibility of the cantons, unless the law provides otherwise (Art. 4 para. 1 CPC). The cantons would therefore be free, even without Art. 6 CPC, to introduce "commercial courts" with limited subject-matter jurisdiction, such as specialized labor courts, tenancy courts, family courts, etc. may provide. However, due to the principle of double cantonal jurisdiction (double instance; Art. 75 para. 2 BGG), such "commercial courts" may not serve as the sole cantonal courts. 3

Accordingly, the purpose of Art. 6 CPC is to enable the cantons at the level of the higher cantonal courts (Art. 75 para. 2 lit. a and b BGG) to provide for a specialized court as the sole cantonal instance for commercial court disputes. By shortening the number of instances, among other things, an acceleration of the process is achieved. 4

As specialized courts, the commercial courts created under Art. 6 CPC are not inadmissible exceptional courts within the meaning of Art. 30 para. 1 FC, but are generally abstractly competent for disputes under Art. 6 CPC and thus admissible special or specialized courts. 5

C. Commercial courts as specialized courts

6 Commercial courts are characterized by the combination of legally qualified judges with judges versed in the respective industry. In order to fulfill their purpose as specialized courts, commercial courts must have a sufficient number of specialized judges with appropriate knowledge of the industry. The pools of specialized judges in the cantons of Bern and Zurich consist of 60-70, the one in the canton of St. Gallen of 25 and the one in the canton of Aargau currently of twelve specialized judges.

7 In my opinion, a specialized court only exists if the majority of the panel of judges - subject to the jurisdiction of individual judges - consists of specialized judges. The existence of specialized knowledge in the panel of judges is the decisive argument why a special commercial court should be responsible for certain disputes. This idea is all the better taken into account the more specialist judges are involved in the decision. In Switzerland, therefore, with one rare exception, a practice has been established whereby female specialist judges form the majority in panels of five at a ratio of 3:2 or in panels of three at a ratio of 2:1.

II. BASIS OF THE SUBJECT MATTER JURISDICTION OF THE COMMERCIAL COURTS

A. Examination of Subject Matter Jurisdiction

1. Principle of examination

8 Pursuant to Art. 60 CPC, the court examines ex officio, inter alia, whether the procedural requirement of subject-matter jurisdiction is met. According to the case law of the Federal Supreme Court, this standardizes a limited principle of examination, which has an asymmetrical effect on the parties. The following principles apply: No objection by the defendant is required for the court to review its subject-matter jurisdiction. The court is also not bound by concessions made by the parties. Art. 60 CPC does not release the plaintiff from the burden of proof or the burden of assertion. Rather, the negotiation maxim and the right of novelty also apply to the plaintiff with regard to this procedural requirement. Thus, the court does not have to search for facts of its own accord that speak in favor of its subject-matter jurisdiction. The defendant, on

the other hand, is relieved of the burden of denial, and the right of novelty does not apply to facts that speak against the subject-matter jurisdiction. The court shall only investigate facts that speak against the existence of its subject-matter jurisdiction. However, it is not obliged to conduct extensive inquiries in this context. Only if the court has indications for its lack of subject-matter jurisdiction, an investigation of the facts is required ex officio.

2. Time of examination

The courts are free to decide when to examine their subject-matter jurisdic- 9
tion. The examination may take place from the initiation of proceedings until at the latest one logical second before a decision on the merits is rendered. Whether a written response must be obtained in ordinary proceedings prior to a decision not to enter an action is a matter of dispute. For reasons of procedural economy and due to the requirement of acceleration (Art. 124 para. 1 CPC), it is desirable for the court to examine the matter as early as possible in order to be able to take any further precautions, e.g. to limit the response to the question of subject-matter jurisdiction (cf. Art. 222 para. 3 and Art. 125 lit. a CPC).

3. Time at which subject-matter jurisdiction must be present at the latest

According to a common formula, the procedural prerequisites - or the facts 10
relevant for their assessment - must, with certain exceptions, be present at the time the decision on the merits is rendered. However, it is not sufficient if the subject-matter jurisdiction only exists at the time the decision on the merits is rendered. Rather, the subject-matter jurisdiction must already be present when a binding decision is made on it, e.g. in an early trial decision. If the subject-matter jurisdiction is denied therein, the matter will not be addressed by a procedural final decision and no decision on the merits will be rendered.

A distinction must be made between this and the question at what point in 11
time those facts must have been introduced into the proceedings that allow the conclusion of subject-matter jurisdiction. Based on the asymmetrical principle of investigation propagated by the Federal Supreme Court (cf. n. 8), a distinction must be made between facts that speak for and against subject-matter jurisdiction: For facts establishing jurisdiction, the usual trial maxim with a strict right of novelty applies (Art. 229 para. 1 CPC). Thus, a factual ju-

risdiction that has not yet been established can only be remedied with admissible novelties after the file has been closed. In contrast, facts and evidence that speak against the subject-matter jurisdiction can always be taken into account until the relevant judgment deliberation (Art. 229 para. 3 CPC). The relevant deliberation is the deliberation in which the court makes a binding decision on its jurisdiction.

12 In order for the commercial court to have subject-matter jurisdiction at all, all of the requirements set out in Art. 6 para. 2 CPC must exist simultaneously at least once. A staggered occurrence of individual prerequisites is not sufficient.

4. Perpetuatio fori

13 The principle of perpetuatio fori, according to which the court once competent remains competent for the duration of the proceedings, also applies to subject-matter jurisdiction (then also called perpetuatio competentiae). However, perpetuatio fori does not exclude the possibility that a court that initially lacks jurisdiction may become competent in the course of the proceedings. Thus, there is no perpetuatio fori of lack of jurisdiction.

B. De- and Prorogation and Depositions

14 The subject-matter jurisdiction of the courts is generally mandatory, including that of the commercial court. The subject-matter jurisdiction of the commercial courts is, in principle, exclusive. A choice according to Art. 8 CPC is inadmissible. Both the derogation and the prorogation of the commercial court are therefore invalid.

15 However, Art. 6 para. 3 CPC contains an alternative jurisdiction, which is also mandatory. The fact that a prorogation of the commercial court within the scope of application of Art. 6 para. 3 CPC is thus excluded appears to be correct, since the special features of commercial court proceedings (loss of the cantonal appellate instance, limited cognition of the Federal Supreme Court, specialized court instead of an ordinary court) should not be imposed by the more powerful counterparty on the party entitled to vote, which is usually weaker in the market. However, a derogation of the commercial court is not problematic. In such cases, the electing party would not be subject to a jurisdiction that is more disadvantageous for it - unlike in the case of partially compulsory local courts - but merely to the ordinary jurisdiction.

The factual jurisdiction of the commercial courts, which is in principle mandatory and not at the disposal of the parties, also prohibits a plea by the parties. Accordingly, the parties may not plead before the ordinary courts in the context of commercial court disputes, nor before the commercial court in the context of non-commercial court disputes. 16

C. Court orders of voluntary jurisdiction

Commercial courts have jurisdiction only over disputes but not over court orders of voluntary jurisdiction. 17

The commercial courts shall therefore not have jurisdiction in particular for: 18

- the appointment of an expert to examine the work in accordance with Art. 367 para. 2 CO,
- the dismissal of judicially appointed liquidators,
- the organizational deficiency proceedings referred by the Commercial Registry Offices (as of January 2021),
- the ex officio deletions referred by the Commercial Registry Offices in the case of legal entities with no business activity and no assets pursuant to Art. 934 para. 3 CO,
- the re-registrations according to Art. 935 CO, and
- the cancellation of promissory notes, securities and insurance policies.

In contrast, the commercial courts may have jurisdiction over the following disputes: 19

- ordering the provision of information and inspection pursuant to Art. 697b CO,
- the appointment of an expert to conduct a special investigation pursuant to Art. 697c para. 2 or the ordering of a special investigation pursuant to Art. 697d para. 1 CO,
- the judicial convocation of a general meeting of shareholders,
- the dismissal of liquidators in accordance with Art. 741 para. 2 CO, whose mandate is based on law, the articles of association, a company resolution or a contract
- the declaration of invalidity pursuant to Art. 137 FinMIA, and

- the organizational deficiency proceedings initiated by a shareholder or a creditor.

D. Enforcement

20 Because the commercial courts only have jurisdiction over disputes under substantive law (Art. 6 CPC) and state enforcement is not concerned with the settlement of civil law relationships, but involves the compulsory enforcement of claims under substantive law that have been recognized by the courts or are otherwise enforceable, i.e. it serves to create facts, the commercial courts do not have subject-matter jurisdiction in this regard.

1. Real enforcement

21 However, Art. 236 para. 3 CPC and Art. 267 CPC provide for direct real enforcement that the court of cognizance also directly orders real enforcement measures. These are therefore not issued in separate summary proceedings. Direct enforcement can therefore be regarded as a downstream part of the proceedings and is included in them. Accordingly, the commercial courts have subject-matter jurisdiction for direct enforcement if they also have jurisdiction for the corresponding summary proceedings. If the commercial courts are responsible for direct enforcement, they are also responsible for its execution.

22 Indirect real enforcement, on the other hand, is no longer part of the proceedings for a judgment and is issued in a separate summary proceeding following the judgment proceedings (Art. 338 f. CPC). In contrast to direct enforcement, indirect enforcement proceedings can no longer be assigned to any pending proceedings. In contrast to the precautionary measures prior to the pendency of the proceedings (cf. Art. 6 para. 5 CPC), which are subject to a similar problem, there is also no legal provision according to which the commercial courts would be responsible for the indirect real enforcement of the decisions rendered by them. Therefore, the commercial courts do not have subject-matter jurisdiction for indirect real enforcement.

23 Since direct and indirect real enforcement do not differ in substance, this legal situation is not convincing. De lege ferenda, therefore, a provision modeled on Art. 6 para. 5 CPC is necessary for indirect real enforcement.

2. Judicial matters of debt enforcement and bankruptcy law

Purely substantive disputes relating to the SchKG are indeed connected with 24 the debt enforcement proceedings. However, the corresponding decisions have full substantive legal force. They are based on an actual substantive dispute, which means that the commercial courts may have subject-matter jurisdiction, provided that the requirements of Art. 6 CPC are met in the individual case. Disputes under purely substantive law include, for example, actions for recognition and revocation, actions for discontinuation or cancellation of debt collection under Art. 85a SchKG, actions for recovery by the debtor after payment of a non-debt, actions for attachment and actions for damages, e.g. under Art. 273 SchKG.

In purely debt collection disputes, substantive law is not decided on the mer- 25 its. Although they may have a connection with a dispute under substantive law, they have a different subject matter. Therefore, they do not fall under the jurisdiction of the commercial courts. Disputes under purely debt collection law include, for example, the legal opening proceedings, the opening of bankruptcy proceedings and the action to establish the existence of new assets pursuant to Art. 265a SchKG. For the same reasons, this also applies to orders on unilateral application, such as the opening of bankruptcy proceedings in non-contentious cases, the discontinuation of bankruptcy proceedings for lack of assets, the revocation of bankruptcy proceedings and the final judgment.

By their nature, disputes under debt collection law with a reflex effect on sub- 26 stantive law must also be classified as disputes under debt collection law and not substantive law. This is because they are not used to bring substantive disputes to a res iudicata; instead, the substantive legal situation is decided only on a preliminary basis, if at all. Disputes under debt collection law with a reflex effect on substantive law therefore do not fall within the jurisdiction of the commercial courts. These include, for example, actions for opposition, segregation, collocation and avoidance.

E. Substantive nature of the claim

According to the Federal Supreme Court, the nature of the claim is not a con- 27 necting factor for the substantive jurisdiction of the commercial courts under Art. 6 para. 2 CPC. It is correct that Art. 6 para. 2 CPC in principle does not refer to the substantive nature of the claim filed and therefore the commercial courts may have subject-matter jurisdiction irrespective of the substantive qualification of a claim. This means that the commercial courts can have jurisdiction over both contractual and non-contractual claims, e.g. claims under property law, claims in tort and unjust enrichment, claims arising from management without a mandate or from culpa in contrahendo, as well as from a liability based on trust, etc. This principle was amended with the introduction of the new Code of Civil Procedure (CCP).

28 This principle was abandoned with the revision of the CPC adopted in March 2023. Now, disputes arising from an employment relationship, under the Employment Agencies Act, under the Equal Treatment Act, as well as from the rent and lease of residential and commercial premises or from agricultural leases no longer fall within the subject-matter jurisdiction of the commercial courts due to their substantive nature (Art. 6 para. 2 lit. d CPC; see n. 66 f.).

29 Similarly, Art. 6 para. 4 CPC contains a list of substantive claims that are optionally commercial court disputes but not commercial disputes within the meaning of Art. 6 para. 2 CPC. If it were otherwise, and if the optional commercial court disputes were also commercial law disputes according to Art. 6 para. 2 CPC, the commercial courts would have mandatory jurisdiction over these disputes and the right of choice granted to the cantons in Art. 6 para. 4 CPC would be undermined to this extent. Since disputes arising from the law of commercial companies and cooperatives in particular are excluded from Art. 6 para. 2 CPC, this also applies consequently to disputes arising from the other forms of companies whose activities typically have no or only a less close connection to commercial law (e.g. associations and simple partnerships), and to disputes arising from the law of foundations. De lege ferenda, however, it could make sense to grant the cantons the possibility to assign certain of these disputes to the commercial courts. This applies, for example, to disputes in the internal relationship of a construction consortium or to disputes arising from a shareholders' agreement qualifying as a simple partnership.

F. Jurisdiction Attraction and Competing Jurisdictions

30 In the case of a competition of substantive norms, an action may have multiple grounds. If the substantive jurisdiction is also or exclusively based on the

relevant legal subject matter, the question may arise as to which court has jurisdiction over what.

According to the principle of jurisdiction attraction, the courts must compre- 31
hensively assess the facts of the case and also examine those claims for which, considered separately, they would not have jurisdiction (cf. also Art. 57 CPC). In the case of multiple claims, commercial courts must therefore examine all bases of claims, even if they would not have jurisdiction over individual claims if considered separately.

Which court has subject-matter jurisdiction to adjudicate a multiply founded 32
claim is not determined by the principle of jurisdictional attraction, but is resolved by the competition of jurisdiction:

- Insofar as a commercial court (based on federal law) competes with a court based on cantonal law (ordinary courts), the commercial court's jurisdiction takes precedence. Alternative jurisdiction exists only within the framework of Art. 6 para. 3 CPC, whereby the plaintiff has the right to choose.
- In relation to the Federal Patent Court, the competition of jurisdiction is regulated by Art. 26 PatCA. The Federal Patents Court has exclusive jurisdiction over actions for continuance and infringement, as well as actions for the grant of a license relating to patents, the ordering of precautionary measures prior to the pendency of such an action, and the enforcement of such decisions (Art. 26 para. 1 PatCA). If preliminary issues and objections concerning patent nullity and infringement become relevant before a commercial court, they must be submitted to the Federal Patent Court within the time limit, otherwise they will be disregarded (Art. 26 para. 3 PatCA). If the patent nullity or infringement is asserted by way of counterclaim, the counterclaim and the main action shall be referred to the Federal Patent Court (Art. 26 para. 4 PatCA). To this extent, the jurisdiction of the Federal Patent Court takes precedence over that of the commercial courts. If, on the other hand, there is a multiple substantiated action in connection with Art. 26 para. 2 PatCA, there is an alternative between the jurisdiction of the Federal Patent Court and the Commercial Courts, with the plaintiff having the choice.
- There is an alternative between the commercial court and a single cantonal instance according to Art. 5 CPC.

- The jurisdiction of the single cantonal instance under Art. 7 CPC takes precedence over that of the commercial court.
- There is an alternative between the jurisdiction of the commercial court under Art. 6 para. 3 CPC and the single cantonal instance under Art. 8 CPC.

III. COMMERCIAL DISPUTES (ART. 6 PARA. 2 CPC)

33 Art. 6 para. 2 CPC defines when a dispute is commercial. The individual defining characteristics according to Art. 6 para. 2 CPC must be present cumulatively and at least once at the same time (cf. n. 12).

34 Both the concept of a commercial dispute and the individual requirements thereof (Art. 6 para. 2 lit. a-d CPC) are concepts of federal law.

35 A parallel or concurrent jurisdiction regulation of the cantons is excluded due to the mandatory nature of the commercial court jurisdiction. The cantons are also precluded from defining the commercial law dispute more narrowly than is prescribed by federal law, for example by establishing additional requirements for the subject-matter jurisdiction of the commercial courts. However, it is also inadmissible to further circumscribe the commercial law dispute.

A. Commercial activity (Art. 6 para. 2 lit. a CPC)

1. Bases

36 A dispute under commercial law within the meaning of Art. 6 para. 2 CPC is only if it concerns the business activity of a party. Thus, first, the exercise of a business activity by at least one of the parties and, second, the involvement of at least one business activity in the dispute are required.

37 The reference to the business activity is a substantive characteristic of the dispute. The purpose of Art. 6 para. 2 lit. a CPC is to assign to the commercial courts, as specialized courts, as far as possible only those disputes that they can ideally judge more competently on the basis of their specific expertise. In this context, a certain abstraction is essential for the benefit of legal certainty.

38 It is questionable at what point in time the dispute must concern the business activity of a party. The characteristic of the business reference of a dispute is

derived from the claim underlying the dispute. It is justified to base the relevant point in time on the period in which the claim arose. It is at this point in time that it is determined whether the dispute is related to the business activity or not. Subsequent discontinuations or commencements of business are thus disregarded.

It is not relevant whose business activity is affected as long as this applies to at least one party. 39

2. Existence of a business activity

Business activity means that there must be an enterprise aiming at profit. 40 What is meant is an economic activity aimed at making a profit. The activity also distinguishes the facts of the case from the performance of one-off transactions. The business activity is then to be subsumed under the broader concept of trade. Art. 2 lit. a HRegV defines this as an independent economic activity aimed at permanent acquisition. It is therefore not a question of the narrower concept of trade, the actual craft business, but of the economic gainful activity itself. The intention to make a profit is sufficient. The actual achievement of an acquisition or profit is not necessary. The assessment does not depend on the entry in the commercial register, but solely on the actual activity.

Thus, there is no business activity in particular i) if organizations only carry 41 out non-material and no economic activities and are thus not geared to making a profit, ii) in the case of the state service sector, as long as it is not geared to making a profit, even if it is organized under private law (e.g. cantonal hospitals) and iii) if only one-off transactions are carried out, whereby in individual cases a continuing one-off business opportunity may under certain circumstances take on the character of an actual business activity.

According to Art. 6 para. 2 CPC, the type of business to which the activity be- 42 longs is irrelevant. It may be commercial, industrial, trade or other businesses, producers or service providers, freelancers or even members of the primary sector. It follows from this that commercial courts today are no longer special courts for commercial and business transactions, but courts for general business transactions.

3. Relation to the dispute

43 With the concern of the business activity, a certain relation between the dispute and the business activity of at least one party is required. The relationship need not be strong; direct involvement is not a prerequisite. Rather, an indirect business connection of some kind is sufficient. The dispute may therefore only concern ancillary or auxiliary business. The characteristic performance is not important. In any case, the wording of Art. 6 para. 2 lit. a CPC offers hardly any indications to limit the jurisdiction of the commercial court as soon as one party is a commercial company and its external relations are affected. This solution sacrifices individual case justice in favor of a simple jurisdiction rule and thus legal certainty. A dispute can thus be a commercial dispute within the meaning of Art. 6 para. 2 CPC even if it does not have this characteristic per se.

44 In contrast, there is no reference to business activity in the case of so-called private transactions. Whether a private transaction exists must always be answered from the point of view of both parties: If a private transaction exists for one party, the transaction may nevertheless have a connection with the business activity of the other party. Only if the transaction is a private transaction for both parties, the relation to a business activity in the sense of Art. 6 para. 2 lit. a CPC has to be denied. Especially in the case of owners of a sole proprietorship, a distinction must be made between their private and business spheres, since sole proprietorships do not have legal capacity. The concrete circumstances are decisive.

B. Requirement of the amount in dispute (Art. 6 para. 2 lit. b CPC)

1. Basics

45 Prior to the revision of the CPC adopted in March 2023, aArt. 6 para. 2 lit. b required, according to the wording, that an appeal in civil matters against the decision was open to the Federal Supreme Court. This wording led to numerous ambiguities, some of which remained unresolved until the revision of the CPC. With the new wording, the legislator has created clarity: Art. 6 para. 2 lit. b CPC contains a pure amount in dispute requirement.

According to the Federal Supreme Court, the amount in dispute for determining the court's jurisdiction is measured according to the circumstances at the time the action is filed and the amount in dispute requirement must already be met at the time the action is filed. This is not convincing, especially since it is not recognizable why increases in value in the course of the proceedings should not have the effect of establishing jurisdiction. Secondly, according to Art. 91 para. 2 CPC, the parties can agree on the amount in dispute, which, by its very nature, happens only after the commencement of the action. Thirdly, the CPC provides for certain cases that the subject-matter jurisdiction changes with the change of the amount in dispute after the commencement of the action (e.g. Art. 85 para. 2, Art. 227 paras. 2 and 3 CPC). Therefore, the amount in dispute need not reach the required level until the commercial court first decides on its subject-matter jurisdiction. Due to perpetuatio fori, a subsequent reduction in the amount in dispute does not invalidate the commercial court's jurisdiction once it has been established. 46

2. Minimum amount in dispute

According to Art. 6 para. 2 lit. b CPC, the amount in dispute must exceed Fr. 30,000.00 for the dispute to qualify as commercial. If the amount in dispute is exactly CHF 30,000.00, there is no dispute under commercial law. The amount in dispute is calculated in accordance with the rules of the CPC (Art. 4 para. 2 CPC). 47

Art. 6 para. 2 lit. b CPC expressly states that the amount in dispute requirement applies only to disputes under property law. Accordingly, non-pecuniary disputes are already deemed to be commercial disputes if the business activities of at least one party are affected and the parties are entered in the Swiss Commercial Register or in a comparable foreign register. . Gleichzeitig darf es sich nicht um eine Streitigkeit nach Art. 6 Abs. 2 lit. d ZPO handeln. 48

3. Proposal de lege ferenda

Even before the introduction of the CPC, the four commercial court cantons provided for an amount in dispute requirement for the general jurisdiction of their commercial courts. This served primarily to regulate the business burden of the commercial courts by limiting their subject-matter jurisdiction. This purpose is also served by the amount in dispute requirement of Art. 6 para. 2 lit. b CPC, especially since the legislator was guided by the previous cantonal 49 provisions. However, the business burden of the commercial courts is not a matter of federal law, but of cantonal law. The regulation by federal law is therefore questionable. Moreover, the rather high amount in dispute requirement of more than CHF 30,000.00 - due to the lack of a sufficient business burden - is likely to prevent the introduction of new commercial courts in other cantons, although it was an important concern of the Federal Council when introducing the CPC to upgrade the commercial jurisdiction. Moreover, it is not quite comprehensible why a federal litigation requirement applies only to commercial disputes under Art. 6 para. 2 CPC, but not to the optional commercial court disputes under Art. 6 para. 4 CPC.

50 Accordingly, it would be worth considering abandoning Art. 6 para. 2 lit. b CPC and leaving it to the cantons to provide, if necessary, for a dispute value requirement to regulate the business burden or to dispense with such a requirement due to its systemic inconsistency.

C. Entry in the Commercial Register (Art. 6 para. 2 lit. c CPC)

1. Principles

51 The purpose of Art. 6 para. 2 lit. c CPC is to restrict access to the Commercial Court to persons who are entered in the Commercial Register, exempting them from proving that they are merchants or traders.

52 The only thing that matters is the actual entry. The reasons for the entry are irrelevant. It may have been made on the basis of an obligation to register or voluntarily, it may have had a constitutive or merely declaratory effect, it may have been justified, unjustified, incorrect or made ex officio. It is also irrelevant for what reasons a possible entry in the commercial register has not yet been made. The existence of an obligation to make an entry is not sufficient to establish the subject-matter jurisdiction of the commercial courts.

53 Entries in the Swiss commercial register are obvious and therefore need neither be asserted nor proven. For entries in foreign registers this applies only exceptionally, because these are often not easily accessible or only at a high cost. Entries in foreign registers, on the other hand, are not obvious and must always be asserted and proven.

54 The parties must be entered in the commercial register at the latest at the time when the commercial court first decides on its subject-matter jurisdic-

tion or before the start of the corresponding judgment deliberations. Due to the perpetuatio fori, a subsequent deletion from the Commercial Register does not cause the factual jurisdiction of the Commercial Court, once established, to lapse. However, such a deletion may establish the jurisdiction of an ordinary court in proceedings before it. If an ordinary court once had jurisdiction, it remains so, even if all the requirements of Art. 6 para. 2 CPC were met following a subsequent entry of a party in the Commercial Register (perpetuatio fori).

The requirement of entry in the commercial register refers to the parties. In 55
particular, the party representatives are not parties, which is why only the entry of the represented party is relevant in representation cases. Furthermore, according to Art. 6 para. 2 lit. c CPC, both parties must be entered in the Commercial Register. If only the defendant is registered in the Commercial Register, the plaintiff has the choice according to Art. 6 para. 3 CPC. However, if only the plaintiff party is registered, the dispute is not a commercial dispute from the outset.

2. Entry in the Swiss Commercial Register

The wording of Art. 6 para. 2 lit. c CPC, as amended by the revision of the 56
CPC adopted in March 2023, requires that the parties be registered as legal entities in the Commercial Register. Accordingly, it is no longer the company name that is to be taken into account, but the legal entity within the meaning of Art. 927 para. 2 CO. The entry in the commercial register does not have to show the party as a company or subject that carries on a trade, manufacturing business or other business conducted in a commercial manner within the meaning of Art. 931 CO.

The following commercial register entries are therefore deemed sufficient: 57

- sole proprietorships,
- general partnerships,
- limited partnerships,
- stock corporations,
- limited partnerships,
- limited liability companies,

- cooperatives,
- associations,
- foundations,
- limited partnerships for collective investment,
- investment companies with fixed capital,
- investment companies with variable capital,
- institutions under public law, and
- branches.

58 With regard to sole proprietorships, it should be added that, although only they - and not their owners - are entered in the Commercial Register as a legal entity, it is not they but their owners who are parties to the civil proceedings. However, the CPC revision was not intended to exclude the owners of sole proprietorships from the jurisdiction of the commercial court, so that no legal consequences regarding jurisdiction can be derived from this inaccuracy. Thus, if the entry in the commercial register as the owner of a sole proprietorship satisfies the requirements of Art. 6 para. 2 lit. c CPC and the dispute concerns the business activities of the other party, the owners of sole proprietorships do not have a right of choice under Art. 6 para. 3 CPC even for private matters and may have to answer to the commercial courts for such matters as well.

59 As far as branches are concerned, they have no independent personality; they are not capable of being parties within the meaning of Art. 66 CPC. Their entry in the commercial register is therefore irrelevant. If the dispute relates to a branch, the entry in the commercial register of the person of which the branch is a part must be taken into account.

60 If the entry of a legal entity in the Commercial Register is supplemented with the addition "in liquidation", it is nevertheless still registered within the meaning of Art. 6 para. 2 lit. c CPC. In my opinion, if a person falls into bankruptcy, this person remains the relevant party to the proceedings, but is now represented by the bankruptcy administration to the extent of the bankruptcy estate. There is neither a change of parties nor a procedural status. Nor is the bankruptcy estate as such a party to the proceedings. Accordingly, only the entry in the commercial register of the bankrupt is relevant (disputed).

Because the following commercial register entries are not legal entities, they do not satisfy the requirements of Art. 6 para. 2 lit. c CPC: 61

- entries as corporate bodies (e.g., members of the board of directors), representatives (e.g., authorized signatories, directors) or as persons with similar functions (e.g., administrators), and
- entries as partners of partnerships and legal entities (e.g. general partners, managing partners).

3. Entry in a comparable foreign register

According to Art. 6 para. 2 lit. c CPC, an entry in a "comparable foreign register" is equivalent to an entry in the Swiss commercial register. However, even in this case, an entry in the register is required, which is why evidence of any kind as to whether a party is recognized as a commercial enterprise abroad is not sufficient. In my opinion, an entry in the comparable foreign register as a legal entity is not required, since the term "legal entity" explicitly refers to the terminology of Swiss commercial register law. 62

In practice, the comparability of the registers is generously affirmed. So far, for example, the registers of the following countries or territories have been considered comparable - sometimes only implicitly: Anguilla, Bermuda, Denmark, Germany, England, French Polynesia, Greece, Iceland, Israel, Italy, Latvia, Liechtenstein, Netherlands, Austria, Singapore, California Secretary of State database. 63

Although the comparability of registers is a question of law, the available decisions hardly ever state why comparability was affirmed. It seems as if the comparability of the registers is presumed as soon as it is a register of companies. The mere assertion that a company is registered in a foreign register, on the other hand, is not sufficient. 64

In itself, the same principles apply to an entry in a comparable foreign register as to an entry in the Swiss commercial register. The foreign register must therefore serve to record and make accessible information under commercial law in order to identify individual legal entities on the basis of their central features, such as company name, registered office, purpose, powers of representation or similar, and to provide information about their legal existence. However, since the foreign register only has to fulfill approximately the same function as the Swiss commercial register, the information does not have to 65 be free of charge or accessible on the Internet, nor does it have to be as detailed as that of the Swiss commercial register. It is also not necessary that the foreign register serves the protection of third parties or has a publicity effect within the meaning of Art. 936b CO, because these are not the reasons why Art. 6 para. 2 lit. c CPC refers to the commercial register entry. Who prepares the foreign register extract is also irrelevant. Courts, foreign authorities, consulates or also private persons (e.g. chambers of commerce) can be considered. It is also irrelevant how the foreign register extract is titled. However, so-called certificates of incumbency are likely to be insufficient, since they usually only provide information about the officers of a company.

D. Excluded Disputes (Art. 6 para. 2 lit. d CPC)

66 With the introduction of Art. 6 para. 2 lit. d CPC as part of the revision of the CPC adopted in March 2023, a new criterion - and for the first time a negative criterion - was introduced to define a commercial dispute.

67 From now on, disputes arising from an employment relationship, under the Employment Agency Act, under the Equal Treatment Act, or from the rent and lease of residential and commercial premises or from agricultural leases will no longer constitute disputes under commercial law. This exclusion presumably does not apply to disputes arising from collective labor law, especially since these are not disputes arising from an employment relationship.

IV. RIGHT OF CHOICE OF THE UNREGISTERED PLAINTIFF (ART. 6 PARA. 3 CPC)

68 If only the defendant is registered within the meaning of Art. 6 para. 2 lit. c CPC, but the other requirements of Art. 6 para. 2 lit. a and b are met and those of Art. 6 para. 2 lit. d CPC are not met, the plaintiff may choose between the commercial court and the ordinary court in accordance with Art. 6 para. 3 CPC. The business activities of the plaintiff need not be affected in this case as long as those of the defendant are affected. The plaintiff does not even need to be engaged in business activities. Therefore, actions by consumers, bank and insurance customers, victims (e.g. accident victims, victims of faulty medical interventions) etc. are eligible, but not those by employees, tenants and leaseholders within the meaning of Art. 6 para. 2 lit. d CPC.

If, on the other hand, only the plaintiff and not the defendant is registered, the dispute is not a commercial dispute and there is no right of election within the meaning of Art. 6 para. 3 CPC. This also applies in the case of an action for disqualification, where the roles of the parties are reversed. 69

The choice is exercised by filing the action with the ordinary court or the commercial court. The right of choice is said to be unique and irrevocable. This certainly applies within the same proceedings or the same lis pendens (see Art. 63 CPC). Outside the same lis pendens, however, a revival of the plaintiff's right to choose is not excluded, e.g. if an action before the ordinary court of one canton is not admitted due to lack of local jurisdiction and the action is refiled in another canton without maintaining lis pendens within the meaning of Art. 63 CPC before the commercial court. 69a

V. OPTIONAL COMMERCIAL COURT DISPUTES (ART. 6 PARA. 4 CPC)

According to Art. 6 para. 4 CPC, the cantons may declare their commercial court competent for a) disputes under Art. 5 para. 1 CPC, b) disputes arising from the law of commercial companies and cooperatives, and c) certain international disputes. 70

Here, the requirements of Art. 6 para. 2 lit. a-d CPC do not play a role. However, the terms used in the context of Art. 6 para. 4 CPC are also those of federal law. The central difference to commercial disputes under Art. 6 para. 2 CPC lies in the fact that the cantons are free in their decision to declare their commercial courts to have subject-matter jurisdiction also for disputes under Art. 6 para. 4 CPC. 71

Art. 6 para. 4 lit. a CPC refers directly to Art. 5 para. 1 CPC and Art. 6 para. 4 lit. b CPC indirectly to Art. 552-926 CO. In my opinion, these are dynamic references, i.e. references to the respective applicable version of these provisions. 72

It has not yet been fully clarified what exactly the cantons' right to choose pursuant to Art. 6 para. 4 CPC comprises. Certainly, the cantons can choose whether their commercial court has jurisdiction only for disputes under Art. 6 para. 4 lit. a CPC, only for those under lit. b, only for those under lit. c, for 73 none of them, or for any combination of them (e.g., only for those under lit. a and b).

A. Disputes under Article 5(1) CPC

74 With Art. 6 para. 4 lit. a CPC, the CPC refers directly to the disputes listed in Art. 5 para. 1 CPC. This is a hodgepodge of special disputes from which the cantons may select individual ones and assign them to the commercial courts.

75 In this context, the cantons are free to designate their commercial courts as having jurisdiction only for disputes of individual letters listed (Art. 5 para. 1 lit. a-i CPC). Thus, all four commercial courts have jurisdiction for disputes under Art. 5 para. 1 lit. a, b, c, d, g and h CPC, only the commercial courts of the cantons of Aargau and Zurich have jurisdiction for disputes under Art. 5 para. 1 lit. e CPC, and only the commercial court of the canton of Bern has jurisdiction for disputes under Art. 5 para. 1 lit. i CPC. It would not make much sense, but based on the previous cantonal regulations, which the legislator has followed, it would be permissible to differentiate even further within the framework of Art. 5 para. 1 lit. a and i CPC according to the individual legal bases, e.g. the disputes arising from the individual intellectual property laws. However, due to the purpose of concentrating legal and technical knowledge, a further division of subject matter jurisdiction even within the individually listed laws does not seem permissible.

76 Whether the cantons can make the jurisdiction of their commercial courts for disputes under Art. 5 para. 1 CPC dependent on an amount in dispute limit has not yet been clarified. It is true that the CPC dispatch states that the cantons may declare their commercial courts competent for disputes under Art. 5 CPC as well as, more generally, for disputes arising from corporate law as well as investment fund and bond law, whereby they are free to set dispute value limits for these matters. However, the purpose of having a single cantonal instance responsible for disputes under Art. 5 para. 1 CPC is to concentrate legal and professional knowledge. This purpose is better achieved if the subject-matter jurisdiction is not divided on the basis of dispute value limits. Accordingly, the CPC - with the exception of Art. 5 para. 1 lit. d and f CPC - does not provide for limits on the amount in dispute for disputes under Art. 5 para. 1 CPC, if a single cantonal instance other than a commercial court decides on them. Why anything else should apply to the jurisdiction of the commercial court is not apparent. Therefore, in my opinion, the cantons may not provide

for limits on the amount in dispute within the framework of Art. 6 para. 4 lit. a CPC.

B. Disputes arising from the law of commercial companies and cooperatives

With Art. 6 para. 4 lit. b CPC, the CPC refers to disputes that may arise from Art. 552-926 CO. This also includes actions for review under merger law pursuant to Art. 105 para. 1 FusG. This does not include, but disputes arising from a contract of sale of shares, a shareholders' agreement, a simple partnership, from associations and concerning foundations. 77

If the cantons have declared their commercial courts competent for disputes pursuant to Art. 6 para. 4 lit. b CPC, they may not restrict this jurisdiction in factual terms according to the Federal Supreme Court. Only the introduction of limits on the amount in dispute is permissible. This is not convincing: It is not recognizable that the legislator intended to harmonize the heterogeneous jurisdiction in this area that prevailed in the four commercial court cantons prior to the introduction of the CPC. However, it hardly makes sense to exclude individual disputes. A current example is the jurisdiction regulation of the canton of Bern, according to which so-called organizational deficiency proceedings are excluded from the jurisdiction of the commercial court. According to the case law of the Federal Supreme Court, this exception would be contrary to federal law. The High Court and the Government Council of the Canton of Bern now also consider this exception with regard to proceedings initiated by shareholders or creditors to be contrary to federal law and refer them to the commercial court, which has jurisdiction in the matter. In contrast, an extension of the jurisdiction of the commercial court pursuant to Art. 6 para. 4 lit. b CPC, e.g. to disputes arising from simple partnerships, associations or foundations, is not permissible. 78

In addition, the cantons are entitled under Art. 6 para. 4 lit. b CPC - in contrast to Art. 6 para. 4 lit. a CPC - to provide for an amount in dispute requirement. However, due to the concentration of knowledge in these cases, a limit on the amount in dispute seems questionable here as well. Currently, the two cantons of Bern and Zurich each provide for a minimum amount in dispute of CHF 30,000.00 for disputes under Art. 6 para. 4 lit. b CPC. 79

C. International disputes

80 With Art. 6 para. 4 lit. c CPC, the cantons were given the possibility, within the framework of the revision of the CPC adopted in March 2023, to declare their commercial courts also competent for certain international disputes. This is intended to lay the foundation for creating specialized courts or court chambers (e.g. the commercial courts) for international commercial disputes. Both the cantons of Bern and Zurich are currently planning to extend the jurisdiction of their commercial courts to disputes under Art. 6 para. 4 lit. c CPC.

81 The special feature of Art. 6 para. 4 lit. c CPC is that the parties can prorogate the subject-matter jurisdiction of the commercial court - contrary to the principle according to which this is mandatory (cf. n. 14) (Art. 6 para. 4 lit. c no. 3 CPC). According to the intention of the legislator, it is also possible to plead to the Commercial Court. However, the admissibility of prorogation presupposes the existence of the requirements of Art. 6 para. 4 lit. c no. 1, 2 and 4 CPC. I.e. the dispute must concern the business activity of at least one party (no. 1), be property-related, have an amount in dispute of at least CHF 100,000.00 (no. 2) and at least one party must have its domicile or habitual residence or its registered office abroad at the time of the prorogation of the commercial court (no. 4).

82 Contrary to the requirement of Art. 6 para. 2 lit. c CPC, an entry in the commercial register of both parties is not required. On the contrary, if both parties are entered in the Commercial Register or a comparable foreign register, the Commercial Court has mandatory subject-matter jurisdiction anyway pursuant to Art. 6 para. 2 CPC - with the exception of cases under Art. 6 para. 2 lit. d CPC. Thus, Art. 6 para. 4 lit. c CPC should remain irrelevant for the majority of international commercial disputes. Nor does this provision deal with international and local jurisdiction. Thus, as before, both international and local jurisdiction must exist in a commercial court canton. If this is the case, however, international disputes under Art. 6 para. 4 lit. c CPC already mostly fall under the substantive jurisdiction of the commercial courts on the basis of Art. 6 para. 2 CPC.

83 Accordingly, Art. 6 para. 4 lit. c CPC applies only to cases in which either the defendant is not registered in the Commercial Register or in a comparable foreign register or, if it is registered, to disputes arising from labor, tenancy

and lease law under Art. 6 para. 2 lit. d CPC. Moreover, if only the defendant is registered in the Commercial Register or a comparable foreign register, Art. 6 para. 4 lit. c CPC represents an excess over Art. 6 para. 3 CPC insofar as a prior proration of the Commercial Court is also binding.

The real innovation concerning international disputes lies in the possibility of choosing English as the language of proceedings if certain conditions are met (Art. 129 para. 2 lit. b CPC; also restricted by Art. 42 para. 1^{bis} BGG) and in the repeal of Art. 5 para. 3 lit. c PILA. Since Art. 129 para. 2 lit. b CPC directly follows Art. 6 para. 4 lit. c CPC, a separate reference to Art. 6 para. 4 lit. c CPC is required to determine whether English is admissible in commercial proceedings. In my opinion, Art. 129 para. 2 lit. b CPC also applies in cases where subject-matter jurisdiction is already based on Art. 6 para. 2 CPC, as long as the requirements of Art. 6 para. 4 CPC are also met, e.g. in a dispute between two foreign stock corporations registered in a comparable foreign register with a value in dispute of over CHF 100,000.00, where the parties have agreed to the jurisdiction of the commercial court or have consented to it. Otherwise, there would hardly be any scope for application of the English language (see n. 83). 84

VI. OTHER COMMERCIAL COURT MATTERS

The cantons are free to declare their commercial courts competent to hear disputes outside the scope of Art. 6 CPC within the scope of the CPC (cf. Art. 1 CPC). In these cases, however, the commercial courts would not rule as the sole cantonal instance and therefore not as a commercial court within the meaning of Art. 6 para. 1 CPC in the absence of a legal basis for an exception to the principle of dual cantonal jurisdiction. 85

Even outside the scope of the CPC, the cantons are free, within the scope of their competences, to declare their commercial courts competent for other matters. For example, the Commercial Court of the Canton of Aargau also has jurisdiction to hear appeals against orders of the Commercial Registry Office pursuant to Art. 942 CO or for disputes assigned to a court pursuant to the HRegV. The latter also applies to the Commercial Court of the Canton of St. Gallen. 86

Likewise, according to Art. 191b para. 2 FC, the cantons are free to establish a joint commercial court on the basis of a concordat. 87

VII. PRECAUTIONARY MEASURES AND PRECAUTIONARY TAKING OF EVIDENCE

88 According to Art. 6 para. 5 CPC, the commercial court is also competent to order precautionary measures prior to the lis pendens of an action. Due to its systematic position, this jurisdiction relates both to commercial disputes under Art. 6 para. 2 CPC and to disputes under Art. 6 para. 3 CPC and optional commercial court disputes under Art. 6 para. 4 CPC.

89 The decisive factor is whether the commercial court would have subject-matter jurisdiction in the main case. If the jurisdiction on the merits is affirmed, the commercial court is also competent to order precautionary measures before the pendency of the main action. The justification for this jurisdiction attraction is the interest in a uniform procedure or procedural economy. It automatically follows that the commercial courts are not only competent to order precautionary measures prior to the pendency of the main action, but also for those during the pendency of the main action.

90 If the commercial courts are competent to order precautionary measures, this also applies to the ordering of superprovisional measures under Art. 265 CPC and to the receipt of protective writs under Art. 270 CPC.

91 Likewise, the commercial courts are competent to take precautionary evidence before and during the pendency of a main case for which they have subject-matter jurisdiction.

VIII. SPECIAL CONSTELLATIONS

A. Relationship to the simplified procedure

92 Certain disputes fall simultaneously within the scope of application of the simplified procedure and within the subject-matter jurisdiction of the commercial courts. Since the commercial courts do not apply the simplified procedure (Art. 243 para. 3 CPC), the question arises as to how this overlapping area should be handled. Even before the revision of the CPC, the Federal Supreme Court ruled that the provisions on the type of proceedings take precedence over those concerning the subject-matter jurisdiction of the commercial courts, with the consequence that commercial courts do not have jurisdiction in the overlapping area.

With the revision of Art. 6 para. 2 CPC adopted in March 2023, part of this overlapping area was eliminated. Currently, the following overlaps can still be identified: 93

- Disputes under Art. 243 para. 2 lit. b, d and f CPC with an amount in dispute of more than CHF 30,000.00, provided that the business activity of at least one party is affected and at least the defendant is entered in the commercial register,
- disputes pursuant to Art. 243 para. 2 lit. b, d and f CPC with an amount in dispute of more than CHF 100,000.00, provided that the business activity of at least one party is affected, the parties have prorogated the Commercial Court and at least one party had its domicile or habitual residence or its registered office abroad at the time of prorogation,
- disputes pursuant to Art. 5 para. 1 CPC with an amount in dispute of up to CHF 30,000.00, insofar as the commercial courts have been declared competent pursuant to Art. 6 para. 4 lit. a CPC, and
- disputes arising from the law of commercial companies and cooperatives with an amount in dispute of up to Fr. 30,000.00 (AG and SG) or of exactly Fr. 30,000.00 (BE and ZH).

It can be assumed that the previous case law of the Federal Supreme Court, according to which the type of proceedings takes precedence over the subject-matter jurisdiction of the commercial courts, will remain applicable in the context of these overlaps, especially since the revision of the CPC has not changed the basis of the Federal Supreme Court's reasoning. Admittedly, the Federal Supreme Court had not explicitly judged any case of Art. 6 para. 4 CPC so far. However, it recently held that its case law applies to all matters to which the simplified procedure applies pursuant to Art. 243 para. 1 and 2 CPC, which also includes disputes under Art. 6 para. 4 lit. a, b and c CPC. 94

B. Amendment of the action

According to Art. 227 para. 1 CPC, an amendment of a claim is admissible if the amended or new claim is to be judged according to the same type of procedure and has a factual connection with the previous claim or if the opposing party consents. 95

96 The CPC does not expressly regulate whether an amendment of a claim requires the same subject-matter jurisdiction of the original claim and the amended claim. Article 227 para. 2 CPC states that the court originally seized shall transfer the case to the court with the higher subject-matter jurisdiction if the amount in dispute of the amended action exceeds the subject-matter jurisdiction of the court originally seized. Thus, an amendment of the action does not require the same subject-matter jurisdiction of the original and the amended action, if this is purely related to the value of the dispute. In this case, it should be added that the change in the value of the claim must not lead to the application of another type of proceedings, otherwise the change in the claim would already be inadmissible on the basis of Art. 227 para. 1 CPC.

97 What applies if the subject-matter jurisdiction for the original and the amended action diverge due to the nature of the dispute has not yet been clarified. In the doctrine, the view is expressed that an amendment of the action is excluded in the case of a purely dispute-related change of subject-matter jurisdiction. In my opinion, however, there is no reason why it should not be possible to remedy an original lack of subject-matter jurisdiction by amending the action, even if the original and the amended action are subject to a different subject-matter jurisdiction. This is because the institution of the amendment of the action was created, in particular, for reasons of procedural economy. It is not considered reasonable to limit the plaintiff to the original action and, if necessary, to provoke another lawsuit concerning the amended action. In such cases, it would make no sense to deem the amendment inadmissible, to dismiss the original action for lack of subject-matter jurisdiction, and then to adjudicate the "amended" action in a new trial as a new action on the merits.

C. Withdrawal of action

98 A withdrawal of the action or a limitation of the action, as formulated in Art. 227 para. 3 CPC, is possible at any time and, according to the law, is not subject to any preconditions. If the action is only partially withdrawn, the court seized of the action remains competent pursuant to Art. 227 para. 3 CPC (perpetuatio fori). There is no transfer to another court. Consequently, it is not necessary that the commercial courts would also have subject-matter jurisdiction for the part of the action that remains after the action has been withdrawn if it were brought as an independent action.

If, for example, an action for payment of CHF 100,000.00 is withdrawn by CHF 80,000.00, the commercial court remains competent to judge the remaining part of the action above CHF 20,000.00. The fear that in this case an appeal in civil matters could no longer be filed against the decision of the Commercial Court due to Art. 74 para. 1 lit. b BGG, but only the subsidiary constitutional appeal, is unfounded. This is because the appeal in civil matters is admissible against decisions of the Commercial Court irrespective of the amount in dispute (see Art. 74 para. 2 lit. b BGG). 99

D. Legal succession before lis pendens

Since a transfer of rights before the pendency of proceedings (e.g. by assignment) does not change the content of the dispute and thus its business connection, it has no influence on the requirement of the business activity being affected. Accordingly, the dispute must concern either the business activity of the counterparty of the legal successor or that of the - in case of several successive transfers of rights original - legal predecessor. This applies despite the clear wording of Art. 6 para. 2 lit. a CPC, because this provision - unlike Art. 6 para. 2 lit. c CPC - is not intended to control access to persons, but to control the content. The legal succession before lis pendens also has no influence on the amount in dispute requirement. This applies even if a claim is sold at a discount of, for example, 10%. 100

As far as the requirement of an entry in the Commercial Register is concerned, however, this relates to the legal successor itself, since it is it that seeks access to the Commercial Court as a party in place of the legal predecessor (or against which access is sought before the Commercial Court). The entry in the Commercial Register of the legal predecessor is irrelevant. If the legal successor acts on the defendant's side, it must be registered in the Commercial Register, otherwise the Commercial Court has no jurisdiction under Art. 6 para. 2 and 3 CPC. If, on the other hand, the legal successor that is not registered in the Commercial Register acts as the plaintiff, it may invoke its right of choice under Art. 6 para. 3 CPC. 101

E. Change of Party

A change of party occurs if an existing party withdraws from the proceedings with the simultaneous accession of a person who was not previously involved in the proceedings as a party. Its admissibility is regulated in Art. 83 CPC. The 102 purpose of a change of parties is to continue the proceedings with another party after the change; the legal relationship between the parties is transferred. The new party takes up the proceedings as they are. The justification for the admissibility of a change of party derives from procedural economy.

103 It follows from this that a commercial court with subject-matter jurisdiction cannot become without subject-matter jurisdiction as a result of a change of party (perpetuatio fori). Therefore, neither the entry in the commercial register of the entering party nor a possible discontinuation of the entry in the commercial register of the withdrawing party is relevant. It is equally irrelevant whether the dispute concerns the business activity of the entering party, as long as that of the withdrawing party or the other party is affected.

104 If, on the other hand, the commercial court did not have subject-matter jurisdiction before the change of parties and has not yet ruled on this, its jurisdiction may be established by the change of parties, for example, if the entering party, unlike the exiting party, is entered in the commercial register.

F. Litigation status

105 Since the existence of a litigant status does not change the content of the dispute and thus its business connection, it has no influence on the requirement that the business activity be affected. Accordingly, the dispute must concern either the business activity of the opposing party of the litigant or that of the materially entitled person not participating in the lawsuit as a party. This applies again (cf. n. 100) despite the clear wording of Art. 6 para. 2 lit. a CPC, because this provision - unlike Art. 6 para. 2 lit. c CPC - is not intended to control access to persons, but to control the content. The litigant status also has no influence on the amount in dispute requirement.

106 As far as the requirement of entry in the commercial register is concerned, however, this relates to the litigant itself, since it is the litigant who seeks access to the commercial court as a party instead of the materially entitled person (or against whom access is sought before the commercial court). The entry in the Commercial Register of the substantively authorized person is irrelevant. If the litigant acts on the defendant's side, he must be registered in the Commercial Register, otherwise the Commercial Court has no jurisdiction under Art. 6 para. 2 and 3 CPC. If, on the other hand, the litigant who is not

registered in the Commercial Register acts as the plaintiff, it may invoke its right of choice under Art. 6 para. 3 CPC.

G. Necessary joint litigation

Necessary joint litigation is admissible if it is required by substantive law (Art. 107
70 para. 1 CPC). The procedural law does not impose any additional requirements on its admissibility, because a separation of the necessary joint litigation would result in the dismissal of the respective actions due to a lack of active or passive legitimacy and would therefore prevent the realization of the substantive right. It follows from this that the necessary joinder of parties does not presuppose the same subject-matter jurisdiction for each of the necessary joinder of parties. Rather, the question merely arises as to which court has subject-matter jurisdiction in the case of active or passive necessary joinder of parties, if none of them, considered individually, would have subject-matter jurisdiction for all necessary joinder of parties.

As far as the business activity is concerned, it is sufficient if either the busi- 108
ness activity of the other party to the necessary joint venture or the business activity of only one of the necessary joint venturers is concerned. With regard to the entry in the Commercial Register, a distinction must be made between active and passive necessary joint litigants: While it is open to active necessary disputants not registered in the Commercial Register to invoke their right of choice under Art. 6 para. 3 CPC, the Commercial Courts have jurisdiction under Art. 6 paras. 2 and 3 CPC in the case of passive necessary disputants only if all disputants are registered in the Commercial Register. On the other hand, the necessary joinder of parties has no influence on the amount in dispute.

H. Simple cooperative litigation

Whether, in the area of commercial jurisdiction, the same subject-matter ju- 109
risdiction for the subjectively clustered actions constitutes a prerequisite for simple joinder in dispute is not clearly regulated: On the one hand, according to the revision adopted in March 2023, Art. 71 para. 1 lit. c CPC states that simple joint litigation is only admissible if the same court has subject-matter jurisdiction over the individual actions. Thus, the case law of the Federal Supreme Court was transferred to the CPC, according to which the same subject-matter jurisdiction is an implicit prerequisite for simple joint litigation.

On the other hand, Art. 6 para. 6 CPC also incorporated into the CPC the case law of the Federal Supreme Court, according to which the jurisdiction of the Commercial Court was not intended to prevent simple joint litigation within its scope of application and the cantons were allowed to provide for a uniform subject-matter jurisdiction for simple passive litigants, whereby the Commercial Court could not be involved if it did not have jurisdiction over all litigants. This jurisprudence was issued only in respect of simple passive joint litigants. However, the newly included provision of Art. 6 para. 6 CPC is also intended to regulate active simple joinder of parties.

110 Based on this starting position, I believe that the following situation must be assumed: Contrary to Art. 71 para. 1 lit. c CPC, according to the revision adopted in March 2023, a simple joint litigation does not presuppose the same subject-matter jurisdiction of the subjectively clustered actions if one part of them falls under the jurisdiction of the ordinary courts and the other part under the jurisdiction of the commercial courts due to the lack of entries in the commercial register. In this constellation of cases, the simple joint litigation is peculiarly admissible despite the difference in subject-matter jurisdiction. Based on Art. 6 para. 6 CPC, the ordinary courts have jurisdiction in these cases. The situation becomes complicated if the same type of procedure is not applicable to the individual actions. In these cases, passive simple joinder of parties is excluded. However, based on the Federal Supreme Court's case law on the addition of the amounts in dispute to determine the type of proceedings in the case of an objective accumulation of claims, active simple joint litigation should also be permissible according to the legislator's intention if the type of proceedings merely diverges due to the amount in dispute, which is difficult to reconcile with Art. 93 para. 2 CPC. After all, in such cases, even according to the case law of the Federal Supreme Court, those subjectively clustered claims that have an amount in dispute of no more than CHF 30,000.00 are still to be dealt with in the simplified procedure. Since the simplified procedure does not apply before the commercial courts, they will not be competent for such cases. Accordingly, a simple joint litigation before a commercial court within the scope of Art. 6 para. 2 and 3 CPC requires that all subjectively clustered claims have an amount in dispute of more than Fr. 30,000.00, all passive simple joint litigants are registered in the Commercial Register or in a comparable foreign register, any active simple joint litigants not registered in the Commercial Register exercise their right of election un-

der Art. 6 para. 3 CPC and, with respect to each subjectively clustered claim, at least one party's business activity is affected.

The dispatch on the draft revision of the CPC clarifies that Art. 6 para. 6 CPC 111
applies only in the context of commercial law disputes and not also to optional commercial court disputes. Thus, in the context of Art. 6 para. 4 CPC, Art. 71 para. 1 lit. c CPC applies. In this area, simple joint litigation is thus excluded if the commercial court does not have subject-matter jurisdiction for all disputes.

I. Main Intervention

Admittedly, according to the case law of the Federal Supreme Court, the gen- 112
eral procedural requirements of Art. 59 CPC must be fulfilled for the main intervention. However, Art. 73 para. 1 CPC contains a special provision on subject-matter jurisdiction in that only the court before which the first action is pending has subject-matter jurisdiction to deal with the main intervention action.

If the first action is pending before a commercial court, it is therefore irrele- 113
vant with regard to the main intervention action whether the requirements of Art. 6 para. 2 CPC are fulfilled, e.g. because the plaintiff in the first action - passive sui generis intervener in the main intervention action - is not entered in the commercial register on the basis of Art. 6 para. 3 CPC. Although this is not unproblematic due to the peculiarities of the commercial court proceedings, it can be compared to the situation of a conjoined counterclaim, which the Federal Supreme Court has deemed admissible. Since the main intervention has to refer to the same subject matter as that of the first lawsuit, it is always related to the first lawsuit.

J. Subsidiary intervention

An ancillary intervention occurs when a third party supports one of the main 114
parties in a pending civil action in its own name either on its own initiative (cf. Art. 74 et seq. CPC) or in response to a simple notice of dispute (Art. 79 para. 1 lit. a CPC). In this case, the intervening party is deemed to be an ancillary party. The intervening party as a mere ancillary party does not have party status, since he neither seeks legal protection in his own name nor is legal protection sought against him.

115 Since intervening parties are not parties, the requirement of entry in the Commercial Register does not apply to them under Art. 6 para. 2 and 3 CPC, nor does it matter whether the dispute concerns their business activity or not. This applies irrespective of whether it is a dependent or independent or contentious ancillary intervention. The subsidiary intervention also has no influence on the amount in dispute requirement (Art. 6 para. 2 lit. b CPC).

K. Simple notice of dispute

116 The simple notice of intervention consists in the request of a party - or a person called to litigate - to a third person whom he intends to sue in case he loses, to support him in the litigation (Art. 78 CPC). We have already spoken about the person called in dispute acting as an intervening party pursuant to Art. 79 para. 1 lit. a CPC (cf. n. 115). If, on the other hand, the person called to dispute does not allow himself to be heard or refuses to support the person announcing the dispute in the proceedings (cf. Art. 79 para. 2 CPC), he does not participate in the proceedings. The question of their influence on the subject-matter jurisdiction of the commercial courts then does not arise.

117 If, on the other hand, the person called to dispute decides to conduct the proceedings on behalf of the party (Art. 79 para. 1 lit. b CPC), it has not yet been definitively clarified whether he does so as a mere representative or as a party to the proceedings. If it acts as a mere representative of the party announcing the dispute, this has no influence on the subject-matter jurisdiction of the commercial courts. If, however, it is assumed that there is a change of party, with or without a simultaneous change of party, reference can be made to the corresponding explanations on the change of party and the change of party (cf. n. 105 f. and 102 ff.).

L. Action for notice of discontinuance

118 An action for notice of a dispute is only admissible if the same court has subject-matter jurisdiction for both the main action and the action for notice of a dispute (Art. 81 para. 1 lit. b CPC). Accordingly, the requirements of Art. 6 CPC must also be met for the action for notice of dispute brought before a commercial court.

M. Objective heaping of actions

Objective aggregation of actions is admissible if the same court has subject-matter jurisdiction over all aggregated claims and the same type of proceedings is applicable (Art. 90 para. 1 CPC). It is also admissible if a difference in subject-matter jurisdiction or type of proceedings is based solely on the amount in dispute (Art. 90 para. 2 CPC). A factual connection between the individual claims is not required. 119

Thus, for the admissibility of an objective aggregation of claims before the Commercial Court, it is in principle (Art. 90 para. 1 CPC) a prerequisite that the subject-matter jurisdiction is fulfilled with respect to each of the aggregated claims and that the simplified type of proceedings is not applicable. Exceptionally (Art. 90 para. 2 CPC), the objective aggregation of claims before the Commercial Court is also admissible if the individual claims - e.g. based on Art. 6 para. 2 lit. b CPC - are subject to a different subject-matter jurisdiction or a different type of proceedings due to the value of the dispute, but otherwise the requirements of the subject-matter jurisdiction of the Commercial Courts are met. As an example, the combination of a claim for payment of CHF 50,000.00 with a claim for payment of CHF 3,000.00 may be mentioned. 120

It remains questionable how to treat the constellation in which none of the claims fulfills the amount in dispute requirement of Art. 6 para. 2 lit. b CPC on its own, but the combined claims do. As an example, the combination of a claim for payment of Fr. 25,000.00 with a claim for payment of Fr. 10,000.00 may be mentioned. The admissibility of the objective accumulation of claims pursuant to Art. 90 CPC does not pose a problem here, since both claims fall within the subject-matter jurisdiction of the ordinary courts and within the scope of application of the simplified procedure pursuant to Art. 243 para. 1 CPC. However, the Federal Supreme Court held in BGE 142 III 788 E. 4.2.3 that Art. 93 CPC is also applicable when it comes to the determination of the subject-matter jurisdiction and the type of proceedings and that this provision may lead, inter alia, to a change of both the subject-matter jurisdiction and the type of proceedings in case of an objective accumulation of actions. According to Art. 93 para. 1 CPC, the amounts in dispute of the asserted claims are added together, unless they are mutually exclusive. This means for the above example that for the determination of the subject-matter jurisdiction and the type of proceedings an amount in dispute of CHF 35,000.00 has to be 121 assumed, which fulfills the amount in dispute requirement of Art. 6 para. 2 lit. b CPC and excludes the scope of application of the simplified procedure according to Art. 243 para. 1 CPC. Thus, the Commercial Court is factually competent for the objectively aggregated claims.

N. Counterclaim

122 Pursuant to Art. 224 para. 1 CPC, the defendant may raise a counterclaim in its statement of defence if the claim asserted is to be assessed according to the same type of proceedings as the main action. If the simplified type of procedure would apply to the counterclaim only because of its amount in dispute, it nevertheless remains admissible and the ordinary procedure applies together with the main action (Art. 224 para. 1^{bis} lit. a CPC).

123 Unlike, for example, the objective accumulation of actions under Art. 90 para. 1 lit. a CPC, Art. 224 CPC does not list the same subject-matter jurisdiction as a condition for the admissibility of the counterclaim. If the amount in dispute of the counterclaim exceeds the subject-matter jurisdiction of the main action court, the latter shall transfer the main action and the counterclaim to the court with the higher subject-matter jurisdiction (Art. 224 para. 2 CPC). It follows that the same subject-matter jurisdiction is not a prerequisite for the admissibility of a counterclaim if it is based solely on the value of the dispute. A counterclaim would therefore be admissible before the commercial court if it could not be qualified as a commercial dispute only because the amount in dispute was too low. This is not precluded by the simplified procedure pursuant to Art. 224 para. 1^{bis} lit. a CPC. On the other hand, a counterclaim before a court of ordinary jurisdiction which, due to the amount in dispute, falls within the jurisdiction of the commercial court is inadmissible. A transfer of the main action, for which the court of ordinary jurisdiction has subject-matter jurisdiction, to the commercial court within the meaning of Art. 224 para. 2 CPC cannot be justified solely on the grounds of the withdrawal of a cantonal appeal instance.

124 The Federal Supreme Court then ruled that a counterclaim is admissible before the Commercial Court if it is directed against a party who is not registered in the Commercial Register and who exercises his right of choice pursuant to Art. 6 para. 3 CPC in the main action proceedings, as long as there is a connection between the main action and the counterclaim. What applies if the main action and the counterclaim are not related to each other has not yet

been decided by the highest courts. However, the admissibility of such a counterclaim appears doubtful, especially since the main plaintiff exercises its right of choice under Art. 6 para. 3 CPC only with respect to a specific dispute and thus does not generally submit to the jurisdiction of the commercial court.

A counterclaim is likely to be inadmissible before the Commercial Court if it 125
does not concern the business activities of at least one party.

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COMMENTARY ON

Art. 52 CPC

A commentary by Lorenz Sieber

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Title 3 Procedural Principles and Procedural Requirements

Chapter 1 Procedural Principles

Art. 52 Acting in good faith

[1] All those who participate in proceedings must act in good faith.

[2] Incorrect instructions on appellate remedies are effective in relation to all courts to the extent that they are advantageous to the party invoking them.

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I. THE PRINCIPLE OF GOOD FAITH (ART. 52 PARA. 1 CPC)

A. Fundamentals

1 Art. 52 para. 1 CPC requires all persons involved in civil proceedings to act "in good faith." The Civil Procedure Code thus incorporates the "fundamental requirement of the Swiss legal system" contained in Art. 2 para. 1 CC, according to which everyone must act accordingly in the exercise of their rights and in the fulfillment of their obligations. This **general legal principle** contains a "standard of fairness" and subjects "interpersonal relations to the ethical values of fairness, loyalty [...] and correctness [...]". Art. 52 para. 1 CPC thus takes up a legal concept whose roots go back to antiquity and which has an effect throughout the entire legal system. Against this background, the provision obliges all parties to the proceedings to behave in good faith and with mutual consideration.

B. Good faith in proceedings

1. Application to civil proceedings

2 The requirement to act in good faith contained in Art. 52 para. 1 CPC refers to civil proceedings as understood in Art. 1 CPC. The **reference to civil proceedings** already arises from the fact that the provision is contained in the procedural decree. Art. 52 para. 1 CPC also states that the "persons involved in the proceedings" must act in good faith. Even if the applicability of the principle enshrined in Art. 52 para. 1 CPC is thus limited to civil proceedings, it nevertheless covers them in their entirety. This is evident from its inclusion among the procedural principles (Art. 52-58 CPC), i.e. the "most important normative guidelines of civil procedure law" that characterize the nature of every (civil) proceeding. The reference in Art. 52 para. 1 CPC to civil proceedings has a variety of effects and must be borne in mind when the provision is being applied in specific cases.

2. Notes on the history of the provision

3 The application of the principle of good faith in civil proceedings has not always been recognized: For a long time, the Federal Supreme Court saw no need to apply Art. 2 CC in proceedings, in particular because, unlike substan-

tive legal relationships, proceedings could not be conducted in any other way than as provided for by exhaustive statutory provisions, the interests at stake were therefore recognizable in advance and weighed up in detail, and there was no scope for pursuing interests not recognized by law. However, the highest court considered it permissible to apply the provision as a subsidiary principle of cantonal (customary) law. In a groundbreaking essay from 1943, Max Guldener showed that the principle of good faith can play a valuable role in civil proceedings by preventing the abusive exercise of procedural rights, even if the chosen course of action is based on the wording of the law. He explained this clearly: “If private rights must be exercised in good faith, it cannot be permissible to use tactics that contradict this principle when asserting or defending such rights in court.” The Federal Supreme Court subsequently described Art. 2 CC as “a norm of general legal theory” which cannot be denied validity outside civil law, and recognized the principle of good faith as a general principle that also applies to procedural and debt enforcement law. However, insofar as civil procedure was regulated by the cantons, the Federal Supreme Court also assigned the requirement of good faith to cantonal law. Now that the federal government also has legislative competence in the area of civil procedure, the enactment of Art. 52 CPC clarifies that the principle of good faith also applies to federal law in the area of civil procedure law.

3. International aspects

4 The application of the principle of good faith in civil proceedings is also recognized internationally, as demonstrated by its inclusion in the **Unidroit Principles of Transnational Civil Procedure**. Article 11.1 reads as follows: “The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.” This requires the parties in particular “not [to] make a claim, defense, motion or other initiative or response that is not reasonably arguable in law and fact.”

C. Special connection or legally relevant relationship

5 The requirement of good faith governs the content of legal relationships and is linked to a special connection or legally relevant relationship between the parties concerned, within which the rights and obligations arising from the general principle unfold. This is no different in litigation than in other relationships; Art. 52 para. 1 CPC does not differ from Art. 2 para. 1 CC in this re-

spect. Accordingly, the Federal Supreme Court states in connection with the service of court documents: "According to case law, [...] it is only when a case is pending that a **procedural legal relationship** arises which obliges the parties to act in good faith [...]". This refers to the legal relationship existing between the parties and between the parties and the court from the beginning of the proceedings, to which the various rights and obligations of the parties can be assigned. Insofar as the persons involved in the procedural legal relationship are concerned, the requirement to act in good faith is therefore linked to this relationship.

6 In the context of civil proceedings and in relation to these, there are **other legally relevant relationships** which serve as a point of reference for the obligation to behave honestly and correctly under Art. 52 para. 1 CPC. These include, for example, the relationships arising from public law between the state and free legal representation or an expert witness, or the duty to give evidence arising from the law. With regard to these persons, the obligation to act in good faith is linked to these relationships.

II. ADDRESSEES OF THE NORM

7 According to Art. 52 para. 1 CPC, **all persons involved in the proceedings** must act in good faith. The wording of the law thus covers not only the parties and the court and its members, i.e. the judges and other court officials, but also all other parties involved in the proceedings, such as party representatives, interveners and third parties such as witnesses or experts. Nothing else can be inferred from the Italian ("tutte le persone che partecipano al procedimento") and French ("quiconque participe à la procédure") versions of the law. However, it can be inferred from the reference in Art. 52 para. 1 CPC to civil proceedings that the application of the provision presupposes a connection with those proceedings. Consequently, the requirement to act in good faith under the Civil Procedure Code can only apply insofar as actions directly related to the proceedings are at issue. Beyond that, for example with regard to the compensation of an expert, only the rights and obligations arising from the specific underlying relationship are decisive.

8 There are no grounds for further restricting the broadly formulated provision of Art. 52 para. 1 CPC: Although there are some doubts as to whether Art. 52 para. 1 CPC also applies to **third parties**, namely witnesses, experts, and translators who are only indirectly involved in the proceedings, these doubts

do not give rise to any further restrictions. Since they are not covered by the procedural legal relationship, the necessary connection for the application of the norm is lacking. However, as explained above, there are also legally relevant relationships with regard to these persons that require the application of Art. 52 para. 1 CPC. In this regard, it must be considered that these persons only participate in the civil proceedings in question (in whatever form) on the basis of these relationships.

III. NORMATIVE CONTENT

A. Specification of Art. 52 para. 1 CPC

1. Formation of case groups

The requirement to act in good faith, i.e. the obligation to conduct proceedings in a fair and correct manner and to show mutual consideration, is extremely vague and can be characterized as a general clause. It needs to be specified in each individual case, whereby Art. 1 para. 2 CC must be followed and rules must be established as the legislature would have done. Case law and doctrine have developed a number of **typical case groups** that specify the principle of good faith and can be used to resolve new cases. Before presenting some of these case groups, we will briefly discuss a few fundamental aspects that appear to be of particular importance for the specification of Art. 52 para. 1 CPC. We will also show how the general requirement to act in good faith relates to those legal provisions that already contain a specification of this requirement. 9

2. Consideration of procedural peculiarities

a. European Convention on Human Rights and Federal Constitution

Art. 6 no. 1 ECHR and Art. 29 para. 1 FC apply to court proceedings concerning civil claims. The procedural guarantees contained therein (including the guarantee of a fair trial and equal and fair treatment) and their constituent elements have various points of contact with the principle of good faith. These include, for example, the prohibition of excessive formalism and the requirement of expeditious proceedings. Insofar as the relationship between the court and a person involved in the proceedings is concerned, whether this is a party or another person involved in the proceedings, these guarantees must 10 therefore be taken into account when giving concrete form to Art. 52 para. 1 CPC. The court's duty to act in good faith also arises from Art. 9 FC.

b. Good faith in civil litigation

11 The Civil Procedure Code applies in particular to contentious civil matters (Art. 1 lit. a CPC). These include adversarial proceedings between at least two parties aimed at the final, permanent settlement of civil law relationships in the sense of a *res judicata*. Civil proceedings can therefore be understood as a procedure designed to achieve an authoritative determination of the existence and content of legal relationships between the parties. They serve to enforce their (subjective) rights. As is generally the case in legal transactions, and particularly when establishing their rights, the parties are also bound by the general standard of fairness and good faith when enforcing them. However, the parties to the proceedings are in dispute with each other and must therefore treat each other with a certain degree of mistrust. They cannot be expected to help the other party win the case; the principle of good faith does not prohibit procedural tactics or the implementation of a favorable litigation strategy. Furthermore, the parties have the fundamental right to invoke existing procedural rules and to insist on compliance with procedural formalities. These considerations must be taken into account when applying Art. 52 para. 1 CPC, insofar as the relationship between the parties to the proceedings is affected. As has been noted on several occasions, the principle of good faith must be applied even more **cautiously in proceedings than in substantive law**.

3. Good faith and prohibition of abuse of rights

12 As explained above, the Civil Procedure Code adopts the general principle for civil proceedings contained in Art. 2 CC. According to its wording, Art. 52 para. 1 CPC only incorporates the requirement to act in good faith under Art. 2 para. 1 CC. However, it is recognized that even in legal proceedings, the manifest abuse of a right does not enjoy legal protection, and Art. 52 para. 1 CPC therefore also encompasses the prohibition of abuse of rights under Art. 2 para. 2 CC. Art. 52 para. 1 CPC thus contains a **requirement of loyal** conduct and a **prohibition of disloyal** conduct.

4. Relationship to statutory provisions

a. General

Art. 52 para. 1 CPC contains a general legal principle that applies in addition to the individual statutory provisions. How this general principle **relates to the statutory provisions** in detail requires clarification. The Federal Supreme Court has already commented on this issue at an early stage: "The principle of good faith cannot take precedence over the principle of legality and give the judge the power to modify the law as he sees fit or to disregard it altogether [...]. In particular, reference to the principle of good faith does not allow the judge to introduce into law all kinds of social ethical postulates that the legislature did not intend to include. [...] Moreover, where the purpose of a legal provision is clearly defined or is absolute in nature, as is the case with rules of procedure, there is normally no scope for adaptation to individual cases on the grounds of good faith [...]." Accordingly, there is generally little scope in civil procedure law to deviate from a clear procedural rule on the grounds of breach of good faith or abuse of rights. The general clause in Art. 52 para. 1 CPC should therefore only be invoked if a specific act that is not subject to a special statutory provision must be classified as contrary to good faith. 13

In detail, it must be clarified **by interpreting** the relevant statutory provisions whether and to what extent the legislature has left room for recourse to good faith. The circumstances described above and the fact that the parties to the proceedings are in dispute with each other call for cautious application of the general principle. At the same time, the law itself provides in Art. 52 para. 1 CPC for the application of good faith in civil proceedings, which is why an overly restrictive application of the general principle is also not justified. This is all the more true given that the Code of Civil Procedure does not contain an exhaustive set of rules governing civil proceedings that would be capable of taking into account all the interests at stake in advance and precluding any need for a general requirement to act in good faith. 14

However, the principle of good faith does not only have an effect as a corrective to individual legal provisions. Rather, it must already be taken into account **in the context of the (teleological) interpretation** of the individual provisions of the procedural decree, so that these can be applied without contradicting the general principle of law. 15

b. Examples of legal concretizations of the principle of good faith

16 In detail, reference can be made, for example, to the following **concrete examples** of the principle of good faith **in the Code of Civil Procedure**:

17 According to Art. 49 para. 1 CPC, a party wishing to challenge a member of the court must submit a corresponding request to the court without delay as soon as it becomes aware of the grounds for recusal.

18 Art. 56 CPC obliges the court to give a party the opportunity to clarify and supplement its submissions by asking appropriate questions if they are unclear, contradictory, vague or obviously incomplete (so-called **judicial duty to ask questions**).

19 According to Art. 128 para. 3 CPC, the parties may be punished with a fine for **malicious or frivolous litigation**.

20 Art. 132 para. 1 and 2 CPC stipulate that defective, illegible, improper, incomprehensible or verbose submissions must be corrected within a judicial grace period. According to Art. 132 para. 3 CPC, however, **querulous and abusive submissions** are returned without further ado.

21 According to Art. 134 CPC, the **summons** must be sent at least ten days before the date of appearance, unless the law provides otherwise.

22 If **acceptance of a court document** is refused, it shall nevertheless be deemed to have been served on the date of refusal if it was delivered in person, in accordance with Art. 138 para. 3 lit. b CPC.

23 Pursuant to Art. 145 para. 3 CPC, the court **shall inform** the parties ex officio of the **exceptions to the suspension of time limits**.

24 Art. 148 CPC governs the **restoration of missed time limits**.

25 Pursuant to Art. 160 CPC, the parties have a **duty to cooperate in the taking of evidence**. This applies in particular if the opposing party who has to prove a fact is in need of evidence and the party who does not bear the burden of proof is closer to proving it, as well as in connection with the proof of negative facts. The court shall take into account the unjustified refusal to cooperate in the taking of evidence in its assessment of the evidence in accordance with Art. 164 CPC.

B. On the individual case groups

1. Preliminary remarks

Below, we will present some **case groups** recognized in doctrine and case law that constitute conduct contrary to good faith in court proceedings. In light of the above, these are to be classified according to whether the relationship between the parties, the relationship between the parties and the court, or the relationship with another party to the proceedings is at issue, and whether the requirement to act in good faith or the prohibition of abuse of rights applies. This presentation is not exhaustive. Rather, the recognized case groups can serve to clarify Art. 52 para. 1 CPC in other constellations, namely those involving addressees of norms who are outside the procedural legal relationship. In this last case, however, it has been rightly pointed out that the duties of conduct applicable to these persons are likely to be regulated elsewhere by law. 26

2. The relationship between the parties

a. Duty to act in good faith

It follows from Art. 52 para. 1 CPC that (unilateral and multilateral) **procedural acts must be interpreted in good faith**. Accordingly, the subjective intention of the party is not decisive for the understanding of a procedural act, but rather how it could objectively be understood taking into account all circumstances. Obvious errors such as the incorrect designation of a legal remedy or the opposing party, calculation errors or an erroneous or unfortunate choice of words are not detrimental. In particular, if a request is unclear or incomplete, the court may be required under Art. 56 CPC to give a party the opportunity to clarify its submission by asking appropriate questions. An inadmissible or invalid procedural act must also be reinterpreted as a valid procedural act serving the same purpose if the former contains all the elements of the latter and the intention of the party to perform the other procedural act in the event of an error in the first is apparent. Furthermore, consideration may be given to whether a submission has been made by a lay person. In particular, a party with no legal knowledge cannot be expected to use legal terms at all or in the sense customary in professional circles. Procedural requests must not be interpreted literally without considering the meaning to be attributed to them. They must always be read in the light of the grounds given. 27

28 The parties have a duty of truthfulness in good faith insofar as they may not deliberately make untrue factual assertions or knowingly dispute true facts. A deliberately untrue assertion or dispute shall not be taken into account in the proceedings, and even a truthful statement made by both parties shall not be binding on the court. However, this does not mean that only those assertions are admissible which the party knows to be true and that only what is known to be untrue may be disputed. Rather, mere conjectures are admissible provided that they are not made entirely without tangible evidence. Such conjectures may even be required in certain circumstances. It is permissible to assert a fact that is known to be untrue if it only has a negative effect on one's own position. There is no obligation to present facts that are unfavorable to one's own position or facts that contradict one's own presentation of the facts. The obligation of the party that has not provided evidence to substantiate the opposing party's assertions is then derived in part from the obligation to tell the truth. Insofar as a party is obliged to cooperate in the taking of evidence, is questioned by name in the context of a party examination or a statement of evidence, the duty to tell the truth already arises from Art. 160 para. 1 lit. a, Art. 191 para. 1 and Art. 192 para. 1 CPC.

29 Finally, the principle of good faith gives rise to the requirement of **good faith in proceedings**. Accordingly, if one party raises the other party's legitimate expectations, it must fulfill them. However, the expectations are only legitimate if the other party was not aware of the actual circumstances and could not have been aware of them even with the attention required in the specific case. For example, a party must be bound by its statements from which the other party may, in good faith, conclude that it has taken up residence. The commitment to the legal appearance created by the declarations is made without regard to any deviating internal intention of the party and with corresponding consequences for the local jurisdiction of the court. However, it must always be critically examined to what extent a corresponding trust is justified in the individual case in view of the special features of the (contentious) civil proceedings.

b. Prohibition of abuse of rights

30 The prohibition of abuse of rights contains a prohibition on the abusive creation or exploitation of procedural legal situations. If one party obtains an advantageous procedural position vis-à-vis the other party by abusive means,

this is not recognized. For example, a party acts abusively if it first prevents the other party from providing evidence and then claims that the other party has failed to provide evidence. In this case, the party must be denied the right to present the factual assertion that was prevented from being proven as disputed. Furthermore, an action against several co-litigants is abusive if its sole purpose is to circumvent the ordinary place of jurisdiction of one of the co-litigants. The prohibition of abuse of rights may also be violated by asserting a divisible claim in several partial actions in order to avoid a certain type of procedure or jurisdiction.

There is no protection against the **abuse of procedural powers**. The legal 31
consequences that would normally apply must be denied in the event of abusive conduct. The exercise of rights in a useless, vexatious, or inappropriate manner constitutes abuse. This includes, for example, the malicious or wanton filing of a futile lawsuit or the lodging of an appeal or legal remedy that does not pursue any legitimate interests but rather other purposes, such as delaying the proceedings or annoying the opposing party. On the other hand, it is not abusive to defend a decision of the lower court that was in your favor in appeal proceedings. It is vexatious to file a large number of submissions that are grossly disproportionate to the interests pursued.

Finally, abuse of rights can be based on **contradictory behavior** on the part 32
of the parties. It is abusive to raise formal objections only when the outcome of the proceedings is unfavorable, even though they could have been raised earlier. New facts must also be brought into the proceedings as soon as possible and may not be withheld in order to be used later in the proceedings to seek the reversal of an unfavorable decision. A party must accept the accusation of abuse of rights if it accuses the court of inadmissibly rejecting evidence or failing to take evidence, even though it had previously agreed to the admission of the former or waived the latter in the course of the proceedings. A party acts inconsistently if its conduct is incompatible with its previous conduct in proceedings against the same opposing party and is aimed at obtaining an unjustified advantage. It is also inadmissible to take contradictory positions in the same proceedings. A request for super-provisional measures may be contrary to good faith if it is used to wait until a particular urgency arises. The prohibition of abuse of rights requires the parties to behave consistently during the proceedings. However, it must always be borne in mind that the parties are facing each other in a contentious civil proceeding, that they cannot

therefore be expected to do more than comply with a certain standard of fairness, and that the prohibition of abuse of rights cannot override a prior statutory provision.

3. The relationship between the court and the parties

a. Duty to act in good faith

33 The court is bound to the truth; it must not lie to or deceive the parties to the proceedings by providing them with information that it knows to be false. The parties are generally protected against (erroneous) **incorrect information**, whereby reference can be made to the criteria developed in relation to Art. 9 FC. A party's reliance on information provided by the court on a specific issue arising in the course of proceedings is therefore worthy of protection if it could not readily recognize the inaccuracy of the information and if, relying on that information, it has made arrangements which it cannot reverse without disadvantage. The claim to protection of legitimate expectations does not apply if the legal order has changed between the time the information was provided and the realization of the facts, or if there are overriding interests in the correct application of the law. Legitimate expectations can only arise with regard to procedural issues, but not with regard to issues of substantive law, the validity of which is to be clarified by the proceedings. The parties cannot rely on the court to provide binding information other than through its judgment. Of course, the court can establish legitimate expectations not only through (incorrect) information, which does, however, constitute a significant group of cases, but also through its overall conduct. One example is a case in which a (procedural) order gives the parties the impression that the court will act in a certain way. This also takes account of the principle of trust in the relationship between the court and the parties.

34 A party may not suffer any disadvantage from a **defect in the opening of proceedings** or **incorrect information on the right of appeal**. The case group of incorrect information on the right of appeal has been expressly regulated by Art. 52 para. 2 CPC in the context of the recent revision of the Code of Civil Procedure. The aforementioned constellations are therefore discussed below in n. 52 ff. in the discussion of this provision.

35 The principle of good faith continues to have an effect on **changes in case law**: it does not preclude a change in practice based on objective reasons, and

the principle applies that the new case law is immediately applicable, i.e., also to pending proceedings. However, if a change in practice affects the conditions for lodging an appeal, in particular time limits and formal requirements, and if its immediate application would be disadvantageous to the party concerned, it must in principle be announced in advance in accordance with good faith. In the proceedings that gave rise to the change in practice, the old practice therefore remains decisive.

Finally, the court also violates the principle of good faith if it does not issue its 36
decision within a reasonable time frame given the nature of the matter and the circumstances of the individual case, thereby violating the **prohibition of undue delay** or the **principle of expeditious proceedings**. However, this primarily concerns the scope of application of Art. 6 no. 1 ECHR and Art. 29 para. 1 FC, which is why this issue will not be discussed further here.

b. Prohibition of abuse of rights

Although the court is required to apply the applicable procedural rules and 37
formal requirements in order to ensure the orderly conduct of proceedings and thus a constitutional procedure, it must not do so with excessive strictness. The **prohibition of excessive formalism** constitutes the limit of the formal strictness to be enforced in proceedings. This not only applies to the normative content of the prohibition of denial of justice under Art. 6 no. 1 ECHR and Art. 29 para. 1 FC, but also has a close connection to the requirement to act in good faith. The court acts abusively if it falls into excessive formalism. This is the case if rigorous formal requirements are imposed on proceedings without the strictness being objectively justified, if the court applies formal requirements with excessive severity or imposes excessive requirements on legal documents, and if it unlawfully prevents the person seeking justice from pursuing legal remedies. This means that the court must, for example, interpret the requests made in the light of the grounds given in the legal document and, where applicable, the contested decision, or draw the parties' attention to deficiencies in legal documents and give them the opportunity to remedy them. An incorrectly addressed or insufficiently stamped submission is also sufficient for compliance with the deadline, provided that the party remedies the defect after it has been returned by the post office (after the deadline has expired).

38 Like the parties, the court also acts abusively if it **behaves inconsistently**. For example, a court commits an abuse of law if it sends a decision to an address that is no longer current and subsequently accuses the party of refusing to accept it, even though it has been informed of the party's new place of residence. Furthermore, the court can be accused of a breach of good faith if it notifies a party of a decision during their vacation, even though it had previously assured them that it would refrain from making any deliveries that would trigger a deadline during this period. The Federal Supreme Court classified as unusual, but not contrary to good faith, the fact that a court, after the opposing party had been given the opportunity to comment on the conditions for the proceedings, first set a deadline for a written response to a claim, but then withdrew this deadline a few days later and did not admit the claim.

39 Finally, the parties must not behave disloyally or abusively toward the court. Thus, a party requesting legal aid cannot, in principle, be held against it that it is responsible for its own indigence. However, if it has foregone income or disposed of certain assets specifically in view of the proceedings to be conducted, this conduct is not protected and the legal benefit may be denied.

4. Other parties involved

40 The duty to tell the truth applies not only to the parties and the court, but also to other parties involved in proceedings. This duty is often the subject of separate statutory provisions. In this regard, reference should be made in particular to Art. 171 para. 1 CPC for witnesses and Art. 184 para. 1 CPC for expert witnesses. Here too, however, it follows from the principle of good faith that untrue statements made in court proceedings must be disregarded.

IV. LEGAL CONSEQUENCES OF VIOLATING THE DUTY TO ACT IN GOOD FAITH

A. General: Legal consequences in individual cases

41 The duty to act in good faith generally requires, as explained above, that legitimate expectations be fulfilled and that any legal effect be denied to conduct that is contrary to good faith. What this means in detail can only be determined by looking at the **specific conduct in question**. The legal consequences of violating the legal principle are therefore determined according to

the case groups developed for its application. For details, reference can be made to the explanations provided in the discussion of each of these case groups.

B. (Civil) procedural sanctions

The court may take breach of good faith in the proceedings into account when allocating the costs of the proceedings. Such conduct may justify a departure from the general principles of allocation under Art. 107 para. 1 lit. f CPC. Furthermore, the court has the option of imposing unnecessary costs of the proceedings on the party that caused them under Art. 108 CPC. However, recourse to these provisions is only necessary where the breach of good faith does not in any case lead to the loss of the case, namely because no action or appeal is brought and the party acting in breach of good faith is therefore already liable for the costs under Art. 106 CPC. This applies, for example, in cases where the party that ultimately prevails can be accused of individual violations of the principle of good faith. In the event of malicious or frivolous litigation, the court costs may also be imposed on the party concerned in proceedings for which no fees are payable, in accordance with Art. 115 para. 1 CPC. According to Art. 119 para. 6 CPC, this also applies in particular to proceedings for legal aid. On the other hand, pursuant to Art. 107 para. 1 lit. b CPC, no costs shall be imposed on a party despite losing the case if it was prompted to bring the action in good faith. This is particularly the case if a submission is declared inadmissible due to a change in practice (which, as an exception, does not have to be announced in advance). 42

Access to the courts should not be granted for claims that are made in bad faith or frivolously, but should only be open for the pursuit of interests worthy of protection. There is therefore no entitlement to free legal aid for proceedings conducted in bad faith, and any legal benefit granted in such cases may be withdrawn (even retroactively). 43

In the event of malicious or frivolous litigation, which is also contrary to good faith, the court then has the option of imposing a fine on the party or its representative in accordance with Art. 128 para. 3 CPC. This is a disciplinary measure that can be taken in addition to imposing the costs of the proceedings. 44

C. Criminal sanctions

45 Conduct contrary to good faith may also be relevant under criminal law. Under Art. 306 para. 1 and Art. 307 para. 1 SCC, a party who makes a false statement of evidence after being warned by the court to tell the truth, as well as third parties indirectly involved in the proceedings (witnesses, experts, translators, interpreters) who make false statements, give false findings or expert opinions, or translate incorrectly, may be punished with imprisonment or a fine. interpreters) who make false statements on the matter, give a false finding or opinion, or translate incorrectly may be punished with imprisonment or a fine. A member of the court may be liable to prosecution for abuse of office under Art. 312 SCC. In individual cases, document forgery under Art. 251 SCC may also be considered. A deliberately false assertion by a party in the proceedings may then constitute procedural fraud under Art. 146 SCC. Litigation fraud is the fraudulent deception of the court by means of untrue factual assertions by the parties to the proceedings with the aim of obtaining a decision that is (materially unjustified) detrimental to the assets of a party to the proceedings or a third party. The criminal prosecution of a party is not precluded by the fact that an administrative fine has already been imposed on it under Art. 128 para. 3 CPC, which is not a criminal measure.

D. Damages

46 The filing of a lawsuit, the exercise of legal remedies or appeals, and the submission of procedural motions are generally lawful even if the action in question ultimately proves unsuccessful. Everyone is entitled to seek legal protection for alleged claims, provided they act in good faith. The opposing party must accept any disadvantages arising from this, subject to the consequences of compensation under Art. 106 ff. CPC. If, on the other hand, the state proceedings are abused or conducted in bad faith or maliciously, this may give rise to a claim for compensation under Art. 41 CO. This includes, in particular, the initiation of obviously futile legal proceedings, the bringing of a lawsuit without a legal interest in doing so, the vexatious conduct of proceedings solely for the purpose of harming the other party, or the initiation of proceedings contrary to a clear agreement or for the pursuit of third-party procedural objectives (e.g., delay).

V. ENFORCEMENT OF NORMS

A. General consequences

1. Proceedings before the court of first instance

The court applies the law ex officio in accordance with Art. 57 CPC. Accordingly, it must take into account the principle of acting in good faith ex officio, provided that the necessary factual requirements are presented in the manner provided for in the Code of Civil Procedure and are established. No special objection is required. According to Art. 8 CC and Art. 55 para. 1 CPC, it is normally incumbent on the party asserting abusive conduct on the part of the other party to assert and prove the relevant facts. This applies in any case if the alleged breach of good faith results from an act of the opposing party that is not directly related to the proceedings, such as in the case of obstruction of evidence or abuse of procedural powers. If, on the other hand, the alleged breach of the principle of good faith is based on conduct of the opposing party in the proceedings that is directly apparent to the court, e.g., in the case of contradictory conduct, the relevant facts are to be assumed to be known to the court pursuant to Art. 151 CPC and need neither be asserted nor proven. The court is required to take the relevant facts into account ex officio. The same applies where the conduct of the court itself is in question or where the court is required to investigate the facts ex officio pursuant to Art. 296 para. 1 CPC. 47

2. Appeal proceedings

If, in the opinion of one of the parties, the court of first instance has incorrectly applied Art. 52 CPC or Art. 9 or 29 para. 1 FC, that party may challenge the corresponding decision by means of an appeal (Art. 308 ff. CPC) or a complaint (Art. 319 ff. CPC), provided that the requirements for bringing the respective legal remedy are met. However, an interest worthy of protection in the legal remedy under Art. 59 para. 2 lit. a CPC only exists if the error alleged against the court of first instance is likely to lead to the contested decision being amended or set aside. This must be demonstrated in the statement of grounds. In principle, i.e. at least in cases of doubt, it must therefore be demonstrated why the violation of the principle of good faith asserted in the appeal proceedings would have led to a different outcome of the proceedings. 48

49 A violation of Art. 52 CPC may be challenged before the Federal Supreme Court by means of a civil appeal under Art. 72 ff. BGG, and the violation of constitutional rights such as Art. 9 or 29 para. 1 FC can be asserted with this or, if it is not available in the individual case, with a subsidiary constitutional complaint under Art. 113 ff. BGG. However, it is not permissible to allege a violation of the civil procedure code if only the subsidiary constitutional complaint is available. Here too, it should be noted that there is no legitimate or legally protected interest in answering purely theoretical or abstract questions. In case of doubt, it must therefore also be demonstrated here to what extent the alleged breach of good faith is likely to affect the outcome of the proceedings. Here too, the legal remedy must continue to meet the general formal requirements and, in particular, must be sufficiently substantiated.

B. Further sanctions

50 As a rule, in its final decision (Art. 104 para. 1 CPC), the court shall determine the court costs ex officio in accordance with the relevant cantonal tariffs (Art. 96 CPC) and applying the principles set out above (Art. 105 para. 1 CPC). It shall only award compensation to the parties upon request, which need not be quantified (Art. 105 para. 2 CPC). If the court allocates the costs of the proceedings in accordance with the usual principles, i.e. in particular in accordance with the principle of the prevailing and losing party pursuant to Art. 106 para. 1 CPC, it is not necessary to hear the parties on the question of costs according to case law. If the court wishes to deviate from these principles because one of the parties has acted in bad faith, it must therefore grant that party a legal hearing. The decision on costs may be challenged together with the main issue and is subject to the same legal remedies as the latter. Pursuant to Art. 110 CPC, the decision on costs is independently appealable. The decision on costs may also be challenged together with the main issue before the Federal Supreme Court. If only the costs of the cantonal proceedings are disputed, a distinction must be made: if the higher cantonal court also ruled on the merits of the case, only a minor point of this decision is challenged with regard to the costs before the Federal Supreme Court. The legal remedy is governed by that of the main issue and the legal remedy available there is available. If, on the other hand, only the costs were disputed in the cantonal appeal or complaint proceedings, this is the only decisive factor and, depending on the value in dispute and whether a legal issue of fundamental importance arises, an appeal in civil matters or a subsidiary constitutional complaint

is available. The value in dispute is determined in accordance with Art. 51 para. 1 lit. a BGG based on the costs disputed in the cantonal proceedings.

The court imposes administrative fines pursuant to Art. 128 para. 3 CPC as part of its conduct of the proceedings (Art. 124 para. 1 CPC) in disciplinary proceedings. It decides ex officio whether to impose an administrative fine in a specific case. The opposing party in the civil proceedings is not directly involved in the disciplinary proceedings and has no right to make submissions in these proceedings. The right of the person concerned to be heard must be upheld. The imposition of an administrative fine may be challenged in accordance with Art. 128 para. 4 CPC by means of an appeal under Art. 319 ff. CPC and, depending on the case, by means of an appeal in civil matters or a subsidiary constitutional complaint. It should only be mentioned in passing that criminal sanctions must be imposed in the relevant criminal proceedings and that damages must be claimed in civil proceedings. 51

VI. DEFECTS IN THE OPENING OF PROCEEDINGS AND INCORRECT INFORMATION ON LEGAL REMEDIES (ART. 52 PARA. 2 CPC)

As explained above, it follows from the principle of good faith that a party 52 may not suffer any disadvantage as a result of a defect in the opening of proceedings and, in particular, incorrect information on legal remedies. In the event of **incorrect information on legal remedies**, the appellate court is therefore bound by the trust that the lower court has created in the party through the incorrect information. According to the case law applicable until the revision of the Code of Civil Procedure on March 17, 2023, the party whose representative was not aware of the defect and could not have been expected to be aware of it even with due care enjoyed protection of legitimate expectations. The degree of attention that had to be exercised was determined by the circumstances of the individual case. A party who was already aware of the defect when consulting the relevant procedural provisions could not rely on incorrect information on the right of appeal. However, it was not necessary to consult the relevant case law and literature in addition to the text of the law. A party not represented by a lawyer could only be expected to consult the law if it had sufficient knowledge to find the relevant provisions and, if necessary, interpret them. Lawyers had more to do and were required to at least roughly check the information on legal remedies. Depending on the circumstances, the party's legitimate expectations could be met by extending the time limit for appeal or by referring the matter to the competent authority. However, incorrect information on legal remedies did not create a legal remedy not provided for by law. According to the same principles, a party acting with due care could not be disadvantaged by further **procedural defects**, such as the delivery of an order to a third party who was not entitled to receive it. However, both procedural defects and incorrect information on legal remedies only had an effect if the party was actually misled and disadvantaged. If, despite the defective service, the party was able to take note of the order or lodge an appeal in good time, it could not invoke the procedural error.

53 The Federal Assembly considered this case law on incorrect information on legal remedies to be too strict or even excessively formalistic, which is why, with the revision of the Civil Procedure Code of March 17, 2023 (in force since January 1, 2025), it incorporated a statutory provision in Art. 52 para. 2 CPC. The wording of the provision included in the law ("Incorrect information on legal remedies is effective before all courts to the extent that it is to the advantage of the party invoking it") is, of course, very broad and its application raises various questions. Chevalier/Boog point out, for example, that an appeal instruction may refer to a legal remedy not provided for by law or contain incorrect information regarding the suspensive effect of the legal remedy. In practice, solutions will have to be found here, whereby an application of the provision that restricts its broad wording would appear to be appropriate. Reference can be made to the following in this regard:

54 During parliamentary deliberations, it was pointed out on several occasions that the application of procedural provisions is a matter for the court and that the parties may rely on corresponding information regardless of whether they are represented by a lawyer or not. Thus, due to the previous case law, which was considered too strict, the party should not bear the risk of a decision not to hear the case if the higher court interprets a time limit differently from the lower court. Apart from the question of the extent to which it serves the interests of laypersons to allow (professional) legal representatives to benefit from the new provision, it appears that the legislature's primary intention in revising the law was to correct previous case law in the sense that a party (or its representative) cannot be expected to exercise an excessive degree of care when dealing with incorrect information on legal remedies. The new regula-

tion is therefore unlikely to represent a complete departure from the principles that have applied to date. For example, it will still not be possible for a court to create a legal remedy unknown to the Code of Civil Procedure by providing incorrect information. Furthermore, Art. 52 para. 2 CPC will only apply to information provided by the court that is an essential part of the information on legal remedies, such as the name of the competent court of appeal or the time limit for lodging an appeal. This must apply all the more so as, in civil proceedings, an advantage granted to one party in good faith often has a negative impact on the other party. However, parliamentarians were also aware of this problem. As regards the care to be exercised in dealing with incorrect information on legal remedies, even under the new rules, gross procedural negligence on the part of the party or its representative will not be protected by law. Parliament emphasized that no one should be able to rely on obviously absurd ("complètement loufoque") information on legal remedies that provides for a time limit of 3,000 days. Nor is the new provision intended to allow "de faire tout et n'importe quoi ou de récompenser les mauvais avocats" (doing anything and everything or rewarding bad lawyers). Any other solution would be difficult to reconcile with the fact that any legal provision must strive to ensure consistency in the existing system of values. This consistency would not be guaranteed if Art. 52 para. 2 CPC allowed a party, in the event of incorrect information on the right of appeal, to behave in a manner that could itself be classified as contrary to good faith or abusive and would thus contradict the principle enshrined in Art. 52 para. 1 CPC. Furthermore, it must still be required that the incorrect information on the right of appeal has actually had an effect. Where this is not the case, i.e. where an appeal was lodged in time despite incorrect information, there is no need to protect the party concerned. Finally, information on the right of appeal has no effect where it deviates from the provisions of the Code of Civil Procedure to the detriment of the party.

According to its wording, Art. 52 para. 2 CPC only concerns cases of incorrect 55
information on legal remedies. However, the provision is likely to also apply to the more general case of procedural defects, which is largely governed by the same principles, and therefore there is no justification for treating them differently.

Art. 407f CPC does not mention Art. 52 para. 2 CPC as one of the provisions 56
that are (directly) applicable to proceedings already pending when the revi-

sion of the Civil Procedure Code of March 17, 2023, enters into force. This means that, with regard to this provision, the general principle remains that proceedings which were already pending on January 1, 2025, will be concluded before the court concerned in accordance with the previous law.

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COMMENTARY ON

Art. 86 CPC

A commentary by Adrienne Hennemann

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Art. 86 Partial action

If a claim is divisible, an action for part of the claim may be brought.

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I. BACKGROUND

Even before the enactment of the Swiss Code of Civil Procedure, the right to bring a partial action in Switzerland was recognized by the Federal Supreme Court as an outgrowth of the creditor's substantive right to demand only partial payment from the debtor pursuant to Art. 69 para. 2 CO. The doctrine, on the other hand, has always regarded the right to bring a partial action as a consequence of the principle of disposition. The principle of disposition states that the court cannot award a party more or anything else than it demands and not less than is recognized by the other party (Art. 58 para. 1 CPC). The plaintiff can therefore, but does not have to, sue for all claims to which it is entitled on the basis of the facts of the case. The partial right of action was codified without discussion in Art. 86 CPC. In the dispatch on the CPC, the legislator also endorsed the doctrine that the holder of a divisible right was free to sue for only a part of it in accordance with the procedural maxim of disposition, which was no longer regulated at cantonal level. In the meantime, the Federal Supreme Court has agreed with the allocation to procedural law. 1

II. CURRENT DEVELOPMENTS

The case law on partial actions has developed rapidly in recent years and has given shape to the effects of partial actions and their procedural classification in relation to other provisions. Older commentaries and doctrinal opinions should therefore be studied against the background of the more recent case law. The forthcoming revision of the CPC is unlikely to have any impact on case law in the area of partial actions. Art. 224 para. 1bis E-CPC merely states what already applies based on the case law of the Federal Supreme Court: in future, a counterclaim should be possible in two cases that transcend the proceedings. Firstly, if the simplified procedure is only applicable due to the value in dispute, and secondly, in the special case of a negative declaratory counterclaim. If the main action is a partial action, the litigation costs are calculated exclusively on the basis of the value in dispute of the main action, i.e. the partial action, and no longer the negative declaratory counterclaim, in accordance with Art. 94 para. 3 CPC. In future, this provision will provide the party bringing the partial action with the advantage of obtaining a certain degree of certainty regarding the expected cost consequences of their action, as the cost consequences are no longer dependent on the conduct of the defendant. The 2 legislator is thus not only accommodating the party bringing a partial action, but also the party bringing an action for a declaratory judgment in terms of costs. The "victims" of this new provision are the cantons, whose courts will no longer be able to increase court costs in future because a declaratory counterclaim has been brought, despite additional work. The new provision also means that party compensation will remain lower than before, even in the case of a declaratory counterclaim.

III. SUBJECT MATTER

A. General

3 The CPC recognizes three types of action: an action for performance, an action for a declaratory judgment and an action for a declaratory judgment. The partial action is not a separate type of action, but a variation of the action for performance, as is the case with the unquantified action for a claim (Art. 85 CPC) or the objective accumulation of actions (Art. 90 CPC). A partial action does not lead to a partial judgment (as is often the case for the question of jurisdiction, for example), but to a final judgment. For the legal effect of this final judgment, see below, V.H. It is not the action that is divided, but the claim. It is therefore a "partial claim action".

4 Art. 86 CPC does not stipulate any specific concepts, but draws the consequences from other norms. Thus, Art. 86 CPC initially implicitly confirms what already follows from substantive res judicata: An action on the unadjudicated part of a matter in dispute is not excluded because another part has already been adjudicated in a partial action. Similarly, the divisibility of the claim - the only requirement set out in Art. 86 CPC - does not follow from Art. 86 CPC, but from substantive law. It is therefore not the admissibility of a partial action that requires a statutory provision; rather, the inadmissibility of a partial action would have required an express provision.

B. Terminology

5 The subject matter of the dispute is important under procedural law. It influences, among other things, the question of whether an action is cumulative, whether an amendment to the action or the filing of a counterclaim is necessary, and whether a new action is precluded by the substantive legal force of the first decision. If several matters in dispute are asserted together, there is

an objective accumulation of claims and the term partial action should not be used in my opinion. If, on the other hand, the asserted claim is based on one factual matter, a partial action exists.

A distinction is made between genuine and non-genuine partial actions. A genuine partial action differs only in quantitative terms from the overall claim asserted. Only part of a claim is claimed. For example, CHF 10,000 is claimed from a total claim of CHF 100,000 from a purchase price claim. Another example is the assertion of a quantitative part of a total claim arising from a personal injury. This is because several different damage items and compensation from the same accident constitute a single life event. 6

The non-genuine partial action is an individualized claim that can be separated from other claims derived from the same fact of life either in terms of time (e.g. different due dates) or on the basis of the legal grounds. However, the formulation used by the Federal Supreme Court of the individualizable claim of the total damage provides little clarity. The Federal Supreme Court assumed a non-genuine partial claim if only individual, precisely defined claims are asserted from several claims (e.g. only some but not all supplementary claims from a work contract), but these are asserted in full. 7

It is therefore possible to limit the subject matter of a dispute not only by means of a legal request (e.g. only half of CHF 100,000, which the substantive legal basis would allow (then a genuine partial action)), but also by limiting the examination to individual substantive legal bases of the claim. For example, only non-contractual claims can be asserted in the adhesion proceedings, but not contractual claims, as a result of which the latter remain without legal force. In both cases, the remaining subject matter of the dispute is outside of the facts sued for and a separate assessment remains possible at a later date. If, for example, a plaintiff has already obtained a judgment by means of a partial action, whereby the damage item "material damage to a watch" was not asserted, it can still claim this material damage at a later date. This is simply a different matter, even if, according to the terminology of the Federal Supreme Court, it concerns the same matter in dispute from the "rear-end collision". In the light of the Federal Supreme Court's case law, however, care should be taken to explain this in detail in the statement of claim so as not to run the risk of the Federal Supreme Court assuming that the matter has already been adjudicated. 8

9 The proximity to the objective accumulation of claims, which, however, as mentioned, comprises two separate matters in dispute, is striking. In the case of a non-genuine partial action, in my opinion, several independent individual claims are involved, i.e. different matters in dispute, and thus full actions.

10 The open wording of Art. 86 CPC makes it possible to distinguish between genuine and non-genuine partial actions. However, the tendency of the Federal Supreme Court seems to be to dispense with such terms, which are not very clear: When asserting a total of three claims regarding overtime compensation for three different periods of time, whereby only the compensation for one year was claimed, the lower court assumed different periods and thus different life circumstances and assumed a non-genuine partial action. The Federal Supreme Court resolved the case by stating that Art. 224 para. 1 CPC applies to all partial actions, whether genuine or non-genuine. Whether the compensation for the overtime allegedly worked during a certain calendar year constituted an independent subject matter of the dispute was irrelevant. The Federal Supreme Court also left open the question of whether an action for damages arising from a road traffic accident (loss of earnings) is a genuine or non-genuine partial action. Recently, the Federal Supreme Court - in contrast to the lower court, which spoke of a genuine partial claim - has used the term "part of a claim limited in amount"; this in distinction to individual damage items. The term is also no longer used in further decisions of the Federal Supreme Court.

11 The distinction between genuine and non-genuine partial claims plays no role in determining the subject matter of the dispute. In my opinion, the terms genuine and non-genuine partial action should be dispensed with. This is for two reasons: Firstly, it is irrelevant for the court hearing a partial action whether it is a genuine or non-genuine partial action. The court examines what is submitted to it. Secondly, the blocking effect of the substantive legal force is assessed on the basis of the decision issued on the partial action. The only relevant factor here is what the subject matter of the dispute was, and not whether a genuine or non-genuine partial action was to be assessed. Sometimes (also without added value) the term open or concealed partial action is also used, depending on whether the plaintiff makes it clear in the partial action or in the proceedings that not all claims arising from the facts of the case are being asserted with the legal request or not.

C. Delimitation

The partial action must first be distinguished from the unquantified claim pursuant to Art. 85 CPC. In this case, the plaintiff basically asserts the entire claim, but cannot quantify the amount. The provisional minimum amount in dispute does not constitute an upper limit. In contrast, with a partial action, only a specific amount is deliberately claimed. It is therefore not possible for the court to award more to the plaintiff on its own initiative than the plaintiff is claiming with its partial action (Art. 58 para. 1 CPC). 12

A partial assignment is also not to be confused with a partial action. The assignment of part of a claim that has not yet been brought before the court regularly leads to two independent claims with independent fates. They can therefore also be sued for independently. 13

The objective accumulation of claims concerns the assertion of claims based on several different facts of life. The partial action in the form of a genuine partial action comprises only one fact of life. However, there is also talk of a partial action in the form of an objective accumulation of actions. In my opinion, this should be rejected, as it is then not a partial action, but rather various matters in dispute in the form of objective accumulations of actions. 14

The partial action must also be distinguished from the right of rectification. Pursuant to Art. 46 para. 2 CO, the court may reserve the right to amend the judgment for two years from the date of the judgment in the case of damages for personal injury. This reservation is aimed at the possibility of amending a judgment. This is therefore not a (temporary) statutory case of the reservation of the right to bring a subsequent action. 15

D. On the (abandoned) inadmissibility of the alternative objective accumulation of claims in the context of bringing a partial action

In several decisions, the Federal Supreme Court has commented on the inadmissibility of the alternative objective accumulation of claims in order to finally change its practice. The decisions issued prior to the change in practice are still enlightening, as they show when the Federal Supreme Court assumes that there are facts of life (see also III. B above). 16

The Federal Supreme Court had initially considered that a partial claim directed at three annual bonuses was inadmissible. The total amount was CHF 17

480,000 and CHF 30,000 was claimed. The plaintiff had not specified the order in which it wanted to assert the three claims. Legal claims that are directed towards monetary compensation are not individualized on their own and can therefore, as in this case, encompass different life circumstances and therefore different matters in dispute. This does not meet the requirements of certainty, as there is an inadmissible alternative objective accumulation of claims, which is why the claim should not be upheld. In a nutshell, the Federal Supreme Court ruled that although independent damage items (e.g. damage from loss of earnings already incurred and future loss of earnings damage) could not be clearly delimited objectively in the event of a traffic accident, the relevant facts of life remained the accident with personal injury. There was therefore a single life event, although the damage items of compensation and satisfaction were claimed, and therefore no order of examination had to be specified.

18 Later, the Federal Supreme Court, amending its case law, considered that the requirement to specify the order of examination could no longer be upheld. All that was required was that the plaintiff had to assert with sufficient substantiation that there was a claim in excess of the amount claimed. In my opinion, however, this is not a question of the admissibility of the partial action. If the plaintiff does not sufficiently assert this, this does not mean that the partial action will not be accepted. The order of examination is simply left to the discretion of the court. According to the latest case law, a plaintiff no longer has to fear non-admission due to an undefined legal claim if it does not specify the order of several claims. However, this case law leads to considerable legal uncertainty. The plaintiff has only lost if none of the facts of the case provide a basis for approval. However, the consequences of res judicata can be very different depending on the order chosen by the court. In extreme cases, the parties only find out which claims have been adjudicated and which have not from the decision. The claims that have not been adjudicated may again be the subject of a lawsuit. A plaintiff is therefore still well advised to specify the order in which the claims are to be examined.

E. Admissibility

19 The law speaks of the divisibility of a claim. As mentioned, Art. 86 CPC does not contain any further requirements in addition to the divisibility requirement. It has also already been pointed out that it is not the action but the sub-

stantive claim that is divided. In the case of money, the divisibility of the claim is always given. However, a partial action is not limited to monetary claims, but is also conceivable for other claims (e.g. claims for the performance of fungible goods or special debts on material assets).

The parties determine what the court has to assess, insofar as they are free to 20 dispose of the claim. If the parties cannot freely dispose of the claim, the filing of a partial action is sometimes considered inadmissible. The High Court of the Canton of Zurich considered that the plaintiff could not bring a partial action for modification of child maintenance, as child maintenance is subject to the official principle. It also considered that a partial action was also inadmissible where a quantification of the claim was left to the court in accordance with Art. 42 para. 2 CO, which is regularly the case in the context of an unquantified claim. In response to an appeal against this decision, the Federal Supreme Court considered that the ancestral maintenance law as the subject matter of the dispute also excludes a partial action under substantive law that explicitly seeks a fundamental annulment or modification of child maintenance; however, as a full action, a modification of maintenance is only permissible for a certain period of time. In my opinion, the mere fact that the right to bring a partial action arises from the principle of disposition does not mean that the bringing of a partial action is excluded per se where the official maxim applies. As long as there is a claim that is divisible under substantive law, it should be possible to bring a partial action. Anything else would have required an explicit provision in Art. 86 CPC. Thus, in my opinion, the filing of a partial action limited in amount within the scope of a damage estimate within the meaning of Art. 42 para. 2 CO is not excluded because the court has to estimate the damage. However, bringing a partial action will hardly make sense in these cases, as the minimum amount in dispute to be stated in the context of an unspecified claim minimizes the cost risk and bringing a partial action may even fall short of the amount of the court's estimate of damages, which is hardly in the interest of the plaintiff.

The formulation of correct legal claims is a procedural requirement, meaning 21 that inadmissible claims cannot be accepted. If one takes the view that the partial action only applies to matters subject to the principle of disposition, the partial action would not be admitted due to an invalid legal claim. However, the situation is different in the event that an alleged partial action is brought, but the court assumes a full action. The court will not make a decision not to intervene, but will instead substantively approve or dismiss the claim.

22 The filing of several partial actions is generally permissible. However, the filing of many partial actions with low amounts in dispute can be seen as harassment and thus as an abuse of rights.

23 The partial action also offers scope for permissible tactical maneuvers: The plaintiff can, for example, first file a partial action for CHF 50,000, await a settlement hearing in court and, after a positive interim assessment by a delegation of the court, bring the remaining amount into the proceedings in the hope that the full court and the second exchange of documents will not lead to a different assessment. It can also increase the amount of the partial claim as part of an amendment to the claim in the reply without asserting the total claim. The admissibility of this procedure is based on the principle of disposition.

24 The partial action offers advantages. However, it is not without risk. A partial action for more than CHF 30,000 can lead to non-admission for lack of subject matter jurisdiction (as the simplified procedure applies up to CHF 30,000 and the Commercial Court does not deal with lawsuits in the simplified procedure).

IV. ADVANTAGES OF THE PARTIAL ACTION

25 Filing a partial action makes it possible to reduce or even avoid costs, to influence the subject matter jurisdiction and the applicable procedure. The choice of the simplified procedure regularly leads to an acceleration of the proceedings. The partial action can also be advantageous if the plaintiff only has evidence for part of the claim or if there are concerns about the solvency of the defendant. If the claim is for less than CHF 10,000, the right of appeal (Art. 308 para. 2 CPC) and an appeal in civil matters to the Federal Supreme Court (Art. 74 para. 1 BGG) for less than CHF 30,000 can be excluded. In many cases, the test process should also serve to clarify the prospects of the case. In this sense, the partial action makes it possible to clarify the prospects of success with limited risk. To a certain extent, this is also comparable to applications for free legal aid, at least to the extent that free legal aid is refused in cases where there is clearly no prospect of success. In practice, settlements are often reached which, in the case of a partial action, settle the entire claim

with legally binding effect. It is also conceivable that the defendant concludes a settlement for the remaining claim after a favorable decision or voluntarily pays the total claim. The suggestive effect of a decision on a partial claim (similar to interim measures) should also not be underestimated, especially as the same court often judges other lawsuits. The Federal Supreme Court refers to this as the de facto binding effect of the decision on the partial claim.

V. INDIVIDUAL QUESTIONS

A. Reservation of right of subsequent action

The legal claim must be formulated in such a way that it can be directly included in the dispositive part of the decision. The dispositive of a partial claim should neither contain the phrase "additional claim reserved" nor "subject to the reservation of subsequent action". It is unnecessary to add a reservation of the right to bring a subsequent action in the legal request. Art. 86 CPC has precisely the guarantee function that the filing of a partial action does not lead to the forfeiture of the remaining claim that has not been claimed, at least from a procedural point of view. The opinion that a reservation of subsequent action should be made "as a precaution" is not convincing. It is a question of the substantive legal force of the decision on the first partial claim whether a second (partial) claim is admissible. A reservation of the right to bring a subsequent action has no significance with regard to substantive legal force. The court is not guided by what the plaintiff intended with the first partial action, but by how the plaintiff has presented its claim. Caution when drafting a partial action should therefore not be exercised by including unnecessary empty phrases in the request for relief, but rather by providing sufficiently substantiated grounds (Art. 86 CPC does not offer any reduced requirements for substantiation; anyone wishing to bring a partial action should be aware that a partial action must be litigated like a normal action and failing to substantiate it may result in the loss of the remaining claim). A legal request for the reservation of the right to bring a subsequent action should be avoided in order to prevent the claim from being dismissed for lack of interest in legal protection with the corresponding cost consequences (Art. 106 para. 1 CPC). 26

B. Waiver of residual claim

27 A waiver of the residual claim is possible, but cannot be accepted lightly. A waiver of a claim is a question of substantive law. The exercise of a procedural right - the filing of an action for a certain amount - cannot therefore be interpreted as a waiver of a possible claim for an excess amount. Therefore, the Federal Supreme Court's statement that a subsequent action can be waived expressly or by implied conduct and that it is then a so-called full action is unfortunate without reference to the restrictive requirements of this legal consequence. In any case, the absence of a reservation of the right to subsequent action does not constitute an implied waiver. Whether an implied waiver exists depends solely on the specific individual case and the application of the provisions of the law of obligations. The view that a further action could be interpreted as venire contra factum proprium without a reservation of right of action and would therefore be an abuse of rights within the meaning of Art. 2 CC must also be rejected due to the irrelevance of the reservation of right of action. Anyone who makes use of his procedural right does not justify any trust worthy of protection.

C. Legal effect of the decision on a partial action

28 In general, only the dispositive becomes legally binding and the judgment on a partial claim only becomes legally binding with regard to the part of the claim that has been claimed. This is undisputed if the partial claim is upheld. The res judicata effect only applies insofar as the asserted claim has been assessed. However, the scope of the res judicata effect does not result from the dispositive alone, but from the considerations of the judgment.

29 If no negative declaratory counterclaim is filed by the defendant in response to a partial action, the (partial) plaintiff may assert further claims. However, if the defendant files a negative declaratory counterclaim, this leads to the loss of further claims if the plaintiff is unable to prove further claims.

30 When dismissing a partial claim that is limited in amount, the court must examine the overall claim before it can dismiss the partial claim in whole or in part. Therefore, a renewed (partial) action is generally precluded by the res judicata effect of the first judgment. This also applies in particular in cases in which the partial claim was dismissed for lack of sufficient substantiation (i.e. if the court was unable to examine the entire claim before dismissing the par-

tial claim due to a lack of sufficient substantiation). This is the necessary consequence of a lack of substantiation, which generally applies to lawsuits.

However, the dismissal of a partial action does not prevent the plaintiff from asserting other damage items in a new action, because the first judgment did not decide that the plaintiff was not entitled to any claim at all. In this case, however, the plaintiff should already clearly state in the statement of grounds which damage item is being asserted. If this is not done, there is a risk that the court will assume that the claimant has sued for part of the total damage, i.e. a cross-section of all damage items. The same applies in the case of a claim that is limited in time. 31

According to Art. 241 CPC, a settlement or withdrawal of a claim has the effect of a legally binding decision and the court writes off the proceedings. In my opinion, this legal consequence must be distinguished from the legally binding dismissal of the partial action, as there is nothing in the recitals of the dismissal decision about the successful or unsuccessful assertion of claims or the substantiation. Therefore, in this case, the general principle must apply that the legal force is only limited to the amount of the claimed claim. When settling a partial claim, it is advisable to also include the total claim in the settlement in order to create legal certainty. 32

D. Negative declaratory counterclaim

1. Type of proceedings and transfer

A negative declaratory counterclaim subject to the ordinary procedure can also be brought if it is brought in response to a partial action brought in the simplified procedure. This is an exception to Art. 224 para. 1 CPC, according to which a counterclaim can only be brought if the same type of proceedings applies. This is justified by the fact that a declaratory action merely seeks to establish the non-existence of the overall claim already filed by the plaintiff and thus differs from an ordinary counterclaim, with which an independent claim not covered by the prior action is brought. According to the Federal Supreme Court, the question of the admissibility of the negative declaratory counterclaim is not of decisive importance for the delicate delimitation of the subject matter of the dispute. On the contrary, it has already been decided that the exception to the requirement of the type of proceedings is not limited to genuine partial actions. 33

34 If an action for a negative declaratory judgment is brought that exceeds the court's subject-matter jurisdiction, the court refers the case to the competent court within the meaning of Art. 224 para. 2 CPC. A partial action brought in the simplified proceedings is dealt with together with the declaratory action in the ordinary proceedings. It is true that Art. 86 CPC allows the action brought to be treated differently than if the entire claim were asserted (e.g. with regard to the type of proceedings). Nevertheless, in my opinion, the plaintiff can be expected to accept this consequence, as it corresponds to the legal situation that would have applied if the entire claim had been asserted. A partial claimant would therefore be well advised to also prepare the simplified action with a level of detail that would do justice to the ordinary proceedings if it brings a partial action in simplified proceedings within the meaning of Art. 243 para. 1 CPC. Otherwise, the partial plaintiff only has the option of submitting a reply to improve its factual basis. If, on the other hand, the proceedings are social proceedings within the meaning of Art. 243 para. 2 CPC, the filing of a negative declaratory counterclaim cannot change the type of proceedings. The CPC revision does not appear to change this, as Art. 224 para. 1bis E-CPC refers to the criterion of the validity of the simplified procedure based on the amount in dispute.

2. Interest in a declaratory judgment

a. Principle

35 The Federal Supreme Court has consistently held that the defendant has a legal interest in defending against a partial action brought against it with a negative declaratory counterclaim. This is justified by the fact that the defendant's private legal sphere is impaired to the extent of the total claim, as the partial action also includes the entire claim as a necessary basis. However, the mere fact that a partial action has been brought is not sufficient to justify an interest in a declaratory judgment. The question of how far the defendant's interest in a declaratory judgment extends when it is confronted with a claim for damages for loss of earnings from a traffic accident was recently left open by the Federal Supreme Court, as this question was not submitted to it for assessment. If a party is confronted with a partial claim that is not limited in amount, the three general requirements for negative declaratory actions also apply here in my opinion. The legal situation must therefore be uncertain, it must be unreasonable to expect the legal uncertainty to continue and, finally, it must

be impossible to obtain equivalent legal protection elsewhere. The specific circumstances must be used to decide whether there is an interest in a declaratory judgment. However, the vague concept of a non-genuine partial action is not decisive.

b. No interest in legal protection in response to a partial action limited in amount

The aforementioned case law predates the Federal Supreme Court's decision that the dismissal of a claim with a limited amount has the effect of res judicata for the entire claim if the court had to examine all claims before coming to this conclusion. However, the Federal Supreme Court had already previously held that there was no legal protection or declaratory interest in bringing a negative declaratory action if the court considered a partial claim of CHF 30,000 (total claim CHF 45,875.70) to be justified only to the extent of CHF 14,162.55. If this decision becomes legally binding, it is already clear that the complainant owes the respondent this amount based on the facts asserted in the lawsuit, and no more. It follows that an action for a negative declaratory judgment is not admissible if the court must examine the entire claim in order to assess the partial action. 36

3. Contingent declaratory counterclaim and suspension

Due to these uncertainties, the doctrine has proposed various possible solutions that should be applied if a party is confronted with a partial action with a limited amount and wishes to bring a counterclaim for a negative declaratory judgment. 37

First, the filing of a conditional declaratory counterclaim (contingent counterclaim) is proposed in the event that the (partial) action is dismissed. This is considered permissible. In contrast to cantonal codes of civil procedure, however, the CPC does not provide for the filing of a conditional counterclaim. A conditional counterclaim can only be admissible if lis pendens within the meaning of Art. 62 CPC is already assumed when the negative declaratory counterclaim is filed, as lis pendens does not tolerate any conditions. In addition, the withdrawal of the (partial) action would also mean that the counterclaim no longer applies. However, since the CPC provides that the counterclaim has its own fate independent of the partial action (see Art. 14 para. 2 CPC), it is questionable whether a conditional counterclaim should be admis- 38 sible. It is undisputed that a contingent claim can be made. However, it is clear that the main claim made by the same party will be decided one way or another (and that the contingent claim is less than the main claim). Alternative claims are inadmissible. A conditional counterclaim, on the other hand, triggers an exchange of pleadings in the same way as a pending action, but if the main action is upheld, this will have been in vain. To consider a counterclaim as pending upon filing, to conduct an exchange of pleadings like a normal counterclaim in order to ultimately consider the counterclaim as non-existent, therefore seems inadmissible in my opinion. The party filing the partial action incurs costs in responding that it cannot later recover, as there is no general entitlement to reimbursement of costs without the existence of a counterclaim. It is also questionable what the dispositive of the decision should be. Non-admission would probably be the correct solution if lis pendens were assumed, but in my opinion something that does not exist cannot be settled by non-admission. A write-off for lack of purpose within the meaning of 241/242 CPC also does not seem appropriate, as the subject matter of the negative declaratory action is retroactively deemed never to have existed at all. In principle, it is difficult to understand how something can be pending if it is dependent on another action. It is also unclear what happens if the conditional declaratory counterclaim is withdrawn before the condition (dismissal of the partial action) occurs. Can a new counterclaim then no longer be brought, as the conditional declaratory counterclaim has been served on the other party and the burden of continuation has thus arisen? In view of these question marks, in my opinion the filing of a conditional declaratory counterclaim appears inadmissible.

39 In addition to filing a negative declaratory counterclaim, an application for suspension is also being discussed in order to counter the uncertainties in connection with a partial action with a limited amount. If an unconditional negative declaratory counterclaim is brought in response to a partial action, the court can suspend the former (Art. 126 para. 1 CPC). This would save costs, as the exchange of documents regarding the counterclaim would be postponed for the time being. However, the suspension is at the discretion of the court and the court is likely to be inclined to refuse such a suspension, as otherwise there is hardly any difference in time between the filing of a counterclaim for a declaratory judgment with suspension and the filing of an action for a negative declaratory judgment in a separate lawsuit after the decision on the partial action. This should at least be the case if one sees the acceleration

of proceedings as the main motive for the generous admission of the negative declaratory counterclaim in the context of the partial action.

E. Lis pendens

It is questionable whether the filing of a partial action limited in amount precludes a further partial action. This question is probably of a theoretical nature, as this is hardly compatible with the purpose of the partial action, which is precisely aimed at a test process with low costs. In addition, it is possible to increase the amount of the already pending partial action by amending the claim, provided that the requirements for amending the claim are met. As long as the court has not yet reviewed the claim, there is, in my opinion, no bar to lis pendens and further partial actions are permissible. 40

F. Statute of limitations and forfeiture

The partial action interrupts the limitation period only for the part claimed. However, if it is a claim for damages under liability law, the limitation period under Art. 60 CO only begins to run when the entire damage is known. If it is certain that the damage will continue to develop, there is no need to assert the already known part of the damage in advance by filing a partial action in order to avoid the limitation period. 41

The filing of a partial action may constitute a sufficient act to preserve a forfeiture period. 42

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COMMENTARY ON

Art. 142 CPC

A commentary by Linda Novina

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Chapter 3 Limitation Periods, Default and Reinstatement

Section 1 Limitation Periods

Art. 142 Computation

[1] Limitation periods triggered by a communication or the occurrence of an event starting on the following day.

[1bis] If a document is served by ordinary post on a Saturday, a Sunday or a public holiday recognised under federal or cantonal law at the place of jurisdiction (Art. 138 para. 4), the communication under paragraph 1 shall be deemed to have been made on the following working day.

[2] If a limitation period is measured in months, it expires on the same date of the last month as the date of the month in which the period started to run. In the absence of such a date, the period expires on the last day of the month.

[3] If the last day of a limitation period is a Saturday, a Sunday or a public holiday recognised by federal or cantonal law at the location of the court, the period expires on the following working day.

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I. GENERAL INFORMATION ON ART. 142–149 CPC

A. Time limits in the CPC

1 Time limits are the **periods of time** within which the parties and other participants in the proceedings must take procedural action, exercise a right, or make a declaration of intent. They thus serve to ensure the orderly conduct and expeditious completion of civil proceedings. In addition to the deadlines in civil proceedings, there are also a number of deadlines to which the deadline law of the CPC does not apply. For example, the calculation of the limitation and forfeiture periods under federal civil law is governed by the CC or the CO, and in proceedings before the Federal Supreme Court, the time limits under Art. 44–50 BGG apply (for more details, see Chapters I.C.2 and 3).

2 The CPC distinguishes between **statutory and judicial time limits**. A statutory deadline cannot generally be extended and its duration is determined by law. This contrasts with judicial deadlines, the duration of which is set by the court in each individual case and which can also be extended for sufficient reasons.

3 A further distinction is made between peremptory and dilatory deadlines. This distinction relates to the consequences of missing deadlines. In the case of **peremptory deadlines** – also known as exclusion periods – failure to meet the deadline results in forfeiture, i.e., any procedural action not taken within the deadline is invalid. A prime example of this is the deadline for appeals. **Dilatory deadlines**, on the other hand, do not result in a loss of rights, but do entail other legal disadvantages. For example, a first failure to meet the deadline for paying the advance on costs or providing security for the party's compensation does not immediately result in the dismissal of the action or the application, but merely in the setting of a grace period. In contrast to civil procedure law, public procedural law uses the terms peremptory and dilatory deadlines as synonyms for a statutory or judicial deadline.

4 The term “deadline in the broader sense” encompasses, on the one hand, the deadline in the narrower sense, i.e., the deadline measured in a specific period of time (by days, weeks, months, or years), but also, on the other hand, the deadline fixed on a specific calendar day (also known as a fixed deadline). Art.

142 para. 1 and 2 CPC are naturally not applicable to deadlines, but Art. 142 para. 3 CPC and Art. 143 ZPO must also be observed in this context.

B. Scope of application

Articles 142–149 CPC are generally applicable to **all procedural deadlines** within the scope of the CPC (Art. 1 f. CPC). Since January 1, 2025, this also includes the time limit under Art. 53 para. 3 CPC for exercising the right of reply, which is derived from Art. 29 para. 1 and 2 FC and Art. 6 no. 1 ECHR. 5

Due to the reference in Art. 31 SchKG, the provisions of the CPC also apply to the calculation, observance, and running of the **deadlines of the SchKG**, unless the SchKG provides otherwise. Special features – in particular for judicial matters under the SchKG – arise from this reservation with regard to the extension (Art. 33 para. 2 SchKG, only for parties to the proceedings residing abroad or in the case of public notification), restoration (Art. 33 para. 4 SchKG, only in the absence of fault) as well as the suspension of legal proceedings and the consideration of debt enforcement holidays (Art. 56 ff. SchKG and Art. 63 SchKG). 6

With regard to the time limits for bringing an action under the SchKG, the provisions of the CPC regarding their calculation, duration, and observance must also be taken into account on the basis of Art. 31 SchKG, subject to the deviations just mentioned, which result from the SchKG. With the revision of Art. **145 para. 4 CPC** and Art. 56 para. 2 SchKG, the coordination of the suspension of time limits between the SchKG and the CPC will be improved by stipulating in both provisions that the provisions of the CPC on the suspension of time limits apply to all actions under the SchKG that are to be brought before a court. In simplified terms, only the provisions of the CPC are now applicable to all proceedings before a court and the provisions of the SchKG to all proceedings before an administrative or supervisory authority. For more details, see the commentary on Art. 145 CPC. 7

In **international relations**, the law applicable to procedural issues is in principle determined by the place of the court (lex fori processualis). Accordingly, the provisions of the CPC on time limits also apply to proceedings with a foreign connection. The same applies to appeals against declarations of enforceability (known as exequatur) under the Convention of October 30, 2007, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and 8

Commercial Matters (LugÜ; SR 0.275.12), where the time limits of the state of enforcement apply. Within the framework of the Convention of October 25, 1980, on the Civil Aspects of International Child Abduction (HKÜ; SR 0.211.230.02), Switzerland also applies the time limits set out in the CPC, as the HKÜ itself does not contain any specific provisions on the modalities of the running of time limits.

9 In addition to the provisions of the CPC, the European Convention of May 16, 1972, on the Calculation of Time Limits (**EuFrÜb**; SR 0.221.122.3) must be observed in both international and domestic cases (due to its nature as a directly applicable provision of international law, a so-called "self-executing" norm). In relation to Art. 142 CPC, the Convention contains only additions and no deviations in content.

C. Distinctions

1. Improper deadlines (procedural deadlines)

10 Deadlines in the CPC can be divided into **actual and non-actual deadlines** depending on their purpose and target audience. Actual deadlines are addressed to the parties (or third parties) and are set for them to perform a specific procedural act, exercise a right, or submit a declaration of intent (see Chapter I.A above). Non-proper deadlines (also known as procedural deadlines) are addressed to courts and other judicial bodies, whereby the law prescribes certain periods of time for them to perform official acts. An example of such a non-proper deadline is Art. 203 para. 1 CPC. This provision stipulates that the conciliation hearing must take place within two months of the conciliation request being filed. In the absence of procedural law, the seven-day collection period pursuant to Art. 138 para. 3 lit. a CPC after an unsuccessful delivery attempt is also considered an administrative deadline.

11 The deadline law of the CPC does not apply to improper deadlines. The only exception is probably the provision of Art. 142 CPC on the calculation of deadlines. Time limits cannot therefore be extended, nor do they stand still during certain periods.

2. Time limits in federal court proceedings

12 In proceedings before the Federal Supreme Court, it is not the time limits set out in Art. 142–149 CPC that apply, but the **time limits set out in Art. 44–50**

BGG. This must be taken into account in particular with regard to time limits for appeals to the Federal Supreme Court.

The time limits under the CPC were largely **aligned with** the previous federal court system. Art. 142 para. 1 CPC corresponds to Art. 44 para. 1 BGG, and Art. 142 para. 3 CPC corresponds almost word for word to Art. 45 para. 1 BGG. The same applies to Art. 143 para. 1 CPC, which corresponds to Art. 48 para. 1 BGG. The relevant commentaries on the Federal Supreme Court Act can therefore be consulted. 13

3. Substantive law deadlines

The calculation of a deadline is generally based on the law that sets the deadline. The calculation of the limitation periods and forfeiture periods under federal civil law is therefore not based on the provisions of the CPC, but **on the CC or CO** (unless the CPC is applicable by reference (analogously), e.g., in child and adult protection on the basis of Art. 450f CC). Such substantive legal deadlines include, for example, the one-month deadline for challenging association resolutions that violate the law or the articles of association (Art. 75 CC), the two-year separation period (Art. 292 para. 1 lit. a CPC in conjunction with Art. 114 CC), the relative and absolute limitation period for actions to contest the validity of a will (Art. 521 para. 1 CC), the probationary period under Art. 335b OR, and the two-month period for challenging resolutions of the general meeting of a stock corporation (Art. 706a para. 1 CO). Subject to statutory exceptions, they cannot be extended or reinstated, nor do they pause during court recesses. 14

Otherwise, there are only **minor differences** in the commencement, calculation, and observance of time limits (e.g., the relevance of public holidays at the place of residence or registered office of the plaintiff). However, according to Federal Supreme Court case law, time limits should be calculated using the same method, regardless of whether they arise from substantive law or procedural law. The decisive factor for compliance with substantive legal time limits for bringing an action is again the establishment of lis pendens in accordance with the CPC. 15

II. COMMENCEMENT OF THE TIME LIMIT (ART. 142 PARA. 1 CPC)

16 Time limits under civil procedure law are triggered by a notification or the occurrence of an event and begin to run on the following day.

A. Notifications triggering deadlines

17 With a “notification” within the meaning of Art. 142 para. 1 CPC, the court or the person entrusted with conducting the proceedings sets a deadline for the parties or participants in the proceedings, which is triggered immediately. Notifications triggering deadlines constitute **procedural orders**. These must be duly brought to the attention of the parties or their representatives, otherwise the deadline will not begin to run. In the case of effective representation, it is generally the representative's acknowledgment that is decisive, and not that of the represented party.

18 For proper notification, the order must be **correctly served** and, in the case of written service, delivered to the parties in a legally valid manner in accordance with Art. 138 ff. CPC. Written notifications require receipt but not acceptance. The decisive factor is therefore the time of arrival in the sphere of control of the addressee; actual receipt or acknowledgment is not required. In the case of multiple deliveries, the first legally compliant notification is generally considered to trigger the deadline.

19 The content that a (written) procedural order must have, or the **formal requirements** that must be met for a (written) procedural order to be served correctly, cannot be derived conclusively from Art. 238 CPC. The Federal Supreme Court has so far left open the question of whether the provisions of Art. 238 CPC also apply to procedural orders. However, an order may also be served orally (during a hearing).

20 **Examples** of notifications triggering the deadline: Setting a deadline for the payment of advances and securities (Art. 101 para. 1 CPC); Setting a deadline for responding to a claim or counterclaim and for any second exchange of documents (Art. 222 para. 1 CPC, Art. 224 para. 3 CPC, Art. 225 CPC); Setting of a grace period (Art. 101 para. 3 CPC, Art. 131 CPC, Art. 132 CPC, Art. 223 para. 1 CPC).

B. Occurrence of an event

As a rule, the party concerned is the first to become aware of an **event triggering a deadline** before bringing the matter before the court. Often, only the party itself knows the time of the event triggering the deadline and must therefore prove this and compliance with the deadline in the relevant proceedings. 21

Examples of events triggering deadlines: Knowledge of a reason for recusal triggers the deadline for filing a recusal request (Art. 49 para. 1 CPC); Withdrawal of a submission due to lack of jurisdiction or service of a decision not to hear the case triggers the deadline for resubmitting a submission (Art. 63 CPC); The occurrence of deemed service triggers the deadline for appealing against the decision in question (Art. 138 para. 3 lit. a CPC); The cessation of the reason for default triggers the deadline for filing a motion for reinstatement (Art. 148 para. 2 CPC); The discovery of a ground for review triggers the deadline for filing a motion for review (Art. 329 para. 1 CPC); The publication of the collocation plan triggers the deadline for filing a collocation action (Art. 250 para. 2 SchKG). In addition, the (certain) occurrence of a future event may also be used to trigger a court deadline (e.g., setting a deadline for commenting on a document that has yet to be edited). 22

C. Other circumstances triggering deadlines

Legal doctrine and case law are partly **disagreeing** as to whether a particular circumstance triggering a deadline should be classified as a notification or as the occurrence of an event. However, due to the uniform regulation of the start of the deadline for both notifications and events triggering deadlines, the dogmatic debate has no practical implications. 23

D. First day of the deadline

The day on which the notification triggering the deadline is made or a specific event triggering the deadline occurs is not taken into account when calculating the deadline. According to Art. 142 para. 1 CPC, the period does not begin to run until **the following day**. In this context, it is irrelevant whether this day falls on a Saturday, Sunday, or a recognized public holiday at the place of jurisdiction. However, the suspension of the period pursuant to Art. 145 CPC must be observed. 24

25 In the case of the EuFrÜb, however, the day on which the period begins to run (known as the "dies a quo") coincides with the **day of notification or the event triggering the period**. Because the period begins at midnight (24:00) on the dies a quo, the day on which the period begins (dies a quo) is not included in the calculation ("dies a quo non computatur"). This corresponds to a basic principle of deadline law originating in Roman law, according to which deadlines are calculated in calendar days, i.e., periods between midnight and midnight (known as civil computation). Consequently, only days that are fully available (i.e., 24 hours) are counted. As a result, the provisions of Art. 142 para. 1 CPC and Art. 3 para. 1 EuFrÜb are not contradictory.

III. SERVICE BY ORDINARY MAIL (ART. 142 PARA. 1^{BIS} CPC)

26 In order to resolve the problem of delivering a notice triggering a deadline on a Saturday by "A-Post Plus" – and thus a deadline beginning on Sunday – the legislature has introduced a new delivery rule in Art. 142 para. 1^{bis} CPC (in force since January 1, 2025). According to this, the delivery of notices triggering a deadline on a weekend or public holiday is only deemed to have taken place on the next working day. The deadline therefore begins to run on the following day, i.e., the first day after this working day. However, it is unclear to what extent this delivery rule is relevant for calculating deadlines under the CPC in the ordinary course of business of courts and other authorities. This is because, according to Art. 138 para. 1 CPC, the delivery of (procedural) orders – as with notifications triggering deadlines – is only permissible by registered mail or by other means against confirmation of receipt, which is not the case with the "A-Post Plus" shipping method.

IV. CALCULATION OF TIME LIMITS (ART. 142 PARA. 2 CPC)

A. Monthly time limits

27 The CPC only expressly regulates the calculation of monthly time limits. The **number of months** must be added to the month in which the time limit begins. The time limit ends on the last day of the month that has the same number as the day on which the time limit began. If there is no such day, the deadline ends on the last day of the month.

In legal doctrine and cantonal case law, there was controversy as to which day the monthly deadline begins to run, i.e., how paragraphs 1 and 2 of Art. 142 CPC are to be interpreted: According to the prevailing view, in accordance with the wording and structure of Art. 142 para. 2 CPC in conjunction with Art. 142 para. 1 CPC and Art. 2 and 4 no. 2 of the EuFrÜb, the date to be used is the date that corresponds numerically to the *day following* the notification or event that triggered the deadline. However, a few authors and the Cantonal Court of Schwyz considered Art. 142 para. 2 CPC in isolation from Art. 142 para. 1 CPC and regarded the event or notification triggering the deadline as decisive for determining the expiry of the deadline. Otherwise, in the case of one-month deadlines, the day on which the deadline begins would be counted twice and a deadline of one month plus one day would effectively be granted, which, among other things, would not be logical and would defeat the purpose of Art. 142 para. 2 CPC. The monthly deadline should therefore expire on the day that corresponds numerically to the day of the notification or event triggering the deadline. 28

In its decision **BGE 150 III 367**, the Federal Supreme Court clarified for the first time the question of calculating a deadline determined by months in accordance with Art. 142 para. 2 CPC, after the Federal Supreme Court's case law had long been inconsistent in this regard. In doing so, the Federal Supreme Court concurred with the minority opinion. Accordingly, Art. 142 para. 2 CPC is to be interpreted in the sense that the “day on which the period began to run” is not governed by Art. 142 para. 1 CPC, but refers to the day of the event triggering the period. For the calculation of a time limit in months, the relevant reference point for the start of the time limit is therefore the date of the event or the date of the notification triggering the time limit itself. 29

Example: If the notification triggering the period is delivered on January 15, a three-month period begins on the same day and ends on April 15, provided that this is not a Saturday, Sunday, or recognized public holiday (Art. 142 para. 3 CPC) and no suspension of the period is to be taken into account (Art. 145 CPC). If the notification triggering the deadline or the event triggering the deadline takes place on August 31, a three-month period ends on November 30, provided that this is not a Saturday, Sunday, or recognized public holiday and no suspension of the period is to be taken into account. 30

31 Finally, it should be noted that a one-month period **is not** to be equated with or confused with a **30-day period** (see Chapter IV.B below).

B. Daily deadlines

32 Daily deadlines are set more frequently than monthly deadlines. Neither the CPC nor the EuFrÜb contain any explicit provisions on how to calculate deadlines determined by days. According to doctrine and case law, the start of the deadline defined in Art. 142 para. 1 ZPO must be used as a basis, and the **individual days must then be counted**. Every day is counted, i.e. including Saturdays, Sundays, and recognized public holidays. However, a suspension of the deadline must also be taken into account during the current deadline (Art. 145 CPC).

33 **Example**: A court injunction was announced on April 2 and posted on the property. The 30-day period for lodging an objection with the court therefore begins on April 3 and ends on May 2 (day 30), provided that this is not a Saturday, Sunday, or recognized public holiday (Art. 142 para. 3 CPC) and no suspension of the period is to be taken into account (Art. 145 CPC).

C. Hourly, weekly, and annual deadlines

34 Hourly deadlines rarely occur in civil proceedings, unlike in criminal proceedings. Otherwise, the **exact number of hours** must be added to the start of the deadline, which generally begins at midnight on the day in question.

35 **Example**: A 12-hour deadline set by the court begins at midnight on the day of service of the relevant procedural order and ends at 12 noon on the following day, provided that this is not a Saturday, Sunday, or recognized public holiday (Art. 142 para. 3 CPC) and no suspension of the deadline is to be taken into account (Art. 145 CPC).

36 The calculation of **weekly deadlines** is also not expressly regulated in the CPC. The court may nevertheless set a weekly deadline. As with the monthly deadline, this ends on the day of the last week that has the same name as the day of the notification or event triggering the deadline.

37 **Example**: If the legally valid notification of a court-set period of two weeks was delivered on a Monday, the period begins on the same day and ends two weeks later, again on a Monday, provided that this is not a recognized public

holiday (Art. 142 para. 3 CPC) and no suspension of the period is to be taken into account (Art. 145 CPC).

Annual deadlines are rare in the CPC (e.g., Art. 329 para. 2 CPC) and have therefore presumably not been subject to any legal regulation regarding their calculation. In the case of an annual deadline, the exact number of years is added to the dies a quo (analogous to Art. 142 para. 2 CPC for the calculation of monthly deadlines). According to the latest Federal Supreme Court case law, the last day of an annual period bears the same number as the day of the notification or event triggering the period. 38

Example: The ten-year revision period under Art. 329 para. 2 CPC is triggered on the day a substantive decision becomes final. If the decision became final on April 10, 2022, the period ends on April 10, 2032, provided that this is not a Saturday, Sunday, or recognized public holiday (Art. 142 para. 3 CPC) and no suspension of the period is to be taken into account (Art. 145 CPC). 39

V. END OF THE TIME LIMIT (ART. 142 PARA. 3 CPC)

Procedural time limits end **at midnight (12 a.m.) on the last day**, unless otherwise specified and no suspension of the time limit is to be taken into account (Art. 145 CPC). Court deadlines may also be set for a specific time of day (e.g., a specific time on a specific day or the start of a specific hearing). This may be particularly useful in super-provisional measures proceedings (Art. 265 CPC). 40

Art. 142 para. 3 CPC contains a statutory **extension of time**: if the last day of a statutory or judicial deadline falls on a Saturday, Sunday, or a public holiday recognized by federal or cantonal law at the place of the court, it ends on the next working day. This also applies if the end of a judicial deadline has been expressly (and erroneously) set on a specific date on a weekend or public holiday. However, Saturdays, Sundays, or recognized public holidays only affect the end of a deadline; if the deadline is ongoing, they must be counted and do not extend the deadline. The same principle is also contained in Art. 5 EuFrÜb, although the EuFrÜb itself does not specify any public holidays. 41

Public holidays must be recognized by the state at the place of jurisdiction in order to extend the end of a deadline. The only public holiday recognized by federal law is August 1. Cantonal public holidays require an explicit basis in cantonal law in the form of a general abstract norm of public law. However, 42

Art. 142 para. 3 CPC includes not only statutory public holidays, but also days that are treated as statutory public holidays under cantonal law. A basis in municipal law alone is not sufficient. Local celebrations (at municipal or district level) can only influence the deadline (including in Federal Supreme Court proceedings) if they are expressly recognized by cantonal law or if their recognition under municipal law is based on an explicit cantonal enabling provision (e.g., found in the respective cantonal public holiday or court organization laws). To date, there has been no such cantonal recognition or authorization for the afternoons of Sechseläuten and Knabenschiessen in the city of Zurich or for Güdismontag in the city of Lucerne, which is why these local celebrations do not extend a running deadline.

43 The **list** of “Public holidays and days treated as public holidays in Switzerland” (as of January 1, 2011) compiled by the Federal Office of Justice on the basis of Art. 11 EuFrÜb provides an overview of the relevant public holidays in the cantons. However, according to the majority opinion, the list only has declaratory effect. As a precaution, it is therefore advisable to check with the relevant authority, especially as there are also differences within certain cantons (e.g., in the canton of Solothurn due to St. Joseph's Day (March 19) and the patron saint's day celebrations, or in the canton of Fribourg with regard to Corpus Christi, Assumption Day (August 15), All Saints' Day (November 1), and the Immaculate Conception (December 8).

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COMMENTARY ON

Art. 143 CPC

A commentary by Linda Novina

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Art. 143 Compliance

[1] Submissions must be filed no later than the last day of the limitation period, either by filing with the court or by handing over to Swiss Post or a diplomatic mission or consular office of Switzerland for forwarding on to the court.

[1bis] Submissions that are mistakenly filed within the time limit with a Swiss court that does not have jurisdiction are deemed to have been filed on time. If another court in Switzerland has jurisdiction, the court without jurisdiction shall forward the submission *ex officio*.

[2] In case of electronic submission, the relevant time for compliance with a deadline is that at which the receipt is issued that confirms that all the steps have been completed that the party must carry out for transmission.

[3] Payment to the court is made within the deadline if the funds are handed over to Swiss Post in favour of the court or debited from a postal or bank account in Switzerland no later than on the last day of the limitation period.

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I. GENERAL INFORMATION ON COMPLIANCE WITH DEADLINES

1 Deadlines always end on a working day at the place of jurisdiction **at midnight**, subject to the rare judicial setting of hourly deadlines or another time of expiry, such as "until the start of the hearing." The deadline may be used in full until the end, i.e., procedural actions may be supplemented, extended, or corrected until the deadline expires.

2 Failure to comply with deadlines must be taken into account ex officio, whereby the party invoking the timeliness of the procedural action bears (in case of doubt) the **burden of proof** for the timely performance of the procedural action. However, if the court is responsible for the lack of evidence of the timeliness of a party's action, for example because it did not send the notification triggering the deadline by registered mail or did not keep the envelopes (with the postmark) of a party, the burden of proof is reversed.

II. COMPLIANCE WITH DEADLINES FOR SUBMISSIONS IN PAPER FORM (ART. 143 PARA. 1 CPC)

A. Expedition principle

3 The deadline is met if the submission is filed with the court on the last day of the deadline or is **handed over** to the Swiss postal service or a Swiss diplomatic or consular representation for delivery to the court. For submissions in paper form, the so-called dispatch principle applies: a submission must be sent or handed over to the aforementioned authorities within the deadline. However, it is not necessary for the submission to arrive at the court within the deadline.

4 Federal court case law provided for an exception to this rule for the exercise of the **constitutional right of reply** based on Art. 29 para. 2 of the FC and Art. 6 no. 1 of the ECHR, according to which any (unsolicited) comments on the submissions and pleadings of the opposing party had to be received by the court within ten days at the latest in order to be taken into account in the proceedings. Since January 1, 2025, however, the courts have been obliged to always set a deadline of at least ten days for a party to comment on all submis-

sions by the opposing party. This means that the provisions of Art. 142 ff. CPC must now also be observed when exercising the constitutional right of reply.

B. Direct delivery

The parties are free to submit submissions directly to the court. They can hand in their submissions at the court's **reception desk** – during the relevant opening hours – in exchange for a receipt as proof of delivery. There is no entitlement to have the court accept submissions from the parties outside its regular opening hours. 5

The parties may also post their submissions directly in the court's **mailbox**, if available. The submission is presumed to have been filed on the date on which it was stamped by the court. However, the parties are free to provide evidence to the contrary of an earlier date of posting by means of witnesses or similar. If the submission is made outside of counter opening hours and it is obvious that the date stamp will be a later date, the party invoking the timeliness of the submission – especially if it is represented by a lawyer – must offer the court evidence of the timeliness of the submission without being asked and before the deadline expires. Depositing the submission at the entrance gate of the court or placing it in the private mailbox of the responsible court member does not meet the deadline. 6

C. Postal delivery

Submissions in paper form are most commonly sent by post. The deadline is met if the submission is handed over to **Swiss Post** for delivery to the court by midnight on the last day at the latest. However, posting with a foreign postal service – except in Liechtenstein – or with a private delivery service does not meet the deadline. If sent by a delivery service other than Swiss Post, the submission must either be received by the court on the last day of the deadline or be accepted by Swiss Post for further processing. A private or foreign delivery service – whether private or state-owned – thus acts as a representative of the sender or the party bound by the deadline. 7

The **type of** postal service used is irrelevant for the purposes of meeting the deadline. The submission must be posted no later than the last day of the deadline at a Swiss Post counter (even after closing time), at a postal agency (e.g., in a shopping center, a neighborhood store, or a pharmacy, etc.) or at a 8

"MyPost24" machine, handed over to a mail carrier or a courier service commissioned by Swiss Post, or dropped into a Swiss Post mailbox. The latter can even be done after the last collection.

9 Swiss Post outsourced its courier service to swissconnect ag on July 1, 2016, or commissioned a courier service. It therefore no longer has its own courier service. If a party therefore commissions a courier via Swiss Post, it must ascertain whether this is a private delivery service such as swissconnect ag or whether Swiss Post itself is providing the courier service or has commissioned a courier service. Delivery to swissconnect ag (even via Swiss Post, but not commissioned by Swiss Post itself) does not meet the deadline.

10 In accordance with the general rule on the burden of proof, the party invoking the timeliness of the submission must prove that it handed over the submission in paper form (with the required content) to Swiss Post for delivery to the court in good time. As a rule, the **postmark** on the envelope of a submission, the dated postage label, the "MyPost24" receipt, or the Track&Trace number code provide evidence of the date of delivery to Swiss Post in the sense of a natural presumption. It is not sufficient to date the item yourself with a franking machine. Sending by registered mail is not necessary to meet the deadline, but it does make it much easier to provide evidence. It is therefore advisable – especially for lawyers – to send court submissions by registered mail so that the postmark is definitely dated on the date of delivery and the party bearing the burden of proof receives a confirmation of receipt. Posting under a collection agreement involves a considerable risk with regard to proving the timeliness of a shipment, as the initial recording of the shipment by Swiss Post in its system does not necessarily correspond to the date of delivery.

11 However, the party bearing the burden of proof is free to prove that the item was delivered to Swiss Post within the deadline – even if this differs from the date certified by the postmark or similar – by **other suitable means**. For example, a reference to an independent witness can be made on the back of the envelope, or the witness can confirm in writing (stating the date, time, and place of posting) that the letter was posted before midnight. A video recording of the letter being posted is also conceivable. A photograph of the envelope showing how it was posted in the mailbox or post office box is not sufficient. However, it should be noted that the party bearing the burden of proof – especially if represented by a lawyer – must, as a rule, offer the court the rele-

vant evidence in good faith, without being asked to do so and as a precautionary measure before the deadline expires, if it has created uncertainty regarding compliance with the deadline (e.g., by posting the letter after the counter has closed and emptying the mailbox shortly before the deadline expires) or has reasonable doubts about the timeliness of the postal delivery. The same applies in the event of a recognizable malfunction of the selected "MyPost24" machine.

If the party was not required in good faith to provide unsolicited evidence of 12
compliance with the deadline (because it did not itself create any uncertainty regarding compliance with the deadline and did not have to doubt the timeliness of the postal delivery, e.g., when posting a shipment with "A-Post Plus" before the deadline), but the court nevertheless has doubts about the timeliness of the submission, the sender must be granted the **right to be heard** within the meaning of Art. 29 para. 2 of the FC and given the opportunity to name all evidence to prove that the deadline was met. Only if it is clear from the files that a deadline has not been met and the presiding judge has no doubts about this can the party involved be denied a legal hearing and a default judgment be issued directly or, if necessary, a decision not to hear the case be made.

If the party has submitted its submission to the court in good time via Swiss 13
Post, but has used an **incorrect address** or **insufficient postage**, this postal submission may still have been made in time under certain circumstances, according to Federal Supreme Court case law. The defect must be remedied and the returned, undeliverable submission must be re-submitted to Swiss Post immediately, unopened and correctly addressed and stamped (in a new envelope with an explanation and a request for reinstatement of the deadline). A change in the method of delivery—e.g., by direct delivery to the court or by using a private courier service—is not permitted in the case of the aforementioned defects (incorrect addressing and postage).

D. Delivery to a Swiss diplomatic or consular representation

Another way to meet the deadline is to **hand over** the submission in writing 14
to a Swiss diplomatic or consular representation abroad no later than the last day of the deadline. This option is available not only to persons domiciled or habitually resident abroad, but also to any party to the proceedings who is abroad on business or vacation. It is sufficient to place the submission in the

mailbox of the relevant institution. However, simply posting the submission to the institution does not meet the deadline.

15 The above information applies to **proof of** delivery or placement in the mailbox of the representation. In this context, the direct delivery of a submission to a Swiss diplomatic or consular representation is treated in the same way as direct delivery to a Swiss court, and the posting of the submission in the mailbox of a Swiss representation is treated in the same way as posting in a Swiss Post mailbox.

III. EFFECT OF MEETING DEADLINES AND FORWARDING SUBMISSIONS MISTAKENLY FILED WITH AN INCOMPETENT COURT (ART. 143 PARA. 1BIS CPC)

A. Previous legal situation

16 Until now, the Code of Civil Procedure did not contain **any provisions** on the extent to which procedural acts submitted to a court or authority that is not competent (in terms of jurisdiction or subject matter) are deemed to have been submitted within the time limit. Art. 63 CPC concerns the preservation of lis pendens established by a submission when filed with an incompetent authority or in the wrong proceedings, and not the question of compliance with time limits. The Federal Supreme Court considered the time limit for appeal to have been met in the case of a timely but inadvertently addressed appeal to the deciding court of first instance (iudex a quo) or the deciding authority of first instance, and affirmed an obligation to forward the appeal to the competent appellate court (iudex ad quem). Furthermore, it rejected a general obligation to forward the appeal – and, associated with this, the effect of filing with the incompetent court or authority on the observance of the deadline. There was disagreement on this point in legal doctrine and cantonal case law.

17 Since January 1, 2025, **Art. 143 para. 1bis CPC** has regulated the observance of deadlines for submissions that are mistakenly made to an incompetent Swiss court and their forwarding on the basis of jurisdiction. Submissions that are mistakenly filed with an incompetent Swiss court within the deadline are considered to have been filed in a timely manner. In such cases, the court that does not have jurisdiction now has a general obligation to forward the submis-

sion under certain conditions: if another court in Switzerland has jurisdiction, the court that does not have jurisdiction shall forward the submission ex officio.

B. Scope of application of Art. 143 para. 1^{bis} CPC

1. Subjective scope of application

First and foremost, Swiss **courts whose proceedings are governed by the CPC must** apply Art. 143 para. 1^{bis} CPC. In addition, according to the dispatch, this general procedural provision also applies to **conciliation authorities**. 18

Whether the **child and adult protection authorities** are also required under Art. 143 para. 1^{bis} CPC to consider submissions erroneously filed with an incompetent authority as timely and to forward them under certain conditions is generally determined by cantonal law. Insofar as the cantons do not regulate this matter, the CPC – including Art. 143 para. 1bis CPC – applies as supplementary (cantonal) law. 19

The Federal Supreme Court, administrative and criminal courts, arbitration tribunals (including in the area of domestic arbitration), debt enforcement and bankruptcy offices, supervisory authorities, commercial register authorities, inheritance offices, notaries, civil registry offices, land registry offices, tax authorities, criminal authorities, foundation supervisory authorities, or data protection officers. 20

2. Objective scope of application

Art. 143 para. 1bis CPC applies to "**submissions that are mistakenly filed with an incompetent Swiss court within the time limit**." 21

a. "Submissions" (by a party)...

The wording of Art. 143 para. 1^{bis} CPC covers not only documents initiating proceedings, such as a complaint or a petition, but **all civil procedural submissions** to an incompetent court, regardless of the type of proceedings or the stage of the proceedings. It is also irrelevant whether the submission is in paper or electronic form. 22

23 **Examples**: complaint/petition, response to complaint/petition, reply, rejoinder, request for extension of time, application for legal aid, new submission, statement on the exercise of the constitutional right of reply based on Art. 29 para. 2 of the FC and Art. 6 no. 1 of the ECHR, etc.

b. ...“within the time limit”...

24 The submission to an incompetent court must be made **within the time limit**, otherwise Art. 143 para. 1^{bis} CPC does not apply anyway. In this regard, reference can be made to the general comments on Art. 142 ff. CPC.

c. ...“erroneously”...

25 Only submissions filed ‘erroneously’ with an incompetent court can be considered to have been filed in time and forwarded under certain conditions. What is meant by the term “erroneously” in the context of Art. 143 para. 1^{bis} CPC is a **question of interpretation**.

26 **Benn** argues that, in principle, any submission filed with an incompetent authority should be considered “erroneous.”

27 According to **Tanner**, a submission is presumed to have been submitted in error if a party does not gain any tactical advantage in the proceedings as a result. In the case of lay persons, the requirements for error should be low. It is not necessary for there to be no fault in the error. In case of doubt, the application of Art. 143 para. 1^{bis} CPC should always be assumed.

28 For **Lötscher/Plattner**, the decisive factor is whether or not the party “consciously,” i.e., knowingly and willingly, brought the case before the incompetent court. They affirm the application of Art. 143 para. 1^{bis} CPC only in the case of an unconscious submission to the incompetent court. If there is a mandatory place of jurisdiction or if the court seized is not competent in the matter, it must generally be concluded that the submission to the incompetent court was erroneous (unintentional). In the case of non-mandatory places of jurisdiction, Lötscher/Plattner conclude that the submission was erroneous in the following cases: (1) in the case of submissions by lay persons, (2) submissions by persons represented by a lawyer in which the jurisdiction was explained in detail but incorrectly, (3) submissions in which the incorrect filing was based on a factual or legal circumstance that was unforeseeable or was recognizably overlooked (e.g., recent change of residence, latest case law).

They conclude that a submission was “deliberate” or that there was no error in the following cases: (1) recognizable abuse of rights, (2) submission despite information to the contrary about the competent court, (3) vexatious or unclear submission whose jurisdiction cannot be determined, and further in cases of non-mandatory jurisdiction (4) submissions made with the aim of provoking a response from the opposing party in a court that does not have jurisdiction, and (5) submissions that were deliberately made in a specific type of procedure that subsequently turned out to be unavailable (e.g., legal protection in clear cases under Art. 257 CPC).

Fuchs takes a similar view, rejecting the notion of erroneous submission in any case where the party deliberately chooses the incompetent court (e.g., in the formal part of a lawsuit) or even insists on jurisdiction by, for example, continuing to submit further submissions to the incompetent court despite being advised otherwise. Fault does not preclude error, unless the party's conduct is downright abusive or vexatious. 29

Hurni/Hofmann and **Balmer** argue that there must be an obvious error. This is despite the fact that the requirement of obviousness, which was originally included in the draft, was dropped during the parliamentary deliberations. According to Balmer, an error is more likely to be affirmed in the case of a party without legal expertise than in the case of a party represented by a lawyer. 30

In their commentary on Art. 48 para. 3 BGG, **Amstutz/Arnold** argue that anyone who deliberately or maliciously addresses their submission to an incompetent authority cannot invoke the relevant provision. Furthermore, it would be almost impossible to prove that a submission was filed in error if proceedings were pending before a court and the party had already been instructed (e.g., by means of a confirmation of receipt, an order for advance payment of costs, a request for comments, etc.). In this case, the party would in any event be aware of the jurisdiction of the instructing court. Jenny/Abegg also deny that there is an error if the incompetent court is called upon against better knowledge. 31

According to the opinion expressed here, the differentiated discussion by Lötscher/Plattner is a good guideline and starting point for assessing the question of error. In my opinion, however, in the case of lay submissions, it must always be assumed (and thus in deviation from Lötscher/Plattner, Fuchs, and 32 probably also Amstutz/Arnold) that the submission to an incompetent court was erroneous, especially if the party was informed of the jurisdiction and this information was misunderstood. An example of this is the frequent case in which a party submits an application for free legal aid to the appellate court because the order for advance payment of costs contains information on the possibility of free legal aid. However, this does not apply to abusive conduct or clear, albeit extremely rare, cases of deliberate submissions to an incompetent court for the purpose of provoking a response or a certain type of procedure by lay persons. Querulous submissions must then be returned in any case pursuant to Art. 132 para. 3 CPC, which is why the question of error does not arise here in my opinion. The same applies to unclear submissions where jurisdiction cannot be determined at all. In this case, the court seized must first grant the party a grace period within the meaning of Art. 132 para. 1 in conjunction with 2 CPC to correct its submission so that it can be determined whether the submission was actually made in error. If the party does not comply with this request, the submission is deemed not to have been made. Tanner's comments on error are fundamentally to be endorsed in light of the above. In my opinion, the views of Benn, Hurni/Hoffmann, and Balmer are not compatible with the wording of Art. 143 para. 1^{bis} CPC and must therefore be rejected.

33 In principle, it can be stated that an erroneous submission is to be assumed where a party, due to a lack of judgment, concentration, or similar, mistakenly assumes the jurisdiction of the court seized or does not act in accordance with its correct understanding. Their intention is fundamentally to submit the application to a competent court, but they have a false idea of jurisdiction or their action or application does not correspond to their correct understanding of jurisdiction. The reasons for this (ignorance of the law, oversight, misunderstanding, etc.) are irrelevant. The assumption of an error in the case of a mandatory place of jurisdiction or the lack of subject-matter or functional jurisdiction of the court seised may be more obvious than in the case of a non-mandatory place of jurisdiction. In order not to frustrate the purpose of Art. 143 para. 1^{bis} CPC – the protection of the parties against missing deadlines due to errors of jurisdiction or incorrect addresses – or to avoid unnecessarily complicating its pursuit, a generous interpretation of this provision is required in all cases, taking into account all the specific circumstances and without insisting on rigid testing schemes.

d. ...“before a Swiss court that does not have jurisdiction”...

Art. 143 para. 1^{bis} CPC applies to submissions that have been mistakenly filed with a court that does not have local, subject-matter, or functional jurisdiction. The court seised must examine its own jurisdiction **ex officio** as usual and determine its own lack of jurisdiction. 34

If the court seised is a conciliation authority, according to Federal Supreme Court case law, it is not authorized to make a final ruling on questions of jurisdiction, such as local or subject-matter jurisdiction, in view of its primary task (“conciliation rather than adjudication”), unless it acts as a decision-making authority under Art. 210–212 CPC. In pure conciliation proceedings, the conciliation authority may therefore, according to the Federal Supreme Court, declare itself incompetent only under the following conditions: The conciliation authority's lack of jurisdiction is obvious and cumulative in relation to local jurisdiction (2a) there is a (partially) mandatory place of jurisdiction in another location, which is why a statement of defense pursuant to Art. 18 CPC is excluded, or (2b) the defendant invokes local lack of jurisdiction. The examination of its own jurisdiction is thus mainly limited to the question of obvious lack of jurisdiction. Among other things, it must be clarified whether a conciliation procedure is to be conducted for a dispute at all. Accordingly, with regard to Art. 143 para. 1^{bis} CPC, only the conciliation authority that is obviously incompetent is obliged to forward submissions erroneously filed with it. 35

e. ...“submitted”

Art. 143 para. 1bis CPC logically presupposes that the submission is **actually submitted** to an incompetent court. Reference can be made to the general comments on Art. 143 CPC. 36

C. Effects of Art. 143 para. 1bis CPC

1. Compliance with deadlines despite erroneous submission to an incompetent court

Submissions that are erroneously submitted to an incompetent Swiss court within the deadline are deemed to have been submitted in time. Analogous to Art. 63 para. 1 CPC, the date of the first (erroneous) submission to the incompetent court must be considered the date of compliance with the deadline. 37

Submissions that are not mistakenly filed with an incompetent court are still not considered to be within the deadline.

38 According to Abbet, Art. 143 para. 1^{bis} CPC also applies to the observance of **substantive legal deadlines for bringing an action**.

2. Forwarding to another court in Switzerland

a. Prerequisite: Jurisdiction of "another court" in Switzerland

39 The forwarding of a submission erroneously filed with an incompetent court requires that "another court in Switzerland" has jurisdiction. This mainly concerns **other Swiss civil courts and conciliation authorities**.

40 It is still **unclear** whether submissions must also be forwarded to an administrative or criminal court, an administrative authority—in particular a child and adult protection authority, a debt enforcement or bankruptcy office, a supervisory authority, a tax authority, or a criminal authority—or to a federal court or administrative authority. Lötscher/Plattner tend toward a restrictive interpretation of Art. 143 para. 1^{bis} CPC and affirm a forwarding obligation only if the other cantonal instance has jurisdiction within the scope of application of Art. 1 ZPO, i.e., if its proceedings are governed by the CPC, or if the matter in dispute is subject to appeal in civil matters pursuant to Art. 72 BGG. Hurni/Hofmann and Abbet also assume a limited scope of application of Art. 143 para. 1bis CPC.

41 According to the wording of Art. 143 para. 1^{bis} CPC, referral to (national and international) **arbitration tribunals** in Switzerland would also be possible in principle. However, Lötscher/Plattner reject a referral obligation in this case due to the lack of reference to the rules of Parts 1 and 2 of the CPC and for practical reasons.

42 A referral can only take place if it is **possible** for the court first seized to **determine** the correct jurisdiction. According to Lötscher/Plattner, in order to determine jurisdiction, the court that does not have jurisdiction may rely on facts that arise from the parties' submissions or that are considered to be established or notorious. The court is therefore not obliged to establish and supplement the facts of the case ex officio. If jurisdiction is unclear, there is the possibility of an exchange of views between the incompetent court first seized and the court presumed to have jurisdiction (in analogous application

of Art. 29 para. 2 BGG), but referral is also conceivable against the will of the court second seized.

In accordance with its limited powers of review with regard to local and subject-matter jurisdiction, according to Lötscher/Plattner, the **conciliation authority** that is obviously not competent may and must only forward submissions to the authority or instance that is obviously competent. If no other authority or court has obvious jurisdiction, the conciliation authority first called upon is not obliged to forward the case. 43

If there are several "other" **alternative places of jurisdiction**, "one" competent court within the meaning of Art. 143 para. 1bis CPC cannot be determined by the court first called upon. The obligation to forward the case does not apply if there are several "other" alternative competent courts in Switzerland – or even abroad. According to Lötscher/Plattner and Balmer, the plaintiff does not have to be heard in such cases. However, the plaintiff may express its wishes by filing a contingent motion requesting that the case be forwarded to a specific court. If this court is one of the alternative competent courts, the incompetent court must, according to Lötscher/Plattner, forward the submission accordingly after checking its jurisdiction. 44

Partial forwarding must be possible in cases where a single submission contains several claims for which different courts have jurisdiction. 45

b. Procedure on the part of the court

The court that does not have jurisdiction must forward the erroneously filed submission **ex officio**. Accordingly, the court is required in all cases – especially in complex questions of jurisdiction – to examine the requirements of Art. 143 para. 1bis CPC. If the plaintiff or applicant wishes to prevent the court seised from forwarding the submission in the event that it lacks jurisdiction, in order to be able to file the submission initiating the proceedings itself with the court that is (in its view) competent pursuant to Art. 63 para. 1 CPC, it may include a corresponding alternative request for non-forwarding in its legal claims. In terms of time, according to the message, the transfer must be carried out "as expeditiously as always, but not immediately." 46

According to **Lötscher/Plattner**, in the event of an erroneously filed procedural application (lawsuit or petition), the court first called upon (locally or materially) that lacks jurisdiction must always issue a contestable decision of 47 non-admissibility, whereby the decision on referral is a secondary consequence of this and forms part of the decision of non-admissibility. According to Lötscher/Plattner, the court that is not competent is also not obliged to inform the parties of the result of the jurisdiction check prior to forwarding and to grant them a legal hearing. However, a document initiating proceedings must in principle be served on the opposing party in advance in order to give them the opportunity to respond, particularly in the case of a non-mandatory place of jurisdiction. Forwarding without a decision not to hear the case, especially in obvious cases, does not correspond to the will of the legislature and can only be done in exceptional cases where a non-procedural submission has been made to an incompetent court.

48 According to **Tanner**, the court of first instance that is not competent must, in principle, hear the parties and thus determine whether the party submitted its submission to it deliberately or by mistake. This also allows the opposing party to submit a statement in cases of non-mandatory jurisdiction. The court must then issue a decision not to hear the case (with a transfer order or a statement of waiver of transfer in the operative part of the decision). In clear cases, i.e., if the submission is obviously misdirected, such as in the case of documents that do not initiate proceedings, it is possible to dispense with obtaining statements and initiating separate proceedings and to forward the submission informally by means of a short letter. Ultimately, this also corresponds to the view of **Honegger-Müntener/Rufibach/ Schumann**, who, based on legal considerations, distinguish between official forwarding (without opening proceedings before the relevant authority) and referral of proceedings (as a result of a decision not to hear the case when proceedings are opened), whereby the former should only be possible in clear-cut cases of obvious lack of jurisdiction. In all other cases, proceedings must be opened and a decision not to hear the case (with transfer of proceedings) must be made. This view is also held by **Fuchs**, who in the majority of cases advocates formal referral combined with a contestable decision not to hear the case (while preserving the parties' right to be heard). An actual informal referral can only take place if the error and the question of jurisdiction are so clear and obvious that formal proceedings would be pointless and would not serve either party. However, this is no longer the case if the place of jurisdiction is not mandatory and a statement of defense is therefore possible.

It should be noted that, with Art. 143 para. 1bis CPC, the legislature wanted to provide a user-friendly regulation for dealing with submissions to incompetent courts in Switzerland. The party that has mistakenly approached an incompetent court has a significant interest in having its submission forwarded promptly and expeditiously. This is also in the general interest of legal certainty and orderly proceedings. Finally, the court and any opposing party must also be able to ascertain that, subject to cases justifying reinstatement under Art. 148 CPC, no further submissions are to be expected after a certain period of time following the expiry of the deadline. If the court had to issue a decision of non-admissibility (including a decision on forwarding) in every case, this would, **in our opinion**, lead to a significantly higher workload and a comparatively longer response time on the part of the courts, despite the fact that it is now possible to issue decisions without stating reasons. This is because they would have to open new proceedings for every submission erroneously addressed to them in order to be able to terminate them again with a decision not to hear the case, according to Lötscher/Plattner. It should be borne in mind that in most cases the courts are confronted with submissions for which they are clearly not competent (e.g., applications for free legal aid to the appellate court for a first-instance proceeding) and do not involve complex questions of jurisdiction, which means that the effort required on the part of the courts to issue a decision of non-admissibility in such cases appears disproportionate. Furthermore, it should be noted that the party making the erroneous submission does not intend to initiate proceedings before the court that does not have jurisdiction. In particular, it is unacceptable that the plaintiff/ petitioning party, who has mistakenly submitted their submission to a court that does not have jurisdiction, should be held liable for their oversight (and a court that they did not consciously choose) in the case of a non-mandatory place of jurisdiction if the opposing party agrees to the mistakenly invoked place of jurisdiction in accordance with Art. 18 CPC. As regards the advantages of a formal decision, the parties are likely to agree in most cases to the referral to the competent court. The contestability of a decision not to hear the case (including the decision on referral) is therefore likely to be of secondary importance. 49

Based on these considerations, it seems inappropriate, in our opinion and contrary to the view of Lötscher/Plattner, to open new proceedings and issue a decision of non-admissibility in every case of an erroneously filed submission. In obvious cases where the jurisdiction of another court is apparent, and 50 in particular in the case of documents that do not initiate proceedings, it must be sufficient to stamp them with a receipt stamp and forward them to the competent court (with a copy to the parties for information) **informally**, enclosing the envelope or electronic receipt of receipt – i.e. without initiating proceedings – or, if another court has jurisdiction, to return it to the party. For evidence purposes, it is advisable to make a copy or scan of the forwarded or returned submission (including attachments) and keep it on file at the court. If a party does not agree with this procedure, it can still request a contestable decision not to hear the case (including a decision on forwarding).

51 If the jurisdiction of another court is not apparent from the erroneously filed submission, if complex questions of jurisdiction need to be answered, or if the document is a procedural document that is not forwarded, the initiation of formal proceedings is justified **in individual cases**, whereby, depending on the initial situation, an exchange of documents must be ordered or the parties must be granted a legal hearing before a decision not to hear the case (including a decision on referral) is issued. The approach outlined by Gasser/Rickli/Josi, according to which forwarding should take place by means of a (contestable) procedural order – and explicitly not by means of a decision not to hear the case – is not comprehensible. On the one hand, this also requires the opening of formal proceedings in advance, which is not justified from the outset in the case of a document that does not initiate proceedings (as it is not intended by any party). On the other hand, the corresponding proceedings would ultimately also have to be formally concluded with a decision terminating the proceedings, in which case the proceedings would probably have to be dismissed as irrelevant pursuant to Art. 242 CPC. In my opinion, issuing a procedural order for referral therefore seems even more costly than a decision not to hear the case (including a decision on referral). Furthermore, a procedural order generally serves to ensure the swift preparation and conduct of the proceedings. It is not clear to what extent referral within the framework of Art. 143 para. 1^{bis} CPC fulfills this purpose.

52 In conclusion, however, it should be noted that only time will tell which approach proves itself in **practice** and can be recommended as best practice.

c. Consequences of referral

53 Once the referral has become final, the case or submission is **taken over** by the second court or authority. The decision on jurisdiction set out in the re-

ferral order does not, in principle, have any prejudicial effect. Only the court or conciliation authority named therein can make a legally binding decision on its own jurisdiction. It is therefore not excluded (and also permissible) that a court, as the recipient of the referral, considers itself to be incompetent and issues a further referral order.

54 If a court forwards a submission to a **conciliation authority** within the scope of Art. 143 para. 1^{bis} CPC, it can be assumed that the latter must take over the case, as a conciliation authority may only deny its jurisdiction to a limited extent and the conditions for this are unlikely to be met in the case of a referral by a court. In particular, there should be no case of “obvious lack of jurisdiction.”

55 The court takes over the proceedings at the **stage** at which they are at the time of referral. In principle, the parties may again comment twice on the jurisdiction of the court deemed to have jurisdiction. Precautionary measures already ordered by the (erroneously) called court remain in force until they are revoked or amended by the second court called.

56 If a document initiating proceedings is transferred, the date of the first (erroneous) submission to the court that lacks jurisdiction is considered the date of **litigation**. The litigation therefore continues and the plaintiff or applicant has no possibility of resubmitting their claim or application to another court themselves.

d. Consequences of rejection

57 If no referral is made, the plaintiff or applicant may resubmit their **document instituting proceedings** to the competent court or conciliation authority within one month of the decision not to hear the case, with the date of the first submission being deemed the date of lis pendens.

58 A **document that does not initiate proceedings** and that has been returned to the party due to the failure to determine another competent court must also be submitted by the party to the competent court without delay in order to comply with the time limit under Art. 143 para. 1^{bis} sentence 1 CPC.

IV. COMPLIANCE WITH TIME LIMITS FOR ELECTRONIC SUBMISSIONS (ART. 143 PARA. 2 CPC)

A. Form

59 Electronic submissions must be in a specific form in order to meet the deadline. Art. 130 para. 2 CPC stipulates that electronic submissions (including the attachments mentioned therein and submitted with them) must bear a **qualified electronic signature** in accordance with ZertES. Submissions by simple e-mail or other electronic submissions to the court's address do not generally meet the deadline. If the formal error can be corrected before the deadline expires, the court must, in principle, notify the party concerned. The court cannot grant the party an extension within the meaning of Art. 132 para. 1 CPC in order to repeat a formally correct delivery (qualified electronic signature, permissible file format, etc.). According to established Federal Supreme Court case law, subsequent rectification is also not possible.

60 The **modalities** of electronic communication between the parties to the proceedings and the authorities are regulated in the Ordinance of June 18, 2010, on Electronic Transmission in Civil and Criminal Proceedings and Debt Collection and Bankruptcy Proceedings (VeÜ-ZSSV; SR 272.1). However, it does not apply to proceedings before the Federal Supreme Court. Submissions (including attachments) must be sent in PDF format to the address of the authority on the recognized delivery platform used by it. PrivaSphere Secure Messaging from PrivaSphere AG and IncaMail from Swiss Post are currently recognized delivery platforms within the meaning of Art. 2 VeÜ-ZSSV. It should be noted that IncaMail offers the delivery options “Confidential,” “Personal,” and “Registered,” whereby only the latter generates a delivery receipt within the meaning of Art. 143 para. 2 CPC. Furthermore, when using the PrivaSphere AG delivery platform, it is possible to submit an electronic document without providing it with a sufficient digital signature and without obtaining the required delivery receipt. The Federal Chancellery maintains two directories of authority addresses, which are available on the internet.

61 An authority may request the **subsequent submission** of submissions and attachments on paper if these cannot be opened due to technical problems or are not legible when displayed on screen or in printed form. It must grant the

parties involved in the proceedings a reasonable period of time for subsequent submission.

Certain authors also consider it conceivable and possible for the acting party to submit some of the documents electronically and the rest in paper form by post or direct delivery to the court. In my opinion, there is no objection to this, provided that the respective **partial submissions** are sufficiently marked as such so that they can be easily assigned. It goes without saying that the respective partial submissions must be submitted separately in order to meet the deadline. 62

B. Principle of receipt

Electronic transmission is subject to the principle of receipt: the deadline is deemed to have been met if receipt at the court's delivery address has been confirmed by the relevant IT system by the last day of the deadline (by midnight) at the latest. Specifically, the time at which the delivery platform issues the **receipt of submission** is decisive for compliance with a deadline for electronic submissions. The time of dispatch is not relevant, but the receipt is usually issued automatically immediately afterwards. The acting party can therefore immediately see whether the transmission was successful. 63

The **risk** of a transmission failure or technical malfunction is borne by the party until the court's receiving server has received the document – and thus until the delivery platform has issued a receipt. It is therefore advisable not to make the electronic transmission shortly before the deadline, but to allow sufficient time for this, so that further attempts or submission in paper form are still possible as a precaution. 64

V. COMPLIANCE WITH DEADLINES FOR PAYMENTS TO THE COURT (ART. 143 PARA. 3 CPC)

A. (Modified) principle of dispatch

The deadline for payment to the court is met if the amount to be paid is **paid in** or **debited** from the account of the party concerned or its representative by the last day of the deadline at the latest. It is not sufficient for the payment order to be issued within the deadline. On the other hand, it is not necessary 65 for the amount to be received by the court or credited to the court's account within the deadline.

66 The **burden of proof** again lies with the party invoking the timeliness of the payment.

B. Cash deposit

67 In order to meet the deadline, the party liable for payment may deposit the amount due with Swiss Post at the latest on the last day of the deadline by making a payment at the **post office counter** (or at the counter of one of its postal agencies) in favor of the court. The deposit function at Postomats will no longer be available as of July 31, 2021. It is also possible to pay the amount in cash at a branch of the bank that manages the court account. Payment to a foreign post office or bank does not meet the deadline; the amount must again be handed over to Swiss Post or the bank that manages the court account for further processing or received by the court cashier's office by the last day of the deadline at the latest.

68 Although not provided for by law, it is also generally accepted that the cash amount can be handed over directly **at the court** counter in favor of the court cashier's office in exchange for a receipt. However, a party is not entitled to demand that the court accept any amount. In view of the risk of money laundering, an upper limit of CHF 15,000.00 appears reasonable.

C. Bank or postal transfer

69 For payments to the court by bank or postal transfer, the date on which the **account is debited** is decisive for meeting the deadline: The party's Swiss account must be debited with the amount to be paid by the last day of the deadline at the latest (known as the value date). For transfers from abroad, it is also necessary for the required amount to be credited to the court cashier's account in good time or at least to reach the sphere of influence of Swiss Post or a Swiss bank; Simply debiting a foreign account is not sufficient to meet the deadline. In this context, it should also be noted that transaction and exchange fees are borne in full by the transferring party so that the entire amount is paid within the deadline.

70 The party is therefore required to issue the payment order in **sufficient time** so that the bank or post office can process it within the payment deadline. It

must also ensure that there are sufficient funds in the account to be debited. The risk of a delayed debit is borne by the party liable for payment.

If the credit is only made to the court account one day after the deadline, the court must have doubts about the timeliness of the payment and **check back** with the party liable for payment regarding the date of the debit. If the account of the party liable for payment is debited with the required amount before the deadline but no credit is then made to the court account, court practice requires consideration of whether the failure of the transfer is attributable to the party liable for payment or to the bank or post office. 71

D. Erroneous payment to an incompetent court (Art. 143 para. 1bis CPC analogously)

In accordance with Benn and Tanner, it can be assumed that Art. 143 para. 1bis CPC should also apply mutatis mutandis to payments. A payment made in error to an incompetent court within the deadline is considered to have been made in time. The payment must be **forwarded** ex officio if another court in Switzerland is competent. 72

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COMMENTARY ON

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A commentary by Linda Novina

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Art. 144 Extension

[1] Statutory limitation periods may not be extended.

[2] Limitation periods set by the court may be extended for good reason if the request to do so is made before the period expires.

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I. NON-EXTENDIBILITY OF STATUTORY TIME LIMITS (ART. 144 PARA. 1 CPC)

Statutory time limits are those whose duration is determined **by law**. They are generally unalterable and therefore cannot be extended, even by agreement between the parties. 1

The **setting of a grace period** for the correction of defective submissions pursuant to Art. 132 para. 1 and 2 CPC is not considered an extension. It is therefore also available for submissions that are subject to a statutory deadline. However, no subsequent material additions or corrections may be made. The grace period serves only to prevent certain formal defects. 2

Certain authors advocate the application of Art. 43 lit. b BGG as a general legal principle and consider the granting of an appropriate **extension of time** to be necessary even in the case of statutory deadlines in particularly complex or extensive exceptional cases. 3

Irrespective of this, a missed statutory deadline can be **restored** in accordance with the provisions of Art. 148 CPC. 4

Examples of statutory deadlines are deadlines for appeals (Art. 311 para. 1, Art. 314 para. 1, Art. 321 para. 1 and 2, and Art. 329 para. 1 CPC), deadlines for responding to appeals (Art. 312 para. 2, Art. 314 para. 1, and Art. 322 para. 2 CPC), for a request for recusal (Art. 49 para. 1 CPC), for a request for reinstatement (Art. 148 para. 2 and 3 CPC), for filing a lawsuit in court after the issuance of the authorization to sue (Art. 209 para. 3 and 4 CPC), for rejecting a proposed judgment (Art. 211 para. 1 CPC), and for a request for written reasons for the decision (Art. 239 para. 2 CPC). 5

Art. 144 para. 1 CPC is generally only applicable to deadlines that are regulated in the CPC. The extendibility of **statutory time limits under substantive law** (e.g., Art. 439 para. 2, Art. 450b, Art. 521, Art. 533, and Art. 600 CC, etc.) **and under debt and bankruptcy enforcement law** (e.g., Art. 17 para. 2, Art. 18 para. 1, Art. 83 para. 2, and Art. 174 para. 1 of the SchKG, etc.) is not covered by Art. 144 para. 1 of the CPC and is governed by its own provisions (e.g., Art. 576 of the CC, Art. 33 para. 2 of the SchKG). It should be noted that the relevant provisions may refer to Art. 144 para. 1 CPC. 6

II. EXTENSION OF COURT DEADLINES (ART. 144 PARA. 2 CPC)

A. Court deadlines

7 Court (or judicial) deadlines are those whose duration is set in individual cases **by the court** or the presiding judge. These include both deadlines for submissions and payment deadlines. Some legal scholars also consider a deadline whose setting is expressly provided for in the Code of Civil Procedure, but whose duration is not (sufficiently) specified by law and must therefore be set by the court, to be a judicial deadline.

8 The assessment of a judicial deadline is at the court's discretion. Factors to be taken into account include, for example, the estimated time required for the procedural action, the urgency of the case, foreseeable difficulties in the investigation and procurement of evidence, and the seven-day collection period for registered mail in the case of deadlines fixed to a specific calendar day.

9 **Examples** of extendable court deadlines include the deadline for appointing a representative in the event of lack of capacity to conduct legal proceedings (Art. 69 para. 1 CPC), the (extended) deadline for paying the advance on costs (Art. 101 para. 1 and 3 CPC), the extended deadline in the event of an insufficient number of submissions (Art. 131 CPC), the grace period in the event of a formally defective submission (Art. 132 para. 1 and 2 CPC), the deadline for submitting an expert opinion (Art. 185 para. 3 CPC), the deadline for responding to a claim or counterclaim (Art. 222 para. 1 and 224 para. 3 CPC), the grace period for a missed response to the claim (Art. 223 para. 1 CPC), the deadlines in the second exchange of documents (Art. 225 CPC), the deadline for filing a claim in the case of precautionary measures prior to lis pendens (Art. 263 CPC) or for a claim for damages (Art. 374 para. 5 CPC). Since January 1, 2025, this has also included the time limit for exercising the right of reply, which is derived from Art. 29 para. 1 and 2 of the FC and Art. 6 no. 1 of the ECHR (Art. 53 para. 3 CPC).

10 For Art. 144 para. 2 CPC, too, the calculation of a time limit – and thus also the possibility of its extension – is generally governed **by the law which sets the time limit**. The extendibility of substantive law time limits is therefore also governed by the relevant provisions in the CC or CO. The same applies to

debt collection and bankruptcy law. The extension of the court deadline for filing a lawsuit for the definitive registration of a building contractor's lien under Art. 961 para. 3 of the Swiss Civil Code (CC) is reserved, which is of a substantive nature but can nevertheless be extended under Art. 144 para. 2 of the Swiss Civil Procedure Code (CPC).

B. Extension for sufficient reasons

Court deadlines may be extended for **sufficient** reasons. A reason is considered “sufficient” if, based on general life experience, it is likely to prevent or at least impede the timely performance of the procedural act. The court or the presiding judge decides at its discretion, taking into account the specific circumstances of the individual case (importance of the reason given, interest in the proper conduct of the proceedings, urgency of the matter, etc.) when weighing up the interests involved. Art. 144 para. 2 CPC is therefore formulated as a “may” provision. However, an extension of the deadline must be granted if there are sufficient grounds; a refusal constitutes a denial of the right to a fair hearing. 11

The practice of the Federal Supreme Court is generally **generous** in affirming sufficient grounds if the proceedings are not particularly urgent and there are no overriding public or private interests opposing the extension of the deadline. According to some legal scholars, an extension should be granted if there are “reasonably plausible grounds” for why a deadline cannot be met. In any case, extensions are granted more cautiously in simplified and summary proceedings. 12

Examples of sufficient reasons: illness, vacation, hospitalization, death of a close relative, military or civil service, civil defense, imprisonment, absence, work overload or other time-sensitive work, dismissal of key employees, restructuring of the law firm, short-term appointment of a lawyer, missing documents, need to translate extensive evidence, technical difficulties, short-term lack of funds, distance, absence from the office, stay abroad, extensive or complex nature of the case, or reasons of procedural economy such as impending settlement negotiations or an imminent agreement between the parties. The aforementioned impediments may affect both the party itself and its legal representative or attorney. 13

14 The **consent** of the opposing party to the extension of the deadline may serve as sufficient grounds, especially in proceedings subject to the disposition maxim, but the court remains responsible for conducting the proceedings. The court or the presiding judge is not obliged to grant (multiple) requests for extension based on an agreement between the parties without further consideration if there are overriding public or private interests to the contrary. The revocation period in settlements is a private law period and not a court deadline. It can therefore only be extended by the opposing party, not by the court.

15 In principle, **multiple** extensions are possible, although each additional extension request is likely to be subject to increasingly stringent requirements regarding the reasons provided. Only in extremely exceptional cases are deadlines designated as “non-extendable” extendable, or does the approval of a further extension to a deadline already designated as “one-time,” “last time,” or “no longer extendable” appear appropriate. The same applies to (short) grace periods. Where the conditions for the reinstatement of a deadline (Art. 148 CPC) are met, an extension of the deadline must be granted in any case in order to avoid delays.

C. Request for extension of time

16 Although the Code of Civil Procedure does not expressly specify the form, the request for extension of time must generally be submitted to the competent court in **writing or electronically**, in compliance with the general formal requirements of Art. 130 CPC. The competent court or authority is generally the one that originally set the time limit to be extended.

17 The request for an extension of time must be submitted **before the expiry of the time limit**, at the latest by midnight on the last day. The general rule of Art. 143 CPC applies to the observance of the time limit; the request does not have to be received by the court during the current time limit or even be assessed by it. A request for an extension of time that is submitted late must be accepted as a request for reinstatement. An extension ex officio is generally excluded, except in cases where a grace period is set in accordance with Art. 101 para. 3 and Art. 223 para. 1 CPC.

18 It is essential to provide **reasons** for the request for an extension of time. The sufficient reasons must be stated in concise form and must generally be substantiated. It may also be necessary to submit relevant evidence, such as a

doctor's certificate, marching orders, a booking confirmation, or similar. The desired duration of the extension must also be specified, which is determined by the date by which the party will be in a position to take the required procedural action under the known circumstances.

The request for an extension has **suspensive effect** in that the original deadline cannot expire before the court or the presiding judge decides on the extension. This does not apply to frivolous and abusive requests without serious grounds. As a precaution, requests for an extension of time should nevertheless be submitted as early as possible, i.e., as soon as sufficient grounds are known. 19

D. Decision on the extension of time

1. Procedural order

The court or the presiding judge **decides** on the extension of the deadline by means of a procedural order. Reasons need only be given in the case of unusually short or long extensions of the deadline or if the request for an extension is rejected; in all other cases, the request may be approved without giving reasons by means of a stamp indicating the specific duration of the extension. 20

For practical reasons, it is generally not necessary to obtain a **prior statement** from the opposing party on the request for an extension of time, at least in the case of first-time requests. However, the parties must be notified of the decision on the extension of time. Failure by the court or the presiding judge to respond to a request for an extension of time does not automatically mean that the request has been granted. The requesting party is required to inquire with the court or the presiding judge. 21

A procedural order concerning an extension of time can only be **challenged** by appeal if it threatens to cause a disadvantage that cannot be easily remedied. However, according to some legal scholars, if the request for an extension of time is rejected, there are generally no grounds for a threat of a disadvantage that cannot be easily remedied. If the extension of time is granted, the opposing party is also not generally aggrieved in the absence of a disadvantage that cannot be easily remedied; and therefore only in very rare cases, if at all, can it successfully appeal. 22

2. Consequences of the decision

23 If the court or the presiding judge **approves** the request for an extension, the extension shall follow on from the original deadline without interruption. Examples: If the deadline ends on Tuesday, September 6, the start of the extension, if approved, will be Wednesday, September 7. If the end of the original deadline falls on Saturday, September 10, the deadline will end on the following working day (Art. 142 para. 3 CPC). The current deadline is extended to Tuesday, September 13. The approval of an extension of the deadline does not affect the party's legal right to set a grace period – e.g., for the payment of the advance on costs pursuant to Art. 101 para. 3 CPC.

24 If the request for an extension is **rejected**, a short grace period (known as an "emergency deadline") is granted in practice, provided that the request was not futile from the outset. In this context, the Federal Supreme Court ruled that the requesting party must nevertheless be granted a grace period to perform the time-bound action, unless the request must be considered frivolous or the requesting party should have assumed in good faith from the outset that that no extension would be granted because, for example, the deadline was marked "non-extendable" or "final." In the case of "one-time," "non-extendable," or "final" deadlines, an extension is nevertheless not completely ruled out; the applicant may not rely on the setting of an emergency deadline if the request for an extension is rejected. If the emergency deadline is set for a specific calendar day, the seven-day collection period for registered mail pursuant to Art. 138 para. 3 lit. a CPC must be observed.

3. Duration and number of extensions

25 The court or the presiding judge has **wide discretion** in deciding how long or how often a deadline can be extended. The duration of the extension granted and the number of possible extensions must be adapted to the individual case. The reasons given for the extension must be weighed against the interest in a speedy conclusion of the proceedings.

26 In **summary and simplified proceedings**, shorter extensions must be granted than in ordinary proceedings, and the number of extensions granted must also be kept to a minimum. Even greater restraint is required in super-provisional proceedings.

Extensions of time limits for an indefinite period or to an indefinite date, as well as extensions of time limits that are too short, are **not permissible**. This is the case if the extended time limit is already about to expire when the extension is granted. 27

The **duration** of the extension must be specified in number of days, weeks, or months, or the extended deadline must be set to a specific calendar day. In the latter case, the seven-day collection period for registered mail must be observed. Any suspension of the deadline (Art. 145 CPC) must also be taken into account in the calculation. 28

In the procedural order granting the extension, the court or the presiding judge must also **clearly indicate** if he or she does not intend to approve any further requests for extension. For this purpose, the extension granted should be marked as "final," "one-time," or "not (further) extendable." Otherwise, the parties may assume in good faith that a further request for an extension will be considered and, in the event of rejection, at least a short grace period will be granted, provided that the request is not frivolous. 29

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Art. 145 Suspension of limitation periods

[1] Statutory limitation periods or periods set by the court shall be suspended:

a. from the seventh day before Easter up to and including the seventh day after Easter;

b. from 15 July up to and including 15 August;

c. from 18 December up to and including 2 January.

[2] The suspension does not apply:

a. in conciliation proceedings;

b. in summary proceedings.

[3] Parties must be made aware of the exceptions provided in paragraph 2 above.

[4] The provisions of this Code on the suspension of time limits apply to all actions under the DEBA which are to be brought before a court. They do not apply to objections filed with the supervisory authority.

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I. SUSPENSION OF TIME LIMITS (ART. 145 PARA. 1 CPC)

A. Court recesses

1 In principle, **all civil procedure deadlines** – both statutory and judicial, calculated in days, weeks, months or otherwise, grace periods as well as extended or reinstated deadlines – must take into account the court recesses listed exhaustively in Art. 145 para. 1 CPC. This contrasts with Art. 46 para. 1 BGG, according to which court holidays in proceedings before the Federal Supreme Court are only to be taken into account for deadlines determined by days.

2 Court holidays last:

- From the seventh day before **Easter** up to and including the seventh day after Easter (a total of 15 days), with Easter Sunday being the decisive date and the holidays therefore beginning on the Sunday before Easter (i.e., Palm Sunday) and running up to and including the Sunday after Easter;
- From **July 15** up to and including **August 15** (a total of 32 days);
- From **December 18** to and including **January 2** (a total of 16 days).

3 Tappy is of the opinion that the court or the presiding judge may expressly provide for the exclusion of the suspension of time limits when setting a court deadline, in particular in the case of setting a short grace period pursuant to Art. 101 para. 3 or Art. 223 para. 1 CPC, or when setting a short emergency deadline upon rejection of a request for an extension of time, expressly provide for the **exclusion of the suspension of time limits**. The same must also be possible with the consent of the parties and tacitly when setting an hourly deadline. These considerations are not shared in view of the clear wording of Art. 145 para. 1 and 2 and Art. 146 para. 2 CPC and for reasons of legal certainty and user-friendliness of the CPC.

B. Effects

4 During court recesses, **the deadlines are suspended**, i.e., the start of a deadline is suspended and deadlines that are already running are suspended.

1. Suspension of the start of the deadline

Events triggering deadlines may occur without restriction during court recesses. Court deliveries (of notifications and decisions triggering deadlines) are therefore also possible during court recesses. A deadline simply does not begin to run during this period, even though it has already been triggered. The suspension of deadlines therefore only affects the **running of** a specific deadline – and not its triggering. The first day of a statutory or judicial deadline that begins during the court recess in accordance with Art. 142 para. 1 CPC always falls on the first day after the end of the suspension of deadlines or the recess, regardless of whether it is a Saturday, Sunday, or a recognized public holiday. The same applies if the event triggering the deadline occurs on the last day before the court recess. It is irrelevant whether the deadline is a daily, weekly, monthly, or annual deadline. The parties are generally free to take the required procedural action before the deadline begins. 5

Examples: A notification triggering a deadline is served on the party on July 14. Due to the court recess from July 15 to August 15 and the associated suspension of deadlines, the deadline does not begin to run until August 16, which may also be a Saturday, Sunday, or recognized public holiday. The same would apply if the notification triggering the deadline were served on the parties on July 18. 6

2. Extension of deadlines already in progress

A deadline that began before the court recess **is suspended during the recess** and is extended by the duration of the suspension. 7

For the calculation of **daily deadlines**, the days up to the last day before the court recess or the suspension of deadlines are counted, and from the first day after the recess or suspension, the number of days that were still outstanding before the start of the suspension is added. If the deadline calculated in this way falls on a Saturday, Sunday, or recognized public holiday, the deadline shall end on the following working day (Art. 142 para. 3 CPC). Example: The party is served with a notice triggering the deadline on July 11 (Friday). The deadline is 10 days and begins to run on July 12. Three days (July 12–14) have passed until the court recess. On August 16, the deadline continues to run (day 4), with seven days of the deadline still remaining. The deadline is August 22 (Friday). If the last day of the deadline falls on December 17 (Sunday), it is ex- 8 tended to the next working day (Monday, December 18) in accordance with Art. 142 para. 3 CPC. As this day falls during the court recess, the deadline ends on January 3 or, if necessary, on the following working day.

9 **Monthly deadlines** are calculated in a first step in accordance with Art. 142 para. 2 CPC – initially without taking court holidays into account. The number of days of the court recess during which the deadline was suspended is then added. If the last day calculated in this way falls on a Saturday, Sunday, or recognized public holiday, the deadline ends on the following working day. The same applies analogously to weekly deadlines. Example: A notice triggering the deadline is served on the party on December 13 (Friday). The deadline is three months and begins to run on December 14 (Saturday). Without taking into account the court holidays from December 18 to January 2, the deadline would run until March 13 (Thursday). Taking into account the court recess of 16 days (calculated from March 14), the period would then end on March 29 (Saturday) or, pursuant to Art. 142 para. 3 CPC, on the following working day (Monday, March 31), provided that this date does not fall during the Easter recess.

10 For the calculation of **annual deadlines**, it does not seem reasonable to extend them by the duration of the court recess, as is the case with monthly and weekly deadlines. However, the associated suspension of the deadline at the beginning and end of the deadline must be taken into account.

11 If the **end of the period** falls during the court recess, even in the case of periods or annual periods that have been deliberately or accidentally set for a specific calendar day during the suspension of the period, the period is extended until the first day after the end of the suspension of the period, or until the following working day if necessary (Art. 142 para. 3 CPC). The same applies if the deadline expires on a Saturday, Sunday, or public holiday and the following working day falls during the court recess. If the court or the presiding judge sets the deadline for a specific calendar day outside the court recess (e.g., January 5), the court recess has no influence.

II. EXCEPTIONS (ART. 145 PARA. 2 CPC)

12 Art. 145 para. 2 CPC lists **exhaustively** the proceedings in which the deadlines do not stop during the court recess.

A. Conciliation proceedings

During conciliation proceedings pursuant to Art. 202 ff. CPC, there is no court recess. In BGE 138 III 615, the Federal Supreme Court ruled on the scope of the exclusion of the suspension of time limits for conciliation proceedings, limiting it in principle to **Art. 202–207 CPC** of Chapter 2, which is entitled "Conciliation proceedings." 13

Based on this, the **deadline for filing a lawsuit** with the court pursuant to Art. 209 para. 3 and 4 CPC is no longer part of the conciliation proceedings. If this leads to the initiation of ordinary (or simplified) proceedings before the court, the court recesses must be taken into account. 14

According to Federal Supreme Court case law, the suspension of time limits during court recesses must also be taken into account when calculating the time limit for rejecting the conciliation authority's proposed judgment under Art. 211 para. 1 CPC. 15

The **decision-making procedure** before the conciliation authority at the request of the plaintiff pursuant to Art. 212 CPC is also no longer part of the conciliation procedure. Unless this is a summary procedure, the court recesses must therefore be taken into account. 16

B. Summary proceedings

Court recesses are also excluded in summary proceedings pursuant to **Art. 248 ff. CPC**. Summary proceedings are applicable, for example, to precautionary measures (including during divorce proceedings), to the protection of marriage and partnerships, to free legal aid (including supplementary payment proceedings), to requests for recusal, to legal protection in clear cases, to court injunctions, and to matters of voluntary jurisdiction. 17

For proceedings before the **child and adult protection authority** (and before the appeal body against its decisions), the cantons may declare summary proceedings applicable or explicitly exclude the suspension of time limits or the application of court recesses. For example, the canton of Thurgau has declared the provisions of the CPC on summary proceedings to be applicable mutatis mutandis, unless there are special provisions. The CPC thus applies as subsidiary cantonal law and excludes the application of court recesses. Certain cantons, such as Bern and Lucerne, declare the provisions of the cantonal 18 administrative law to be applicable on the basis of the legislative competence granted in Art. 450f of the Swiss Civil Code (CC), which is why these provisions or any regulations contained therein on the suspension of time limits must be consulted first. The cantons of Aargau, Appenzell Ausserrhoden, Fribourg, Schaffhausen, St. Gallen, and Zurich, among others, have expressly excluded the suspension of time limits under cantonal law. If the cantons do not provide for any regulations, no court holidays are to be taken into account, particularly in appeal proceedings against decisions of the child and adult protection authority.

19 If, following summary proceedings, a **time limit for initiating ordinary (or simplified) proceedings** is triggered or set (known as the continuation period), the court recess must be taken into account when calculating the time limit. The court action period for the issuance of precautionary measures prior to lis pendens pursuant to Art. 263 CPC is therefore suspended during court recesses. In contrast, the 30-day objection period for the non-recognition of a court injunction is still part of the summary proceedings, which is why court recesses do not have to be taken into account. It should also be noted that the provisions of the CPC – and thus also Art. 145 CPC – do not apply to substantive time limits under the CC and the CO, even if they concern legal actions. Accordingly, court recesses do not apply in this context.

20 According to Federal Supreme Court case law, the exclusion of the suspension of time limits for summary proceedings under Art. 145 para. 2 lit. b CPC also applies in cantonal **appeal proceedings**.

III. DUTY TO INFORM (ART. 145 PARA. 3 CPC)

21 Pursuant to Art. 145 para. 3 CPC, the court or the presiding judge is obliged – unlike in the scope of application of the BGG – to inform the parties of the exceptions to the suspension of time limits pursuant to Art. 145 para. 2 lit. a and b CPC. This judicial obligation constitutes a **validity provision**. If no such notice is given, the parties may not suffer any disadvantages as a result, and the time limits shall be suspended during court recesses as if there were no exception under Art. 145 para. 2 CPC. It is irrelevant whether the addressee is a party with legal knowledge or represented by a lawyer who recognized or should have recognized the deficiency.

The relevant notice must generally be given **when the specific deadline is set**; a general notice that court recesses do not apply in conciliation or summary proceedings is not sufficient. In the case of statutory deadlines, it may be sufficient for the notice to be given with the first procedural order. The parties must at least be able to recognize that their specific case is exempt from the suspension of time limits. An incorrect or incomplete notice has the same effect as if the notice were missing. 22

IV. SUSPENSION OF TIME LIMITS FOR ACTIONS UNDER THE SCHKG (ART. 145 PARA. 4 CPC)

Since January 1, 2025, the provisions of the CPC on the suspension of time limits have been applicable **to all actions under the SchKG** that are to be brought before a court. This new regulation serves to improve the coordination of the suspension of time limits between civil law and debt enforcement proceedings. This affects all limitation periods of the SchKG in the area of ordinary and simplified proceedings, such as the time limit for bringing an action for revocation, the time limits for bringing an action for opposition, joinder or collocation, an action for separation or an action for seizure, and the corresponding time limits for appeals. Contrary to previous Federal Supreme Court case law, it is irrelevant whether the relevant time limit for bringing an action was triggered by a debt enforcement action or not. 23

Particular attention should be paid to **summary proceedings under debt enforcement law** pursuant to Art. 251 CPC: There is controversy in legal doctrine as to whether Art. 145 para. 4 CPC applies here, since in this case, due to the exception of the suspension of time limits during court recesses in summary proceedings under Art. 145 para. 2 lit. b CPC, time limits in connection with decisions concerning the lifting of the stay of enforcement or the opening of bankruptcy proceedings, for example, would also begin or continue to run during the Easter and New Year holidays or during the summer holidays, and the provisions of Art. 56 ff. SchKG on the suspension of enforcement and the stay of proceedings would not apply. Christmas, and New Year's holidays or during the summer holidays, and the provisions of Art. 56 ff. SchKG (Swiss Debt Enforcement and Bankruptcy Act) on debt enforcement holidays and the suspension of legal proceedings would not apply. For reasons of debtor protection, a restrictive, literal interpretation of Art. 145 para. 4 CPC (applying only to “actions” and not to “petitions” within the meaning of Art. 24

252 CPC) should be assumed. It is not understandable why, of all things, neither court nor debt enforcement holidays should apply to judicial debt enforcement measures such as decisions concerning the lifting of the stay of enforcement or the opening of bankruptcy proceedings, but they should apply to less intrusive debt enforcement measures such as the service of a payment order. This cannot be what the legislature intended. It must be accepted that summary proceedings under debt enforcement law are treated differently from other summary proceedings, such as tenant evictions under Art. 257 CPC, with regard to the suspension of time limits under the SchKG. Consequently, applications in summary proceedings under debt enforcement law pursuant to Art. 251 CPC do not fall under the term "actions under the SchKG" in Art. 145 para. 4 ZPO. For summary proceedings under debt enforcement law pursuant to Art. 251 CPC, the provisions of Art. 56 ff. SchKG on debt enforcement holidays and legal suspension must therefore be observed in the event of a debt enforcement action.

25 The provisions of the CPC on the suspension of time limits do not apply to **debt enforcement appeals** before the supervisory authority in debt and bankruptcy enforcement matters pursuant to Art. 17 f. SchKG. It should be noted that the CPC does not apply to non-judicial matters of debt enforcement and bankruptcy law anyway. This also applies, for example, to appeals under debt enforcement law pursuant to Art. 17 f. SchKG, which are not directed to a court but to the supervisory authority in debt enforcement and bankruptcy matters. It is irrelevant whether the supervisory authority in debt enforcement and bankruptcy matters is in fact a court.

26 Art. 145 para. 4 CPC is not included in the **transitional provision** of Art. 407f CPC, which is why this provision only applies to proceedings that became pending on or after January 1, 2025.

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COMMENTARY ON

Art. 146 CPC

A commentary by Linda Novina

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Art. 146 Effects of suspension

[1] If service is effected during suspension, the limitation period starts to run on the first day following the end of the suspension.

[2] No hearings are held in court during the suspension period, unless the parties agree otherwise.

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I. SERVICE TRIGGERING DEADLINES DURING COURT RECESS (ART. 146 PARA. 1 CPC)

Art. 146 para. 1 CPC expressly regulates how the suspension of deadlines under Art. 145 para. 1 CPC affects service triggering deadlines: If a notification triggering a deadline or a decision is served on the parties during court recesses, the deadline specified therein is triggered, but does not begin to **run** until **the first day after the end of the court recesses** – i.e., on the Monday following Easter Monday, August 16, or January 3 – even if the latter two dates are a Saturday, Sunday or a recognized public holiday (Art. 142 para. 3 CPC). It is irrelevant whether the deadline is a daily, weekly, monthly, or annual deadline. In principle, no deadlines begin to run during a suspension of deadlines. The parties are generally free to take the required procedural action before the deadline begins. 1

Example: A notice triggering a deadline is served on the party on December 20. Due to the court recess from December 18 to January 2 and the associated suspension of deadlines, the deadline does not begin to run until January 3, which may also be a Saturday, Sunday, or recognized public holiday. 2

Art. 146 CPC must be viewed **in conjunction with Art. 145 CPC**, which is why the provision of Art. 146 CPC does not generally apply to conciliation or summary proceedings. Furthermore, the separate provisions on the suspension of deadlines for actions under the SchKG must also be taken into account. 3

II. NO COURT HEARINGS DURING THE SUSPENSION OF TIME LIMITS (ART. 146 PARA. 2 CPC)

The court recesses pursuant to Art. 145 para. 1 CPC also affect court hearings: These **do not take place** during the suspension of time limits. It is irrelevant what type of court hearing (preliminary hearing or main hearing, hearing of evidence, settlement hearing or appeal hearing, etc., or hearings by videoconference pursuant to Art. 141a para. 1 CPC) is affected. 4

If a court hearing is scheduled during the court recess, any summons to that effect is **null and void** and therefore irrelevant. The party that consequently fails to appear at the hearing may not be considered in default within the 5 meaning of Art. 147 CPC and may challenge the corresponding consequences of default (including a decision on the merits of the case or orders for evidence, etc. issued in the absence of the party). The hearing must ultimately be repeated, in principle at a time outside the suspension of time limits. If the party nevertheless appears in court, it must insist at the beginning of the hearing and request that the hearing date be rescheduled.

6 With the **consent of the parties** (including the intervening parties), a court hearing may, in exceptional cases, also be held during the suspension of time limits. Silence in response to a summons to a hearing during the court recess is not sufficient; an explicit and clear declaration of consent is required in advance. However, uncontested participation in a court hearing during the suspension of time limits is also considered sufficient consent. Once consent has been given, it is irrevocable, subject to the existence of any reasons for postponement under Art. 135 CPC. Although the consent of third parties (e.g., witnesses, experts, etc.) is not required by the wording of Art. 146 para. 2 CPC for a hearing to be held during court recesses, it nevertheless appears appropriate for pragmatic reasons.

7 In **conciliation and summary proceedings** (including subsequent appeal proceedings), court hearings may also take place during court recesses due to the lack of a suspension of time limits. The Federal Supreme Court has so far left open the question of whether there is a duty to inform parties about the non-applicability of court recesses in the case of summonses, as is the case for the setting of deadlines under Art. 145 para. 3 CPC.

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COMMENTARY ON

Vorb. zu Art. 213 – 218 CPC

A commentary by Jonas Fischer

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I. MEDIATION AS PART OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Mediation is a procedure that is used both explicitly and implicitly to resolve conflicts, whereby the "conflicts" do not necessarily involve a legal issue in the strict sense. A mediation procedure is explicit if it is explicitly designated and understood as such by both the mediator and the parties involved and basically proceeds according to the phase model (see section V.B. below). Implicit mediation is used when elements from mediation theory are used to resolve a conflict that does not take place in the explicit setting of a mediation process. One might think of the implicit use of techniques such as paraphrasing, which are typical of mediation procedures. The mediator does not necessarily have to be a mediator in the strict sense. Supervisors, colleagues or neutral persons of trust and contact often even intuitively make use of methodological tricks from mediation theory without them or the conflict parties imagining themselves to be in a "mediation process". 1

In jurisprudential discourse, mediation is generally assigned to the subject area of Alternative Dispute Resolution (ADR) or alternative dispute resolution procedures. Along with arbitration, it is considered the most prominent ADR method and is conducted by an impartial and neutral third party who is equally recognised by all parties to the conflict. Unlike other ADR methods such as arbitration, mediators are not involved in the decision-making process. This means that mediators are not allowed to make concrete proposals for a solution within the mediation process, especially not in the form of a settlement proposal, as is customary in arbitration proceedings. Mediation thus differs significantly from other ADR procedures such as conciliation or arbitration; and ultimately also from traditional judicial jurisdiction. In addition to the basic forms of pure mediation and arbitration, hybrid forms (MEDARB, ARBMED, MEDALOA, etc.) have also developed in practice, combining the features of several ADR methods. 2

One of the main goals of mediation procedures is to restore the relationship between the conflicting parties. To this end, a space is created in the mediation setting in which those concerned are invited to reflect and change attitudes and behaviour on the way to finding a joint solution. It follows that there are just as many possible solutions as are considered by the conflict parties. 3

The prerequisite for this diversity of conflict resolution options is that the parties put aside their own needs, ideas or desired outcomes, and can sometimes also endure uncertainty. The fact that the conflict parties rely on analysing and blaming each other for past mistakes should not be the focus, although past hurts, dissatisfaction or misunderstandings are certainly addressed and reflected upon. It is important that mediation does not drift into a therapeutic setting, but rather directs the focus of the parties in the process of change towards common potential solutions. A scope for consensual solutions opens up only when all parties involved break away from entrenched expectations and undergo a change of perspective. A central feature of the classical mediation process is that both participation in the process and the conclusion of a mediation agreement are always voluntary for the parties to the conflict. In summary, the main task of mediators is to provide the parties with a space and to accompany them in finding a solution, without making proposals themselves.

II. HISTORICAL DEVELOPMENT OF MEDIATION

4 From a historical perspective, mediation has a long tradition in many countries and cultures. For example, the first beginnings of mediation can be found as early as 3000 years B.C. among the Sumerians of southern Babylonia, and the first traces of mediation in the broader sense can be found 6000 years ago in China. However, the cradle of the modern mediation movement is the USA of the 1960s, which experienced turbulence during the tense period of the civil rights movement, Vietnam protests and the flare-up of student unrest. Since then, mediation has spread from the USA to Canada and Europe towards the end of the 1980s. However, after the first attempts to make the new method at home in Germany – and in Switzerland it is likely to be similar – disillusionment set in: it became clear that it was not enough to train mediators and enrich the range of services on offer locally, as the continental European development differs significantly from the original US movement: In the USA, the professionalisation of mediation essentially went back to the Harvard concept, which is strongly influenced by negotiation theory and is reflected in the publication The Promise of Mediation (1994) by R.A.B. Bush and J. Folger. In addition, mediation and ADR methodology have been systematically integrated as an integral part of undergraduate legal education at universities in the USA and Australia since the 1990s. In contrast, continental European and especially Swiss mediation theory was not primarily derived

methodologically from the negotiation model. Rather, it was also influenced by other factors, such as approaches from systemic therapy and a debate on the topic of mediation instead of judging that can be traced back to the 1920s, which was ideologically linked to the democratisation of the judiciary and its relief, which is still propagated by authorities as an argument today. In this development, a conscious reaction to and demarcation from the legally standardised, traditional conflict resolution procedures can be read. However, such historical contexts should no longer tempt us to understand mediation and ADR procedures in their current form as the counterpart to judicial procedures: They are merely "alternative" in the sense that a conflict can be resolved with the help of different third parties: Whether this is a state court or a mediator, a (state) conciliation board or an arbitrator depends on the specific circumstances of the conflict situation.

In Switzerland, mediation first became established in the late 1980s in the 5
French-speaking part of Switzerland and was applied in various subject areas. A wide variety of efforts also contributed to the level of awareness; for example, in 1991, initiative groups organised an international colloquium on mediation at the Swiss Institute of Comparative Law in Lausanne. However, much resistance had to be overcome before mediation was introduced as a concept in the CPC: Apart from isolated provisions on the recusal and the right of mediators to refuse to testify, as well as the suspension of the proceedings for conducting a mediation, the expert commission did not foresee any regulation of mediation in the preliminary draft of the CPC. When Switzerland finally adopted a uniform CPC under federal law, it also contained norms on mediation. Thus, mediation (Art. 213–218 CPC) was introduced under the special procedures of Title 2. However, the aim was not to regulate mediation conclusively, but only to clarify its relationship to judicial proceedings. The approach as a non-conclusive regulation proves to be quite sensible due to the diversity of mediation schools and with regard to the many hybrid forms of ADR (MEDARB, ARBMED, MEDALOA), because from a practical perspective it results in a high degree of flexibility in the concrete design and structuring of out-of-court conflict resolution procedures, which in the end benefits the parties, especially since in classical mediation they are themselves and exclusively responsible for the formulation of a solution.

III. TERMINOLOGY

A. Definition

6 Uniform definitions of mediation and the related mediation-specific terms have not yet been established. It should be noted that both the definitions and the variety of professional backgrounds of mediators and their interpretation of mediation reflect a great diversity. It is obvious that the latter can also generate difficulties of interpretation and understanding. The actual term mediation has both Greek and Latin roots; the Greek word medos stands for neutral, impartial, mediating – the Latin phrase media pars denotes the middle. The Latin word mediatio then translates as mediation. This focus on mediation coincides with the often used image of the mediator who stands in the middle between the conflict parties and supports them – facing both equally – in bridging the differences that generate the conflict.

7 Both in teaching and in practical everyday professional life, mediators speak of the profession of solution-finding, a kind of action concept, or "mediation" as a service, as an attitude or as a method for the benefit of the client: mediators see themselves as neutral, impartial and independent third parties who make themselves available to disputing parties as a mediating element, limiting themselves within the methodological ADR spectrum to mediation. After the mediation term was initially used very broadly in the 1980s, a countermovement followed that sought to differentiate the term mediation, such as that of Glasl, and clearly differentiated which mediation method is suitable for which type of conflict situation. In the meantime, the definitions of the term "mediation" are so numerous and yet so similar in their different shades that it does not seem opportune to list them here. Keydel, for example, offers a very basic definition when she describes mediation on the basis of the two most fundamental prerequisites for mediation: an existing conflict and the willingness of the parties to the conflict to want to resolve it. However, terms closely associated with mediation, such as neutrality and impartiality, cannot be clearly defined with the mediation-specific vocabulary and continue to give rise to discussions and interpretations, as Heck and Letzel, for example, state and elaborate in detail in their article. In fact, in everyday professional life, it is precisely the conflict parties concerned who bring their own understanding of terms such as "neutrality", "independence" or "voluntariness", and practising mediators cannot assume that this coincides with what they consider to be

the "correct" understanding in each case. For this reason, many mediators explain to the parties what they understand by "mediation" and what implications their understanding will have for the further course of the mediation process, and in particular for terms that are important for the process, such as "neutrality", "impartiality", "independence", "voluntariness" or "confidentiality".

As with the text at hand, Fischer and Schneuwly adhere to the definition of 8
mediation from the mission statement of the Centre for Effective Dispute Resolution (CEDR) in London: "Mediation is a flexible process conducted confidentially in which a trained neutral mediator actively assists parties in working towards a negotiated agreement of a dispute of difference, with the parties in ultimate control of the decision to settle and the terms of resolution". This definition, which is common in practice, enables mediators from all kinds of professional backgrounds to exploit sufficient leeway for client- and case-specific needs and requirements in their process without departing from the generally accepted principles of the relevant umbrella organisations. For aspiring mediators, it is worthwhile to take a closer look at the respective rules and regulations of an association before seeking membership or accreditation. In this way, a definition of mediation can be found that is in line with the established principles of the umbrella organisation as well as the mediator's own ideas and specific needs (such as a specific area of expertise). However, it is possible that even mediators who have been practising mediation for many years may change their understanding of mediation over time, which may require adjustments to the definition of mediation.

B. Demarcation issues

1. Mediation

Systematically, both mediation and conciliation or arbitration can be classified 9
under the umbrella term "ADR". In a conciliation procedure, the parties to the conflict present their positions and arguments to one or more neutral conciliators. Afterwards, the mediator usually submits a mediation proposal, which, however, is not binding for the parties, so that the outcome of the mediation ultimately remains open. If the proposal is accepted by both parties, the conflict is considered to have been mediated; if it is rejected by at least one party, the mediation attempt has failed.

10 One advantage of the conciliation procedure is that a neutral third party submits a solution proposal to the parties in a timely manner, which has a particularly credible effect due to the authority as conciliator. It is true that such a desire to propose solutions also resonates in mediation proceedings: However, due to the lack of decision-making authority on the part of the mediator or the parties' own responsibility, it cannot be fulfilled. It is therefore all the more important to point out this important difference to the parties explicitly and, if necessary, several times in the run-up to a mediation: Mediators do not make proposals for solutions as a matter of principle. Therefore, if the parties come to the conclusion that they are looking for a concrete proposal from a neutral third party in their situation, they must resort to another ADR procedure such as mediation. Conflict resolution professionals should therefore be familiar with the different forms of ADR as well as the demarcation issues in order to be able to identify and apply the most appropriate procedure for the case. As an example, conciliation, as distinct from mediation, is better suited to situations involving more sober and less emotional issues. This applies, for example, to conflicts that can be reduced to factual or legal issues and where the focus is not necessarily on clarifying the relationship. In mediation, as in conventional court proceedings, concrete facts from the past are dealt with, whereas mediation is characterised by a pronounced orientation towards the future and a consideration of the relationship level between the conflict parties.

2. Mediation close to the court

11 According to the Swiss Code of Civil Procedure (CPC), mediation can be used instead of conciliation proceedings (Art. 213 CPC), without entirely replacing compulsory conciliation proceedings:

12 This requires a formal initiation of conciliation proceedings as well as an application for mediation to the conciliation authority. If, as a result of mediation, the conciliation proceedings are written off as settled (settlement, acknowledgement of claim or withdrawal of claim) (Art. 208 para. 1); the effects are those of a "final decision" (Art. 208 para. 2 CPC); if mediation fails, the authorisation to sue is issued by the conciliation authority (Art. 213 para. 3 CPC). Mediation may also be ordered – or rather recommended – as part of court proceedings. The decision to do so is at the discretion and initiative of the judge in charge. In the model of mediation close to the court, the involvement

of external mediators is assumed, whereby the time factor is often cited as an argument for this type of mediation, since an appointment for mediation is usually available at shorter notice than an appointment for a classic oral hearing. Just as important as the time factor is the argument of cost reduction. Above all, it is crucial that mediation, which takes place in connection with civil proceedings, always remains independent of the court proceedings (Art. 216 para. 1 CPC). Even if the legislative mandate to the courts remains to end conflicts between disputants by means of a judgement, Staubli sees mediation as an additional conflict resolution instrument for the court. As usual, the specific case must be examined separately for its suitability for mediation before it is initiated.

3. Arbitration

In contrast to mediation, in which the decision-making competence always lies with the conflict parties themselves, in the ADR method "arbitration" the parties transfer both this decision-making competence and the authority to organise the process accordingly to one or more neutral third parties determined by them by mutual agreement. The competence of the arbitral tribunals is thereby granted by the state, whereby they function as private courts for civil disputes established by private or public legal entities, in that they are called upon by the parties on the basis of a privately agreed declaration of intent. 13

An arbitral tribunal is thus a "body established by the parties to adjudicate disputes in a binding manner in lieu of the normally competent state courts". As with mediation, there is no statutory definition of arbitration in either the CPC or the IPRG; however, the procedure and arbitrability are described in detail under Art. 353 ff. CPC and Art. 176 et seq. IPRG. Basically, a distinction is made between institutional arbitration and ad hoc arbitration. The binding nature of conflict resolution distinguishes arbitration from mediation and conciliation. 14

IV. LEGAL BASIS, SCOPE OF APPLICATION AND TREATIES

A. Legal bases

Mediation as a method can only be found in a few Swiss federal laws. The primary areas of application are civil proceedings (Art. 213 ff. CPC), administra- 15 tive proceedings before federal authorities (Art. 33 VwVG) and juvenile criminal proceedings (Art. 17 JStPO); however, the inclusion of mediation in the Swiss Code of Criminal Procedure has so far been waived. Mediation is mainly used in civil proceedings as an alternative to traditional conciliation proceedings or as a supplementary instrument during court proceedings. It is also particularly suitable for children's matters in family law proceedings (Art. 297 para. 2 CPC) and is often used there.

16 With regard to the refusal of statements by the mediator, the CPC explicitly states that mediators have a limited right to refuse to testify with regard to the obligation to cooperate in the judicial evidence procedure (Art. 166 para. 1 lit. d CPC). However, this provision within the CPC applies solely and exclusively in dealings with judicial authorities and thus only regulates the relationship of mediation to judicial proceedings. As far as the content or methodology of mediation as a procedure is concerned, the rules of relevant umbrella organisations such as the Swiss Mediation Federation (SDM-FSM), the Swiss Chamber of Commercial Mediation (SKWM) or the Swiss Bar Association (SAV) are authoritative for mediators in this respect.

B. Main scope of application of mediation

17 Although mediation can be used in almost all areas of interpersonal conflict constellations, some main areas of application have emerged over time in which the ADR method of mediation has become particularly well established. The main areas of application of mediation in Switzerland can be described as family law matters on the one hand and labour law matters on the other, which is incidentally also reflected in the corresponding legal provisions of various European states. This focus on certain areas of application has become visible, among other things, in the fact that specific further training courses for mediators have emerged, which has led to an increasing specialisation of mediators in one field and the further training institutes are adapting the range of courses to the needs of practice. This development towards specialisation can also be observed in the USA; in contrast to Switzerland, for example, the focus in the USA is not primarily on family and labour law conflicts, but rather on conflicts from business mediation.

18 It is always the case that a conflict situation arises in an area where certain specialist knowledge may be helpful. Although the question of whether mediators should have such specialised knowledge in the specific area of applica-

tion is certainly discussed, there is no clear answer. Basically, mediation is not about clarifying contentious technical issues, but about resolving the underlying conflict between people. Certainly, the mediator's expertise in the respective area of application can be helpful, because otherwise the mediator risks not recognising possible pitfalls or backgrounds right away and thus jeopardising the professional conduct of the mediation process. Moreover, in practice, conflict parties often ask whether the mediator has experience or a certain expertise in the relevant field. This is understandable, as the parties to the conflict want to ensure that the mediator is a suitable and competent professional whose skills they can rely on in the mediation process. On the other hand, there is always the risk that specialist mediators use their specific knowledge too one-sidedly, drift into an expert role, follow certain tendencies and finally can no longer appear as all-partial due to their profound knowledge in the respective field. The same applies with regard to the role of law in mediation: although there is a legal component in almost all conflicts, which could form the basis for discussions, the legal classification of the subject matter of the dispute in the mediation process need not necessarily form the basis of conflict resolution: In contrast to traditional court proceedings, mediation does not serve the purpose of legal consideration and decision-making on the merits, but rather the concrete confrontation of conflict parties with the interests and needs underlying their claims. The legal level can, however, be quite useful at the outset for orientation, as it can help the parties to prioritise a specifically factual solution. The mediator's task is exclusively to work on the conflict with the parties, not to make a professional assessment or reflect on the subject matter of the conflict. Ultimately, the decision as to whether the mediator should focus on in-depth professional competence lies solely with the parties to the conflict, who must weigh up their personal and case-specific requirements before deciding.

C. Contracts in mediation

1. Legal classification

Contracts can play a role in the mediation process at several stages, as various 19
contractual agreements can be concluded. It is important to note that Switzerland does not have any explicit provisions on contractual agreements in mediation proceedings, nor has any uniform terminology developed in this regard. Lenz and Sommer place the main emphasis on the mediation agree-

ment, which is concluded at the beginning of the mediation, and on the mediation conclusion agreement, which sets out the eventual outcome of the mediation. From a purely legal point of view, it follows from the principle of private autonomy that every legal subject has the possibility to shape its legal relationships itself, which allows for a variety of possible contractual agreements in mediation. The concrete form of the contractual relationships therefore depends on the needs and wishes of the conflict parties, but also on any existing contract templates of the mediator.

20 Legally, the mediation relationship between the client and the mediator qualifies as a simple contract pursuant to Art. 394 et seq. of the Swiss Code of Obligations. There is an analogy to the relationship between the parties to the conflict and the arbitrator. As is customary in contract law, the mediator does not owe any success, which means that the performance effect of the specific contract comes into effect with an ordinary termination of the mediation proceedings, irrespective of whether the parties to the conflict were able to reach an agreement. It follows implicitly from the principle of voluntariness that the mandate is also fulfilled in the case of aborted mediations, mediators can understandably not urge their clients to end the proceedings in an orderly manner. This principle arises not only on a legal level from mandate law, but also from the core methodological element of mediation, which places the responsibility for working out a substantive solution to the conflict solely in the hands of the parties to the conflict, since they must in principle make their decisions without outside intervention. The fee agreement is usually negotiated with the conflict parties in advance, although the term negotiation is not unproblematic in this context. This does not mean that in practice the amount of the fee in the narrow sense is negotiated or debated with potential clients. The individual conditions of the mediation fee are primarily based on the core or source profession of the mediator, especially since mediation procedures are in principle remunerated. Accordingly, the parties to the conflict do not have any actual leeway with regard to the question of fees, unless the mediator agrees with the client on a lump sum with precisely defined general conditions on the basis of an available budget. Conversely, mediators can voluntarily provide for special rates if this appears opportune from their perspective in a specific case. For example, a mediator trained as a lawyer in a commercial mediation case would certainly charge a different fee than a mediator with a social background who has to resolve a family law conflict. In hybrid ADR forms such as MEDARB or MEDALOA, the market fees of arbitrators

also play a role. As with the legal profession, both the region and the area of expertise have a significant influence on the amount of the fee.

2. Mediation agreement and working alliance

The first contractual relationship constitutes the legal relationship between the conflict parties themselves: A mediation agreement is commonly referred to as the decision between the parties to conduct or commence mediation and, if necessary, to record this decision in a mutual written agreement. However, other terms for this inter-party legal relationship can also be found in the literature, whereby the legal nature of this relationship between the parties has not yet been conclusively clarified: Eiholzer, as well as Fankhauser-Lobsiger, are of the opinion that the legal relationship should be treated as a sui generis agreement outside the legal type system and therefore as an innominate contract. 21

Whether the concluded mediation agreement, as an attempt to resolve the conflict between the parties, is capable of developing a legally binding character and thus constitutes a ground for preventing an action. The main argument for this is that the mediation process may be terminated unilaterally and at any time by one or both parties to the conflict due to the principle of voluntariness, which has been supported as a prerequisite by courts in Germany in the past. This view is countered by the fact that a mediation agreement on the basis of the pacta-sunt-servanda principle may not be disregarded and that despite the fact that it can basically be broken off at any time, at least certain minimum steps of a mediation process must be initiated and gone through. However, it is unclear what these minimum steps would have to look like in concrete terms. In practice, examples of "substantial reasons" for discontinuing a mediation procedure would include the situation that the mediator himself considers an agreement between the parties to be futile, if one or both conflict parties repeatedly violate previously agreed principles, or if the neutrality or impartiality of the mediator is no longer given. It should also be noted that insisting on a mediation procedure is of no use even to the party who would prefer not to break off the procedure: If there is not even a minimal consensus on conducting mediation, the chances of success of a voluntary conflict resolution are very limited. Moreover, there are also conflicts that are so hopelessly deadlocked that both the conflict parties and the mediator decide to break off the mediation that has begun. 22

23 As soon as the parties have clearly defined their goals in the mediation process and the mediation agreement has been reached between the conflict parties, the mediator can explain the process in detail and try to explain the principles for the joint work, which can (but do not have to) be laid down in the form of a so-called working agreement. The working agreement contains the essential basic rules of the mediation process with regard to voluntariness, openness, information and disclosure, personal responsibility, neutrality, confidentiality or secrecy, the obligation to maintain secrecy and the right to refuse to testify. Depending on the situation, this can be recorded in written or oral form, or, for example, concluded graphically on a flipchart. Compared to oral and graphic agreements, a written agreement has the decisive advantage that the rights and obligations arising from this working agreement always remain comprehensible and visible and that each party to the conflict can be given a concrete copy. If such a working agreement is concluded, the procedure to be followed in the event of a possible termination or cancellation of the mediation process should also be recorded in the working agreement: Especially if the mediator notices signals at the beginning of a mediation process that indicate a later escalation, it is worth explicitly addressing this termination scenario at an early stage. Individual points can then be added during the mediation process with the agreement of all parties, as it is not uncommon for certain issues to arise later in the process.

3. Mediation contract and mediation agreement

24 According to prevailing doctrine, the agreement between the mediator and the parties to the conflict is called a mediation contract and refers to an agreement under private law between two or more persons or groups with one or more mediators. In contrast, German literature uses the term mediator contract for the same legal relationship. In contrast, the agreement on the outcome of the mediation process is often referred to as a mediation agreement. It is at the free discretion of the parties to decide with which outcome they conclude the mediation, whereby any agreement reached by the parties at the end of a mediation process can be understood as an expression of the parties' will, which may well contain components of a creative achievement.

25 If the conclusion of a legally binding agreement was envisaged within the framework of the working alliance, it is the responsibility of the mediator to comply with the necessary formal requirements. From the perspective of the

parties, it should therefore also be central that they think about competences in this regard when choosing the mediator. In the event that mediators without a legal background are mandated, it is advisable to have the mediation agreement additionally drafted or at least reviewed by a lawyer in order to ensure that the document also stands up from a legal perspective. However, even the use of general legal advice does not mean that the parties involved in the conflict are no longer actively participating in the mediation process, as it is only a matter of describing the facts to a lawyer and having the legal situation presented, as a general legal assessment is not part of the mediator's field of activity. The active participation of all parties involved ensures that the interests of the conflict parties are in the foreground and that no conflict party gains an advantage through this.

V. PRINCIPLES AND STRUCTURE OF THE MEDIATION PROCESS

In the course of the modern mediation movement, numerous own rules and 26
maxims of mediation theory emerged, but also the conceptualisation of relevant training and further education as well as the establishment of research institutes. The increasing professionalisation of mediation has accordingly also led to a catalogue of general basic principles, which has meanwhile become more or less globally accepted and established in the literature. These basic principles, however, do not have a mandatory character, but are understood as a guideline and a guideline for mediative activity.

A. Principles of the mediation process

The possibility of reaching an amicable agreement with parties to a conflict 27
aims at granting them maximum freedom to shape their solution-finding process. This principle is summarised in practice and doctrine under the term party autonomy and means that the parties involved manage the solution-finding process independently, above all without the direct influence of the mediator. The resulting restraint required of the mediator in the formulation of proposed solutions is therefore not only decisive for the characterisation of the role as mediator, but rather creates a space in the first place in which the parties to the conflict can work on their own solution. Closely linked to the maxim of party autonomy in the mediation process is also the principle of individual responsibility, according to which the parties involved also bear the

entire responsibility for resolving their conflict. Accordingly, the less invasive role of the mediator not only allows the parties a space to find a solution, but, with exclusive competence, also transfers to them the duty to achieve it within the envisaged framework of the mediation procedure. Confidentiality is also considered to be a fundamental principle of the mediation process, although here too there are a wide variety of formulations. In addition to these three conditions of the mediation process, which are unanimously regarded by scholars as indispensable, additional principles such as openness are formulated, depending on the authorship: The criterion of "openness" refers to constructive engagement between the parties, which includes tolerating mutual confrontation with relevant facts as well as with personal points of view. In concrete terms, it should be possible for the parties to address and disclose unpleasant issues in mediation, which could weaken their position, without having to fear a legal disadvantage. A confidential, and in this sense "open" framework allows the parties to grow beyond their previous horizon of experience and to find their own creative solutions.

28 The principle of voluntariness means that the parties involved participate in mediation of their own free will, i.e. without coercion, and must not be pressured in any way to find a way out of the conflict. Notwithstanding the methodological principle of voluntariness, however, there are situations in which parties are required to participate in mediation, which is referred to as so-called compulsory mediation and has been supported by the Federal Supreme Court. The relevant legal basis for compulsory mediation arises from Art. 307 para. 3 CC, which provides for so-called appropriate measures to protect the best interests of the child. Although the dispatch on the CPC refers to the voluntary nature of mediation as its core element, which can at most be recommended to the parties, compulsory mediation differs from voluntary mediation primarily in terms of its scope of application: ordered mediation is used specifically in family matters and focuses on the interests and rights of the children, even if in individual cases one of the parents opposes it.

B. Structure of the mediation process (phase model)

29 In practice, the mediation process is carried out on the basis of different models, so there is no strictly prescribed procedure: from three-stage procedures to mediation in 12 stages, the most diverse variants are presented in the literature. Depending on the area of application, certain conventions have pre-

vailed: for example, in family mediation several sessions are held at different times, while in business mediation block procedures are more common. What can be considered the lowest common denominator is the description of the mediation process according to a structured phase model, which is basically the same regardless of the variants. However, the individual phases are not to be understood as a rigid schedule, but rather as a basic structure, which under certain circumstances – after consultation with the parties – must also be flexibly adapted:

The phase model serves as orientation and to avoid gross procedural errors, 30
which can happen especially in highly escalated conflict situations. The predefined structure makes it possible to dissolve blockades between the participants. In addition, the phase model is suitable for promoting the cooperative attitude of the parties and for making the process more controllable. When moving from one phase to the next, it can be useful to briefly summarise and acknowledge the results achieved so far.

Phase 0: Preliminary phase

The preliminary phase is central to mediation and constitutes the initial con- 31
tact between mediator and potential client. Strictly speaking, the initial enquiry is therefore not yet a contractual relationship, but rather qualifies as an invitatio ad offerendum. From a legal perspective, it is therefore decisive for the mediator at which point in time the actual mandate relationship arises or when he or she is initially only in an initiation phase for the actual mandate. What needs to be clarified is primarily who the clients are and what the mandate is. The solid establishment of this preliminary phase has a significant influence on the further course of the mediation and its chances of success, as there are numerous stumbling blocks, especially at the beginning, which can cause a mediation process to fail: A classic example of this is the direct entry into the conflict discussion without having ensured a secure framework beforehand. If a party tries to influence the process in this way, the mediator should postpone the concerns of a conflict party to the following phase in order to establish and consolidate his/her impartiality even before a possible commissioning relationship. This is not to say that one should not listen empathetically to an upset conflict party and ignore basic needs; rather, it is to sensitise the latter to the role of impartiality and, invoking this very quality, to insist that the actual processing of the conflict only take place in the presence of all parties involved.

32 The risks and dangers within the preliminary phase can be particularly present if the mediation is commissioned by a third party, i.e. if, for example, a team leader commissions the mediator to settle a conflict between two or more employees. As a rule, the mandate for mediation (with the exception of the above-mentioned compulsory mediations) should necessarily come from the parties themselves, based on the voluntary nature of the process, as they are the experts on their conflict in the end. At the same time, a person with managerial responsibilities may well decide, within the framework of his or her executive position, that conflict situations be dealt with with the help of an external, neutral person. In this respect, the scope of application of business mediation is an exception to the rule.

Phase 1: Beginning of mediation and orientation

33 Normally, the first joint discussion between the parties and the mediator takes place in the preliminary phase or immediately at the beginning of the first phase. During the first phase or phase 1, the parties to the conflict are asked to present their concerns briefly and clearly, so that the mediator has the opportunity to draw up an appropriate contract for the specific case, which serves to prepare the mediation in a safe framework. It is crucial to inform the parties about the process and principles of the mediation procedure and to outline the tasks of the mediator, thus creating a pleasant atmosphere of transparency, which can be controlled by appropriate welcoming rituals, among other things. At the end of the first phase, all formal framework conditions of the mediation assignment should be clarified to such an extent that the most important elements can be recorded in written contract form. This applies even if no explicit written contract is concluded: It is essential that the negotiated framework conditions are clear to all participants. Legally, both the written and the oral agreement constitute a valid private law agreement, depending on the constellation between two or more parties or groups, or with one or more mediators, as the case may be.

Phase 2: Clarifying the facts and determining the issues

34 In the second phase, or phase 2, the mediator's task is to gain an overview of the facts of the case and, based on this, to develop a collection of issues. In terms of content, the topics are to be determined as amicably as possible with the parties involved. Although the parties describe their views of the conflict, the mediator is not interested in a detailed description of the conflict, but

rather in finding out what is currently happening and where to start in order to have a de-escalating effect.

Mediators listen actively, paraphrase what they hear and ask questions about the situation and the topics covered, as appropriate. What the parties have just said is summarised in their own words in this phase, so that the person concerned receives a mirror image of what the mediator has just said and can thus find a new approach to his or her own statement. Paraphrasing, however, is not just a matter of repeating what has been said. The technique of paraphrasing also serves to show to what extent the mediator has understood what the parties have said. This gives them the opportunity to make additions, to resolve contradictions or to experience a change of perspective already at this stage. Paraphrasing as a technique thus makes it possible to steer the conversation, eliminate ambiguities and involve all participants, as well as to defuse any possible or underlying aggression in the formulations. It is therefore important to anticipate emerging changes in topics or new conflicts: This is particularly common towards the end of sessions. It is therefore all the more important for the mediator to maintain an overview and control over the moderation of the discussion. 35

Complex sequences of topics can also overwhelm the parties at the beginning and lead to minor friction, which is why it can make sense to start with simpler or less controversial topics and to prioritise them without completely ignoring any burning issues. If the process is conducted strictly according to the strictest possible standard in relation to the mediation doctrine, all information on the collection of issues must be supported by relevant documents, figures and contracts. This can lead to considerable delays, because at best one or the other party to the conflict may find such access to the file to be encroaching and therefore also refuse it. It may also be difficult for legal laypersons among the mediators to keep certain documents with them. Although there are occasional calls for such refusal to be overcome professionally and for the perspectives of the parties to be reconciled through targeted enquiries and clarification, it must also be clearly understood at this point: Mediators do not have any legal authorisation or position of authority to demand any (possibly even confidential) files from parties. They are neither public officials nor party representatives in the sense of an advocacy relationship and are therefore well advised to communicate this clearly to their clients and to strictly respect the limits of their own activities. The mutual "inspection of files" that 36 may take place must be based on the voluntariness of all parties involved in the conflict and must be justified in their efforts to contribute to the clarification of any open questions by making documents available that cannot be clarified in any other way. In any case, the parties must not be given the impression that the success of the mediation process stands or falls with the decision to "submit" any documents; even if the refusal of a party in an individual case means that an issue cannot be conclusively clarified as a result.

Phase 3: Conflict management

37 The clarification of interests in the third phase or phase 3 is perhaps the most difficult phase in mediation processes, but at the same time also the most important. This is because only when the central interests of the conflict parties have been predominantly clarified do creative options open up for a mutually agreeable solution between the participants. There are some important core issues to be considered, such as how to deal with power and hierarchies. For where decisions are made through power, the interests of the other party play at best a subordinate role. Mediators should therefore always keep in mind what exactly the relationships between the conflict parties look like and whether there are any additional, implicit or hardly visible dependencies that could jeopardise the voluntary or open nature of the mediation process.

38 Other conflict constellations inherent in the system cannot always be pacified in a goal-oriented manner. In this phase, it is important to promote mutual understanding by working out the motives, interests and needs that have led to the conflict in order to develop an understanding of the other party's point of view. In this respect, however, it is important to act with caution: For in the case of a conflict, it may well be legitimate for one party not to show understanding for the views of the other party. In this respect, it would be counterproductive if the mediator tried to force understanding of the other party's position. Contrary to popular belief, the mediation process is not fundamentally designed to bring the conflicting parties back together, to make up or to find a compromise. Like other dispute resolution procedures, it can also be an objective to separate in a structured way or to be allowed to determine any irreconcilable differences with the help of a neutral, impartial third party and to draw personal consequences from this, but without succumbing to the immense destructive potential of conflicts. For example, it can already contribute to a significant calming of the situation if parties come to the conclusion

that they have no understanding for the other, but at the same time decide to leave each other alone in future and to refrain from continuing the conflict.

Finally, the breaks between meetings are also important. The fact that actively not dealing with the conflict situation can make a significant contribution to the solution may seem surprising at first glance, although the relevance of such a rest period can be proven with insights from creativity research, for example. Often, the breaks between mediation sessions are also a time for reflection, which at best leads to a change of perspective on the part of the participants and can form the basis for further discussions. This delicate balancing act between the demands of deadlines and thorough conflict management requires special sensitivity on the part of every mediator. The breaks should therefore not be too long. 39

Phase 4: Working out solution options

After the interests behind the positions have been uncovered, the fourth phase or phase 4 is about the conflict parties negotiating the most concrete possible solution options together. This phase is often perceived by the participants as more positive and purposeful than the preceding clarification of interests and sometimes even enables a constructive change of perspective, which is the turning point in the mediation process. The fact that the parties to the conflict are open to the viewpoint or perspective of the other party and, if necessary, can even approach each other despite difficulties, requires careful accompaniment, since consensual conflict solutions can only come about on the basis of mutual understanding. If a sufficient number of different solution variants are available for assessment, one or the other option is then selected. To this end, the conflict parties evaluate or prioritise the options that have been worked out and negotiate together on the best choice. The mediator carefully supports this negotiation phase without imposing his or her own proposals and solution options on the parties. 40

Phase 5: End of mediation

The fifth phase or phase 5 commonly concludes the mediation process. If the process has proceeded satisfactorily up to this point, selected solution options and implementation variants of the parties involved can now be set down. Any final agreement that is reached is written down in the language of the parties to the conflict, and can be supplemented and secured with parts of minutes 41 from past meetings or additional agreements, so that the parties are able to implement these results in a controlled manner.

42 Once the content of the agreement has been revised and cleared up, it can be submitted to all parties for signature. Sometimes mediators also sign in their function as process managers. In the end, all participants receive a copy, and the mediator receives a copy for his or her files for security purposes. In addition, in Switzerland it is possible to have the separation or divorce agreement drawn up during the mediation process subsequently approved by the court for payment of the relevant fee.

VI. PRACTICAL QUESTIONS

A. Professionalisation and qualifications in mediation

43 In Switzerland, there is basically no legal basis with regard to profession-specific qualifications and requirements for mediators. However, the authorisation of free mediation under Art. 218 paras. 2 and 3 CPC is an exception to this principle, as the mediator's remuneration is paid by the canton, which usually also imposes certain requirements on the mediator's training and relevant qualifications. In the absence of clear framework conditions, some mediators offer their services without having completed any training or further training in this area. They advertise their communicative talent or their special ability to deal with people. Still others see mediation as a mere component of their basic profession, and see themselves as already sufficiently professionally qualified, e.g. as lawyers or psychologists. People from a wide variety of professions decide to undergo mediation training and have a wide variety of motives for doing so. The professional backgrounds of the mediators are formative for the mediation process.

44 The term mediator is not in itself a protected professional title and can theoretically be used by anyone; i.e. no legally defined training or qualifications are required to practice the profession. However, when choosing a mediator to entrust, experience has shown that clients pay particular attention to the mediator's training, accreditation and professional experience. Anyone wishing to carry out mediation work professionally should, as a first step, certainly strive for a solid professional qualification and accordingly complete specialised further training in which both theoretical and practical knowledge is

acquired and improved, for example with regard to technically oriented posture and intervention skills.

B. Lawyers as mediators

In practice, the question often arises as to how the mediation activities of 45 lawyers are to be qualified, especially since the popularity of mediation has drawn many lawyers into the mediation profession: Indeed, many lawyers in Switzerland now have additional training in mediation. However, doctrine is divided as to whether mediation is a lawyer's activity. This question is controversial in the literature. According to Ross, the increasing popularity of mediation in the legal scene has had an effect in that he notes a shift in interests from the purely emotional needs of the parties to the answering of legal questions. This is also reflected in the fact that clients expect to benefit from the legal knowledge of a mediator with legal training. Experience has shown that clients expect a certain degree of certainty with regard to the outcome of the mediation process if they choose a lawyer as their mediator, whether or not he or she is a lawyer. Precisely because this distinction is not clear to laypersons, it seems particularly important for lawyers to inform their clients in advance about the methodological peculiarities of the mediation process and in particular to point out the distinction from purely party-oriented legal work: This is primarily to prevent misunderstandings and to create clarity with regard to the roles and substantive limits of the mandate. They are thus also required to clarify these considerations sufficiently for themselves first and then to communicate them to their clients accordingly.

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COMMENTARY ON

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Title 3 Ordinary Proceedings

Chapter 1 Scope of Application

Art. 219

The provisions of this Title apply to ordinary proceedings and, by analogy, to all other proceedings, unless the law provides otherwise.

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I. BACKGROUND

A. Nature

Of the various types of procedure covered by the CPC, ordinary procedure is the basic one. Consequently, it also applies by analogy to the other types of procedure (art. 219 CPC). The other types of procedure are the simplified procedure (art. 243 ff CPC) and the summary procedure (art. 248 ff CPC). The provisions relating to these procedures are generally less detailed, and confine themselves to regulating exceptions to the ordinary procedure system. It should be noted that the law introduces certain special procedures in family law (art. 271 ff CPC). These do not qualify as a type of procedure in their own right, but rather contain derogations to the regimes laid down for ordinary, simplified and summary procedures. 1

The CPC thus determines the scope of each type of procedure. In particular, this means that mixing different types of procedure in the same trial is prohibited (cf. in particular art. 90 let. b and 224 para. 1 CPC). Similarly, in principle, the law does not allow for a change in the type of proceedings during the course of a case (cf. in particular art. 227 para. 1 CPC). Certain mechanisms allow the applicable type of procedure to be maintained, even when the amount in dispute fluctuates during the course of proceedings and the limit of art. 243 para. 1 CPC is crossed in one direction or the other (cf. in particular art. 85 para. 1 2nd sentence and 227 para. 3 CPC). Case law does, however, make an exception where a counterclaim for a negative finding is lodged in response to a partial action (art. 86 CPC); in this case, the simplified procedure may be switched to the ordinary procedure. 2

Since civil proceedings are governed by public law, the provisions of the CPC are mandatory. Consequently, the type of procedure applicable to any given claim is not left to the free choice of the parties. The situation in which the plaintiff opts for protection in clear cases (art. 257 CPC), and thus for summary proceedings (art. 248 let. b CPC), remains reserved. The parties can, however, indirectly influence the applicable procedure by virtue of the principle of disposition (art. 58 para. 1 CPC) and the rules on the amount in dispute (art. 91 ff and 243 para. 1 CPC). Thus, the plaintiff may choose to assert only a part of his claim, below CHF 30,000, by bringing a partial action (art. 86 CPC). It is also possible to combine several claims (art. 90 CPC), or to waive the right to 3 do so, which generally has an impact on the amount in dispute (art. 93 para. 2 CPC). Finally, certain rules relating to the amount in dispute allow the parties to agree on the amount (art. 91 para. 2 CPC). Sometimes, it is the plaintiff alone who can provisionally determine the amount in dispute in order to determine the applicable procedure (art. 85 para. 1 1st sentence CPC). The parties must not, however, engage in manifest exaggeration, at the risk of being accused of abuse of rights (art. 52 CPC).

B. Characteristics

4 Ordinary procedure is the expression of the classic civil trial. It is essentially left to the initiative of the parties. The cardinal principles of civil procedure - the maxim of debate (art. 55 para. 1 CPC) and of disposition (art. 58 para. 1 CPC) - apply to a large extent, or more precisely, in a less attenuated manner than in summary or simplified proceedings. The court's activity is confined to the formal conduct of the proceedings. It has considerable discretion in this respect. It can thus decide to order a second exchange of pleadings (art. 225 CPC), one or more preliminary hearings (art. 226 CPC) or summon the parties directly to the main hearing (art. 228 ff CPC).

5 Unlike simplified or summary proceedings, ordinary proceedings are essentially conducted in writing. Oral proceedings play a secondary role, but are nonetheless present. The court may thus order investigative debates (art. 226 CPC) or organize a second round at the opening of the main debates (art. 229 para. 1 CPC), during which the parties plead twice in principle (art. 228 and 232 CPC). In addition, the requirements relating to the form and content of the parties' pleadings are stricter. In particular, it is not possible to dictate an application on the record, unlike in simplified and summary proceedings (cf. art. 244 and 252 CPC). Finally, the court's power of interpellation is more limited in ordinary proceedings (art. 56 CPC) than in simplified proceedings (art. 247 para. 1 CPC).

6 Ordinary proceedings are rightly described as demanding. It is all the more so because any failure to comply with the rules laid down by law can have serious consequences. Thus, by virtue of the strict application of the maxim of the debates, a fact that is not or poorly alleged, or is alleged late, is generally not retained, which may lead to the rejection of the claim on the merits. The legislator considers that the ordinary procedure is designed for private commercial law cases with a high value in dispute. For this reason, the parties are

generally assisted by a professional representative, although they are not obliged to do so.

II. SCOPE OF APPLICATION

A. Negative scope

The scope of the ordinary procedure is mainly defined in negative terms. The ordinary procedure is subsidiary to the simplified and summary procedures. Consequently, the ordinary procedure is applicable to claims for which the simplified procedure (art. 243 ff CPC), the summary procedure (art. 248 ff CPC) and the divorce procedure (art. 274 ff CPC) do not apply. 7

The ordinary procedure therefore applies to claims that are not subject to the simplified procedure due to their nature. These are exhaustively listed in art. 243 para. 2 CPC. To these must be added proceedings relating to children in family law cases (art. 295 ff and 307a CPC). Ordinary proceedings only concern claims with a value in dispute of over CHF 30,0000, in accordance with art. 243 para. 1 of the Swiss Code of Civil Procedure. The amount in dispute is determined in accordance with art. 91 ff CPC. In this respect, the calculation of the amount in dispute precedes the determination of the applicable procedure. Thus, in the event of an objective accumulation of actions, the value of the various claims should first be added up in accordance with art. 93 para. 2 of the Swiss Code of Civil Procedure, and the procedure applicable to the result should then be determined in accordance with art. 243 para. 1 of the Swiss Code of Civil Procedure. 8

Ordinary procedure does not apply to cases subject to summary procedure. These include clear-cut cases (art. 257 CPC), the application of which depends on the will of the petitioner, "mise à ban" (art. 258 et seq. CPC), provisional measures (art. 261 et seq. CPC) and "jurisdiction gracieuse" (art. 248 let. e CPC). In addition, the law prescribes the application of summary proceedings (art. 248 let. a CPC). The law lists these cases in art. 249 to 251a CPC. However, this list is not exhaustive, as the Federal Court has already extended it to one or other of these cases. 9

It is up to the court to determine the applicable procedure, as the plaintiff is not obliged to indicate the applicable procedure in the claim. However, compliance with the applicable procedure remains a condition of admissibility 10 which the court examines ex officio (art. 60 CPC). In this respect, it checks that the conditions relating to the form (art. 130 CPC) and content (art. 221, 244 and 252 CPC) of the document are met, or that the document does not lead to the simultaneous application of several types of procedure (cf. in particular art. 90 let. b or 224 para. 1 CPC). In the event of doubt or dispute as to the applicable procedure, the court may issue a ruling on the matter. Such a decision is generally referred to as another decision within the meaning of art. 319 let. b CPC, or even as a final decision (art. 236 CPC) or incidental decision (art. 237 CPC) if the alleged defect is likely to lead to inadmissibility of the claim. If the claim is declared inadmissible because it has not been lodged in accordance with the prescribed procedure, art. 63 CPC gives the plaintiff a second chance to lodge a new claim within one month.

B. Positive scope of application

11 In certain situations, however, the scope of ordinary procedure is determined positively. This applies first and foremost to disputes of a non-property nature. A claim is said to be non-economic when it is of an ideal nature and does not concern a person's assets or is not closely linked to them. As they have no value in dispute, these disputes are in principle subject to ordinary procedure, unless the summary or simplified procedure applies due to the nature of the claim (cf. art. 243 para. 2 and 295 CPC). It should be noted that many non-economic cases are decided in summary or simplified proceedings by virtue of their nature, which limits the scope of this case law. Examples include disputes to put an end to violence, threats or harassment (art. 243 para. 2 let. b CPC) or concerning the exercise of a right of reply (art. 249 let. a ch. 2 CPC).

12 The second case in which the scope of ordinary procedure is defined positively concerns disputes subject to the jurisdiction of a single cantonal instance (art. 5 f. and 8 CPC). In such cases, the ordinary procedure applies irrespective of the amount in dispute, and the simplified procedure is in principle excluded (art. 243 para. 3 CPC). There are, however, a number of exceptions to this system. First of all, it is not out of the question for the summary procedure to apply before a single cantonal authority. This is the case, for example, when a commercial court is called upon to pronounce provisional measures (art. 6 para. 5 and 248 let. d CPC) or when it has to decide on a claim within the framework of protection in clear cases (art. 257 CPC). Furthermore, the Commercial Court is never competent to hear a case to which the simplified

procedure applies by virtue of art. 243 para. 2 CPC. Finally, it should be remembered that for disputes relating to supplementary health insurance (art. 7 CPC), the simplified procedure applies irrespective of the amount in dispute (art. 243 para. 2 let. f CPC).

III. APPLICATION TO OTHER PROCEDURES

A. Application to other types of proceedings

Art. 219 CPC provides that the provisions relating to ordinary proceedings ap- 13
ply by analogy to other types of proceedings, unless the law provides otherwise. The scope of art. 219 CPC thus depends on the normative density with which the legislator has regulated the different types of procedure. The reasoning is to first ascertain whether the provisions relating to the type of procedure in question provide for anything, and if not, to apply the topical provision relating to ordinary procedure. It should be noted that the latter can also be applied as a result of cascade reasoning. Thus, in proceedings concerning measures to protect the marital union, the provisions on ordinary procedure can only be applied insofar as art. 272 et seq. CPC first, and then those of summary proceedings, do not resolve the problem in question.

The application of ordinary procedure provisions to other types of proceed- 14
ings is not, however, without limits. Firstly, art. 219 CPC states that they apply unless otherwise provided by law. These are mainly provisions relating to other types of procedure. Other laws, in particular the LP (e.g. art. 84 para. 2 LP) but also substantive private law, may also provide for exceptions to the rules on ordinary procedure.

Secondly, the rules of ordinary procedure can only be applied by analogy if 15
they are consistent with the nature of the proceedings in question. In this respect, the Federal Court considers that art. 223 para. 1 CPC, which requires an additional time limit to be set in the event of failure to file a response, cannot be applied when the requested party does not file determinations in release proceedings. Determining which provisions of the ordinary procedure are compatible with the summary or simplified procedure is not always an easy task. However, this power is not unlimited. In case of doubt, in our opinion, it is best to revert to the rule and apply the provisions on ordinary procedure by analogy.

16 The application by analogy of the provisions on ordinary procedure can be achieved by a direct repetition of the provision concerned. Thus, the provisions relating to the obligation to draw up minutes (art. 235 CPC), the notification of decisions (art. 236 ff CPC) or the termination of proceedings without a decision (art. 241 ff CPC) apply by analogy to simplified and summary proceedings. A maiore minus, the court may also attenuate or adapt the rule, in particular to make it compatible with the nature of the applicable procedure. The Federal Court has ruled, for example, that in summary proceedings, the parties cannot assume that they will be guaranteed a second opportunity to speak, but that they can put forward new facts and evidence without restriction when the court orders a second exchange of pleadings or a hearing.

B. Other special procedures

17 In addition to the various types of proceedings, the question arises as to the extent to which art. 219 CPC applies to stages of proceedings that precede or follow the application of ordinary procedure, as well as to civil proceedings in which the CPC is not applicable, or is applicable only as suppletive law.

18 The legal remedies available under the CPC are appeal (art. 308 ff CPC), recourse (art. 319 ff CPC), revision (art. 328 ff CPC) and interpretation and rectification (art. 334 CPC). These procedures are governed by their own regulations. The legislator has abandoned the idea of referring to the rules governing first-instance proceedings. In the view of the Federal Court, this suggests that the legislature did not intend the rules of first instance procedure to apply to legal remedies. It is therefore only when the rules on legal remedies are silent that an application by analogy of the rules on first-instance procedure can come into play. The Federal Court has thus applied art. 221 and 244 of the Swiss Code of Civil Procedure by analogy to determine the content of the appeal brief, since art. 311 of the Swiss Code of Civil Procedure is silent on the subject. On the other hand, in our view it is not possible to interpret the provisions on legal remedies extensively by applying art. 219 CPC.

19 The conciliation procedure, although a mandatory prerequisite (art. 197 CPC), is not part of the ordinary procedure that begins with the filing of the claim (art. 220 CPC). As with the legal remedies, the law regulates the conciliation procedure in detail. Conciliation proceedings have other aims than first-instance proceedings, namely to achieve an amicable resolution of the dispute in a less formal setting than in ordinary proceedings (art. 201 para. 1 CPC).

Consequently, the rules of ordinary procedure are mainly applied when art. 197 et seq. of the Swiss Code of Civil Procedure are incomplete. This is generally the case when the conciliation authority acts "like a court" by issuing a ruling of inadmissibility or a decision (art. 212 CPC). In the latter case, however, the conciliation authority is obliged to apply the rules of simplified procedure first, followed by those of ordinary procedure in the alternative (art. 219 CPC).

Finally, the application of ordinary procedure does not necessarily follow 20
from the CPC. In principle, it applies before the Federal Patent Court (art. 27 FLPG). Lastly, it may apply, as suppletive cantonal law, in appeal proceedings against decisions of the child and adult protection authority (art. 450f CC). On the other hand, the PCF - and not the CPC - applies in the rare cases where the Federal Court rules as a single instance (art. 120 para. 3 LTF). In such cases, however, the provisions of the CPC may apply in the alternative.

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Chapter 2 Exchange of Written Submissions and Preparation for the Main Hearing

Art. 220 Initiation

The ordinary proceedings are initiated by filing the statement of claim.

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I. SUBMITTING THE APPLICATION

A. Characteristics

Under art. 220 of the Swiss Code of Civil Procedure, the filing of the claim is the decisive moment for initiating proceedings before the court of first instance. In ordinary proceedings, the claim is characterized by a written pleading containing at least the plaintiff's submissions and the reasons for them (art. 221 para. 1 CPC). The filing of an application in simplified procedure (art. 244 CPC) determines the commencement of the proceedings, by virtue of the reference in art. 219 CPC. The CPC also recognizes different types of initiating acts. In summary proceedings, proceedings are initiated by means of a petition (art. 252 para. 1 CPC). We might also mention the conciliation petition (art. 202 CPC) and the joint petition or unilateral request for divorce (art. 274 CPC). However, these acts are not covered by art. 220 CPC, which is limited to requests within the meaning of arts. 221 and 244 CPC. 1

As a written pleading, the application must be filed on paper or electronically, and must be signed (art. 130 paras. 1 and 2 CPC). Unlike the simplified or summary procedure (cf. art. 244 para. 1 and 252 para. 2 CPC), the ordinary procedure does not allow the filing of an oral application dictated in the minutes. Similarly, a brief filed by fax or e-mail does not meet the formal requirements of ordinary procedure. An application filed in this way is deemed not to have been submitted, which means that any deadlines cannot be met. If submitted on paper, the request must be delivered to the Swiss Post Office, the court registry or a Swiss diplomatic or consular representation (cf. art. 143 para. 1 CPC). A deed transmitted in electronic form must be provided with a qualified electronic signature in accordance with the Federal Law on Electronic Signatures of March 18, 2016 (art. 130 para. 2 CPC). For the rest, art. 130 ff CPC are applicable as regards formal requirements. 2

The Justitia 4.0 project will have an impact on the application procedures described above. The draft law on electronic communication platforms in the judicial field (P-LCPJ), due to come into force in 2025, provides for the establishment of one or more platforms for the electronic transmission of documents in the judicial field (art. 1 para. 2 let. a P-LCPJ). The draft makes a number of changes to the provisions of the CPC relating to the form of documents. In particular, art. 128c para. 1 P-CPC establishes the principle of com- 3 pulsory use of an electronic communication platform by the courts and the parties' professional representatives within the meaning of art. 68 para. 2 CPC. Filing an application on an electronic platform within the meaning of the LCPJ will then become the usual way of submitting an application in ordinary proceedings (art. 130 P-CPC).

4 The requirements relating to the content of the application are set out in art. 221 PPC for ordinary proceedings, and in arts. 244 and 252 PPC for summary and simplified proceedings. Please refer to the comments on these provisions.

5 In most cases, the regular filing of a claim is subject to compliance with time limits. In most cases, when conciliation has been attempted, these are the time limits set by the authorization to proceed for filing the claim (art. 209 para. 3 and 4 CPC). In the absence of a prior conciliation procedure, any time limits for taking action may derive from other legislation, such as the definitive registration of a legal hypothec for craftsmen and entrepreneurs (art. 961 para. 3 CC) or the action for discharge of debt (art. 83 para. 2 LP), but also from the CPC itself in the case of validation of provisional measures (art. 263 CPC).

B. Treatment by the court

6 Upon receipt of the request, the court has a number of options open to it. The court has broad discretionary powers in the conduct of the proceedings, although it is required by law to ensure a certain degree of expedition (art. 124 para. 1 CPC).

7 If the statement of claim contains a reparable formal defect, the court sets a deadline for rectifying it (art. 132 para. 1 CPC). This applies in particular if the deed is not signed, or if an appendix such as the authorization to proceed or the power of attorney is missing. The same applies to illegible, inappropriate, incomprehensible or long-winded deeds (art. 132 para. 2 CPC). In certain situations, notably where a copy is missing, the court may rectify the defect itself, at the expense of the author (art. 131 CPC). Finally, it should be remembered that a request submitted in a form not provided for by law (e.g. by e-mail or fax) is deemed not to have been submitted, so there is no possibility of rectifying the deed in such a case (supra no. 2). Where the request received by the court has been sent to it in error, art. 143 para. 1bis nCPC provides, as from its entry into force on January 1, 2025, for its ex officio transmission to the com-

petent court. In this case, art. 63 para. 1 nCPC provides that proceedings are deemed to have been instituted on the date of the first filing of the document.

On receipt of the request, the principle of procedural economy requires the court to carry out an initial examination of the conditions of admissibility. Consequently, even at this stage of the proceedings, the court may issue a final decision of inadmissibility (art. 236 para. 1 CPC). In order to limit the risk of a violation of the right to be heard, the court may also order a written exchange limited to compliance with the disputed admissibility condition (art. 125 let. a CPC; infra no. 9). It should be noted that certain conditions of admissibility cannot be examined until the defendant has been heard. This is the case, for example, when jurisdiction by reason of place is not given, but the defendant tacitly accepts the court's jurisdiction (art. 18 CPC). The same applies if the dispute is the subject of an arbitration agreement (art. 61 let. a CPC). In addition, the defendant may expressly or tacitly waive conciliation proceedings in the statement of defence if the amount in dispute exceeds CHF 100,000 (art. 199 para. 1 CPC). In all cases, the court may choose to limit the proceedings and the response to the question of admissibility (art. 222 para. 3 cum 125 let. a CPC). 8

If the claim does not appear to be inadmissible from the outset, and if it is not vitiated by any formal defect, the court will issue the necessary orders of instruction to advance the proceedings. Once the claim has been lodged, the court may require the plaintiff to pay an advance on costs (art. 98 CPC). Payment must be made within the time limit set by the court (art. 101 para. 1 CPC), which may be extended (art. 144 para. 2 CPC); the court will not consider the case if the plaintiff has not complied within a further time limit (art. 101 para. 3 CPC). Art. 222 para. 1 CPC also requires the court to notify the defendant of the claim and set a time limit for filing a response. The question of the order in which the court should proceed is a matter for the court's discretion. Barring special circumstances, procedural economy generally dictates that the claim should not be served on the opposing party until the advance on costs has been paid. 9

For the rest, once the claim has been lodged, the court is responsible for conducting the proceedings (art. 124 para. 1 CPC). It may then issue orders to simplify the proceedings (art. 125 CPC). For example, the court may divide cases (art. 125 let. b CPC) or join the claim to another lawsuit already pending (art. 125 let. c CPC). It may also limit the proceedings to certain questions or con- 10 clusions (art. 125 let. a CPC). At this stage of the proceedings, it may make sense to do so if the claim raises an admissibility issue, or if it contains subsidiary claims that could be time-consuming to deal with. In our view, there is nothing to prevent the court from issuing such orders before hearing the opposing party. On the contrary, the court is guided in its assessment by procedural economy (art. 124 para. 1 CPC). In this respect, it is appropriate to proceed in this way when substantial procedural steps can be avoided, as is the case with the filing of a response (cf. art. 222 para. 3 CPC).

II. EFFECTS

A. Determining the amount in dispute and the applicable procedure

11 The filing of a claim has several procedural consequences. Firstly, the Federal Court has stated that the filing of the claim is the decisive moment for calculating the amount in dispute. This is the corollary of the plaintiff's obligation to indicate the amount in dispute in his claim (art. 221 para. s1 let. c CPC). The disputed value is calculated in accordance with the principles set out in art. 91 ff CPC. Subject to manifest exaggeration or disagreement between the parties on this point (art. 91 para. 2 CPC), the amount in dispute corresponds to the amount indicated by the plaintiff. It is on the basis of this amount that the applicable procedure is determined.

12 It follows from the above that the applicable procedure is determined at the time the claim is lodged; it is therefore from this moment that the rules relating to ordinary procedure apply. Consequently, it is possible for the plaintiff to reduce his or her submissions once leave to proceed has been granted; the applicable procedure is then determined on the basis of the reduced submissions. Similarly, it is possible, in the application, to modify the submissions that were the subject of the authorization to proceed under art. 227 CPC by analogy, without taking into account the requirement that the proceedings be identical. The determination of the applicable procedure is the responsibility of the court, since it is a condition of admissibility that must be examined ex officio (art. 60 CPC). The plaintiff is not obliged to indicate the applicable procedure in his claim. At the very most, it must comply with the formalities applicable to the drafting of documents in the proceedings concerned. In the event of doubt as to the applicable procedure, or at the request of a party, the

court may determine it, depending on the circumstances, by means of an order of instruction, an incidental decision or a final decision (art. 219 CPC no. 10).

B. Litigation

Art. 62 para. 1 CPC provides that proceedings are initiated by the filing of the conciliation petition, the application, the petition or the joint petition for divorce. This means that, in most cases, the filing of the petition does not have the effect of creating lis pendens, as long as a prior conciliation procedure has taken place. Only if the conciliation procedure is excluded (art. 198 CPC), optional (art. 199 para. 3 nCPC) or if the parties have waived it (art. 199 CPC), does the filing of the claim coincide with the moment of lis pendens. In this case, it is also the court's responsibility to issue the parties with a certificate of filing of the document initiating proceedings (art. 62 para. 2 CPC). 13

It should be noted that under art. 65 CPC, it is from the transmission of the claim to the defendant, and not from the lodging of the claim, that the plaintiff must continue the proceedings (Fortführungslast). Withdrawal of the deed from this point onwards will, in principle, lead to res judicata. 14

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COMMENTARY ON

Art. 239 CPC

A commentary by Philip Carr / Tobias Aggteleky

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Art. 239 Notice to the parties and statement of grounds

[1] The court may give notice of the decision to the parties without providing a written statement of the grounds:

a. at the main hearing, by handing over the written conclusions to the parties and giving an oral summary of the grounds;

b. by serving the parties with the conclusions.

[2] A written statement of the grounds must be provided if one of the parties so requests within 10 days of the notice being given of the decision. If no statement of grounds is requested, the parties are deemed to have waived their right to challenge the decision by appeal or objection.

[3] The above is subject to the provisions of the Federal Supreme Court Act of 17 June 2005 on notice of decisions that may be referred to the Federal Supreme Court.

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I. SUBJECT MATTER AND SCOPE OF APPLICATION

1 Art. 239 CPC regulates the modalities of the opening of decisions. These include in particular the form of the opening as well as the question of whether, when and how decisions must be reasoned.

2 Art. 239 CPC applies to first instance decisions made in ordinary, simplified or summary proceedings. Decisions made in family law proceedings (namely divorce proceedings) are also covered by the norm. In principle, it does not apply to decisions on appeal, especially since the CPC stipulates that decisions of the appellate and appeal courts must always be issued with written reasons (Art. 318 para. 2 CPC and Art. 327 para. 5 CPC). Rulings that are newly issued after an application for revision has been approved must also be issued with written reasons (Art. 333 para. 3 CPC). The same applies to decisions of sole cantonal instances pursuant to Art. 5-8 CPC. The opening of decisions of the Federal Supreme Court is governed by Art. 60 FSCA.

3 As far as the type of decision is concerned, Art. 239 CPC applies only to decisions governed by Chapter 5 of the CPC, i.e. to final decisions, to partial decisions, to interim decisions and to decisions on precautionary measures.

4 The final decision leads to a termination of the proceedings before the respective instance by a decision on the merits or a decision not to proceed (Art. 236 CPC). A partial decision, which is not expressly regulated in the CPC and by which the court rules on part of the legal claims in the event of an objective or subjective accumulation of claims, is therefore also deemed to be a final decision. The court may make an interim decision if a final decision can be reached immediately by a different assessment by the higher instance, thus saving a significant amount of time or costs (Art. 237 CPC).

5 In contrast, Art. 239 CPC is not relevant for procedural orders and "other first instance decisions" (cf. Art. 319 lit. b CPC). However, it does not follow from this that such court orders never have to be reasoned; rather, a duty to state reasons may also arise directly from the right to be heard in individual cases.

6 The order to dismiss a case as a result of a settlement, acknowledgement of the action or withdrawal of the action pursuant to Art. 241 para. 3 CPC is a purely declaratory act, as these surrogate decisions end the proceedings immediately. The order to dismiss should nevertheless state the reason for the

dismissal (settlement, acknowledgement of the action or withdrawal of the action), but does not need to be justified beyond that. The situation is different with the dismissal of the proceedings due to lack of subject-matter for other reasons pursuant to Art. 242 CPC. While the proceedings in the cases of Art. 241 CPC end by operation of law, the dismissal of the proceedings due to lack of object for other reasons requires a judicial finding to that effect. This determination must be justified at least summarily, whereby the justification may be provided at the request of a party in accordance with Art. 239 CPC.

In principle, reasons must also be given for the decision on the costs of the proceedings (Art. 104 f. CPC). Here, too, the modalities are governed by Art. 239 CPC. The statement of reasons should indicate the principles of allocation on which the court has based its decision. The statement of reasons may be brief if the distribution is made according to the subordinate principle (cf. Art. 106 CPC). 7

According to Federal Supreme Court case law, no reasons need to be given for the decision on the amount of the legal costs as long as the court complies with the tariff framework and the parties do not submit any extraordinary circumstances. An exception to this is the case where the court fixes the party compensation at a certain amount that does not correspond to the usual compensation granted in practice, in deviation from a submitted cost note; such a decision must be justified. The submission of a cost note can therefore increase the requirements for the obligation to state reasons with regard to the costs decision. However, this case law only applies if the court decides on the cost consequences at the end of the main proceedings. On the other hand, a duty to state reasons exists if the costs and compensation consequences form the actual subject matter of the proceedings. 8

According to the opinion expressed here, the assessment of the costs of proceedings must be justified even if the tariff framework is adhered to, if the relevant tariff grants the court a margin of discretion of a certain scope. While the tariff limits are relatively narrow, e.g. in the case of decisions in summary cases under debt collection law, the cantonal tariffs regularly grant the courts considerable discretion, especially in property disputes with a high amount in dispute. In which cases a statement of reasons is appropriate is difficult to describe in general terms. A brief statement of reasons for the costs decision is recommended, regardless of the amount of the legal costs. If a decision is reasoned in writing, either directly or at the request of a party (Art. 239 para. 2 9

CPC), we believe that reasons should in any case be given for a determination of the costs of proceedings starting from a mid four-digit amount, stating the tariff bases, including the surcharges and reductions applied. Otherwise, it is hardly possible for the parties to properly challenge the costs decision.

10 It should also be noted in this context that Art. 110 CPC expressly provides for the independent challenge of the costs decision by means of an appeal. For this reason, the decision on costs must be substantiated in accordance with the aforementioned principles even if the remaining part of the decision is not subject to a duty to state reasons, which is the case in particular with the write-off decision pursuant to Art. 241 para. 3 CPC. The decision on costs contained in the write-off order may initially be issued in the dispositive, but must be substantiated in writing at the request of a party within the ten-day period pursuant to Art. 239 para. 2 CPC.

11 Art. 239 CPC also covers decisions that the conciliation authority may make at the request of the claimant in property disputes up to an amount in dispute of CHF 2,000 (Art. 212 CPC). The statement of reasons for proposed judgments submitted by the conciliation authority is voluntary (Art. 210 para. 2 CPC). Approvals to sue do not constitute decisions and do not require a statement of reasons. However, the order on the costs of the conciliation proceedings contained in the authorisation to sue (cf. Art. 209 para. 2 lit. d CPC) has the character of a decision and can be challenged by means of an appeal on costs. The cost decisions of the arbitration authorities are usually subject to narrow tariff limits, which is why a statement of reasons for the cost decision usually does not appear to be mandatory. However, there is nothing to prevent the parties from setting a deadline for requesting a written statement of reasons for the costs decision in these cases in application of Art. 239 CPC.

II. OPENING AND JUSTIFICATION OF THE DECISION

A. Opening

12 The "opening" of the decision means its communication to the parties, which is apparent in particular from the French and Italian wording ("communication" and "notificazione" respectively). The decision becomes legally existent when it is communicated to the parties and only becomes binding from that point on. A subsequent amendment of the decision by the court is excluded

(subject to a restoration, explanation or correction). The time limits triggered by the decision also begin to run when it is issued.

Only a decision that contains all the elements specified in Art. 238 CPC is deemed to have been duly issued. The notification of the decision must be made in a form in accordance with Art. 138 CPC (physical service), Art. 139 CPC (electronic service) or Art. 141 CPC (public notice). Delivery of the decision at the main hearing in accordance with Art. 239 para. 1 lit. a CPC constitutes an independent form of service. 13

A party must not suffer any disadvantage from the defective opening. In principle, a defective opening leads to contestability and only exceptionally to nullity of the decision. It must be examined in each individual case whether the party concerned has actually been misled by the alleged defect in the opening of proceedings and has thus been disadvantaged. If this is not the case, the defect in the opening of the proceedings is of no consequence. 14

B. Statement of reasons

1. Duty to state reasons and requirements

According to Art. 239 CPC, a decision must be reasoned in writing if the court so decides or if a party requests it within ten days of the opening. The written statement of reasons referred to in Art. 239 CPC refers to the reasons for the decision pursuant to Art. 238 lit. g CPC. The brief oral statement of reasons (Art. 239 para. 1 lit. a CPC), which may be communicated to the parties at the main hearing, essentially serves to explain the decision. It does not replace the written statement of reasons and does not have to meet high requirements in this respect. 15

Outside of Art. 239 CPC, a duty to state reasons may arise directly from the parties' right to be heard (Art. 29 para. 2 Federal Constitution and Art. 53 CPC). Such a duty to state reasons derived directly from the right to be heard is primarily relevant for procedural orders and "other first instance decisions", as Art. 239 CPC does not apply to these types of decisions. Procedural orders and "other first instance decisions" are appealable if the law so provides or if they threaten to cause a disadvantage that cannot be easily remedied (Art. 319 lit. b CPC). If the ordering first instance did not provide reasons in such cases, the parties would hardly be able to file a reasoned challenge and their right to 16 a fair hearing would be violated. For this reason, reasons must be given for procedural orders and "other first instance decisions" at least if they are (presumably) appealable.

17 The right to be heard also imposes certain requirements with regard to the scope of the statement of reasons: In principle, the statement of reasons must provide information on the history of the proceedings, state the relevant facts (including any evidence) and refer to the legal basis on which the court assessed the claims at issue. A summary of the parties' positions shall also be included in the statement of reasons. However, it is not necessary for the court to address all of the party's positions in detail and to expressly refute each and every argument. The statement of reasons must briefly state the considerations that guided the court and on which its decision is based. It should enable the parties to give an account of the scope of the decision and to be able to challenge it properly.

18 In practice, it is not uncommon to find so-called "that-decisions", the reasons for which consist of a single sentence or a string of various subordinate clauses each introduced with the conjunction "that" ("Whereas [...]"). Such justifications should be avoided, as they can make it difficult to read and understand. The Federal Supreme Court generally considers "that" decisions to be admissible only in the case of shorter judgments. However, the decisive factor remains whether the decision is easily comprehensible in the specific individual case.

2. Distinction from the dispositive

19 The statement of reasons must be distinguished in particular from the dispositive, whereby a distinction must be made between the (written) dispositive within the meaning of Art. 239 CPC and the dispositive pursuant to Art. 238 lit. d CPC:

20 The dispositive pursuant to Art. 238 lit. d CPC refers to the judgment formula as a necessary component and actual core of the decision. The judgment formula expresses the result of the decision in a concise form. It does not have to contain a statement of reasons, but may exceptionally refer to the statement of reasons "in the sense of the considerations" if a complete and unambiguous formulation of the judgment formula is not possible. In principle, the dispositive must reflect the motions filed and provide a response to all motions. The

judgment formula must clarify what is awarded to the appealing party and what is the subject of any enforcement. The costs order pursuant to Art. 104 CPC also forms part of the judgment formula.

In contrast, the (written) dispositive pursuant to Art. 239 CPC covers not only the judgment formula within the meaning of Art. 238 lit. d CPC, but all elements mentioned in Art. 238 CPC with the exception of the reasons for the decision (i.e. the reasons for the judgment) pursuant to Art. 238 lit. g CPC. If the decision is opened with reasons, the relevant main remedy of appeal or complaint must be mentioned. In the case of decisions of the last or only cantonal instance, reference must be made to the possibility of appeal in civil matters and subsidiary constitutional appeal to the Federal Supreme Court in accordance with the Federal Supreme Court Act. If, on the other hand, the decision is opened without a statement of reasons in the dispositive, it must be pointed out that a written statement of reasons may be requested within ten days, otherwise a waiver of the right to challenge the decision by appeal or complaint is assumed (cf. Art. 239 para. 2 CPC). 21

III. VARIANTS OF THE OPENING OF THE DECISION (PARA. 1)

The first paragraph of Art. 239 CPC regulates the variants of the opening of the decision, which are presented below. The wording and the system of Art. 239 para. 1 CPC result in three variants of the opening of the decision: the opening of a reasoned decision, the opening of the unfounded decision at the main hearing and the opening of the unfounded decision by service on the parties. In addition, other variants of the notification of the decision have emerged in practice, which will also be discussed below. 22

The court is guided by various considerations when deciding on the type of opening. For example, in simple cases, the parties will often be better served by a quick opening without a written statement of reasons. If the written statement of reasons is time-consuming, the court may feel compelled to initially dispense with such a statement in order to relieve itself. Conversely, the court will tend to issue its decision directly in writing if a detailed draft judgment is already available or if extensive clarifications have been made by the court. A direct written statement of the reasons for the decision may also be considered if it becomes apparent in the course of the proceedings that one 23 of the parties will contest the decision. The court should also consider whether the scope of the legal force of its judgment is clear if it is (only) opened in the dispositive.

24 The choice of the type of opening is the sole responsibility of the court. The parties therefore have no right to demand that the court choose a particular method of opening the proceedings (e.g. opening in the dispositive in order to save costs). However, if a decision is opened in the dispositive, a party may request a written statement of reasons.

A. Opening with reasons

25 Art. 239 para. 1 CPC is an optional provision. The court is therefore free to open the decision directly with written reasons. In this case, the opening and the statement of reasons for the decision are made at the same time.

B. Opening without reasons

26 Art. 239 para. 1 CPC also allows the court of first instance to open the decision to the parties without a written statement of reasons, whereby the law provides for either the handing over of the dispositive at the main hearing with a brief oral statement of reasons or the service of the dispositive.

1. Delivery of the decision with a brief oral statement of reasons (lit. a)

27 The court may hand over the decision to the parties at the main hearing and give brief oral reasons (Art. 239 para. 1 lit. a CPC). This is an independent form of opening the proceedings, which can be used in addition to the forms of service regulated in Art. 138 et seq. Code of Civil Procedure. The opening of the decision at the hearing presupposes that the parties are actually present. A party in default at the main hearing may therefore rely on being served with the decision in accordance with Art. 138 et seq. CPC will be served on him or her.

28 The short oral statement of reasons provided for by law is a rule of order. A dispositive handed over at the main hearing is therefore deemed to have been opened even if the court does not provide a brief oral statement of reasons. However, the court should definitely make use of the opportunity to explain its decision. The oral brief at the main hearing offers an excellent opportunity to convey the reasons for the decision to the parties in an understandable

form. If there is a contradiction between the oral brief statement of reasons and a later written statement of reasons, only the written statement of reasons is authoritative.

2. Service of the decision on the parties (lit. b)

Instead of handing over the decision at the main hearing, the court may also serve the unfounded decision on the parties (Art. 239 para. 1 lit. b CPC). In doing so, it must comply with the forms pursuant to Art. 138 et seq. Code of Civil Procedure. In the literature, it is sometimes pointed out that the court should, if possible, refrain from opening the decision in this way, since each party has the right to know why it has lost or won. Nevertheless, in practice, the service of the dispositive without reasons is probably the most frequent form of opening. 29

3. Service of the dispositive with a brief written statement of reasons (notes)

In court practice, another form of opening the decision has emerged that is not expressly regulated in the law. For example, the decision served on the parties in accordance with Art. 239 Para. 1 lit. b CPC is sometimes accompanied by a brief written statement of reasons or notes. The doctrine is almost unanimous that such written comments are admissible in principle. According to the opinion expressed here, such comments make sense in any case (and are sometimes even required). The filing of a summary statement of reasons will tend to discourage a party from requesting a full statement of reasons. It is obviously in the interest of the parties to obtain at least a rough outline of the relevant reasons for the decision. To a certain extent, the written comments take the place of the oral brief statement of reasons and have proven their worth in practice. 30

Nevertheless, certain principles must be observed when drafting observations. For example, for the sake of clarity, the parties must be made aware that the note on the dispositive does not constitute a (complete) written statement of the reasons for the decision and that such a statement may be requested within ten days (Art. 239 para. 2 CPC). The note must then be summary and summarise the essential line of argumentation of the court. Inadmissible, however, are notes that essentially correspond to a complete written statement of reasons in terms of their scope and content. On the one hand, such extensive 31 comments do not lead to any substantial relief for the court, which means that a waiver of the opening of the reasoned decision hardly seems justified. On the other hand, an excessively detailed note gives the losing party an advantage with regard to the challenge of the decision, because it allows it to draft its notice of appeal already during the time limit for the application for the subsequent delivery of a written statement of reasons and the time until its delivery. This unequal treatment may constitute a violation of the Convention and constitutional right to equality of arms. Where the borderline between admissible comments and inadmissible factual reasons for a decision lies can only be assessed in a specific individual case. A sense of proportion is called for here on the part of the court. In general, it is advisable to focus on the conclusions in the note and to keep their derivation as concise as possible. Nevertheless, the most central considerations must have their place in the required brevity. A party that does not recognise its most important arguments in the note will hardly forego a written statement of the reasons for the decision.

4. Service of the dispositive after oral communication of the decision

32 It is also not expressly provided for by law to communicate the decision orally during the main hearing (if necessary with a brief statement of reasons), but to dispense with the handing over of the written decision and to serve it instead pursuant to Art. 239 para. 1 lit. b CPC. Such a procedure does not appear to be problematic in principle, although the mere oral communication of the decision without handing over the dispositive does not constitute a formal opening of the decision. In this case, only the subsequent service of the decision is considered to be a formal opening. Of course, the court is free to directly serve the parties with a written reasoned decision after oral communication of the decision at the main hearing.

IV. SUBSEQUENT WRITTEN STATEMENT OF REASONS OR WAIVER OF CHALLENGE (PARA. 2)

33 If the court has issued its decision without a written statement of reasons, a written statement of reasons must be provided subsequently in accordance with Art. 239 para. 2 (sentence 1) CPC if a party requests this within ten days of the decision being issued. The ten-day period is of a statutory nature and cannot be extended. The right to request a written statement of reasons is a

consequence of the right to be heard and is therefore available to both parties - even if one party has completely prevailed. It is permissible to demand a higher court fee for the subsequent written statement of reasons, and many cantons have made use of this. However, it is not permissible to unilaterally impose higher costs on a party if it requests a statement of reasons for the decision, as both parties have the right to know why they lost or won. The distribution of the court costs generated by the statement of reasons for the decision therefore follows the general principles of distribution (and not the polluter pays principle).

The time limit for filing an appeal or a notice of appeal does not start to run 34 until the written statement of the grounds for the decision is served (Art. 311 para. 1 CPC and Art. 321 para. 1 CPC).

If a party mistakenly lodges an appeal with the appellate instance against a de- 35 cision that is not reasoned in writing within the ten-day period instead of requesting written reasons, the appeal must in principle be forwarded to the first instance as a request for written reasons. However, according to Federal Supreme Court case law, it is not contrary to federal law for the appellate instance not to hear the appeal against the unfounded decision, provided that the unfoundedly opened decision unambiguously indicated that a waiver of the challenge would be assumed if reasons were not requested within the time limit. However, such a formalistic interpretation of Art. 239 para. 2 CPC is hardly compatible with the right to be heard - at least in the case of parties who are not familiar with the law.

The rejection of a request for a written statement of the reasons for the judg- 36 ment constitutes a final decision, which in turn requires a notice of appeal.

According to Art. 239 para. 2 (second sentence) CPC, if no written statement 37 of reasons is requested within the time limit, this is deemed to be a waiver of the right to challenge the decision by appeal. However, even the party that has not requested written reasons may challenge the decision by appeal or complaint if the other party has requested written reasons. An application for revision remains possible even after an appeal has been waived in accordance with Art. 239 para. 2 CPC, especially since revision is possible in accordance with Art. 328 et seq. CPC, if the relevant requirements are met, to correct a final decision.

V. RESERVATION OF THE FEDERAL SUPREME COURT ACT (PARA. 3)

38 Pursuant to Art. 239 para. 3 CPC, the provisions of the Federal Supreme Court Act on the opening of decisions that may be appealed to the Federal Supreme Court are reserved. The reservation refers specifically to Art. 112 FSCA. This provision stipulates that decisions that are subject to appeal to the Federal Supreme Court must always be notified to the parties in writing with the reasons for the decision (para. 1). Oral notification at the court hearing is not excluded, but is not sufficient in itself. It is also permissible for the decision to be issued in advance in the dispositive with subsequent delivery of the written statement of reasons.

39 In the area of civil law, Art. 112 FSCA covers the decisions of the cantonal appeal and appellate authorities as well as the decisions of the sole cantonal authorities pursuant to Art. 5-8 CPC. The CPC already takes into account the reservation of the FSCA with regard to decisions of the cantonal appellate bodies insofar as appeal and complaint decisions must be issued with written reasons (Art. 318 para. 2 CPC and Art. 327 para. 5 CPC).

40 However, with regard to decisions of only one cantonal instance, there is no provision in the CPC that would make it mandatory to provide written reasons for such decisions. The question therefore arises whether Art. 239 para. 1 CPC does not apply to decisions of sole cantonal instances despite the reservation of Art. 112 FSCA, so that such decisions do not have to be reasoned in writing in every case. The background to this question is Art. 112 para. 2 FSCA. This provision provides that courts may, in accordance with cantonal law, issue their decision without a written statement of reasons and that the parties may request a complete copy within 30 days.

41 According to the majority opinion, there is no room for Art. 112 para. 2 FSCA in the area of civil procedure law since the entry into force of the Federal Code of Civil Procedure, because civil procedure law is now conclusively regulated at federal level. According to the minority opinion, however, the failure to adapt Art. 112 para. 2 FSCA to Art. 239 para. 1 CPC could be a legislative oversight. If one follows this view, it would be permissible for only cantonal instances to issue unfounded decisions and to give the parties the opportunity to request a statement of reasons within 30 days. A legislative clarification would be welcome in any case.

VI. ENFORCEABILITY OF DECISIONS OPENED IN THE DISPOSITIF

In connection with Article 239 of the Code of Civil Procedure, the issue of enforceability in the dispositive of decisions that have been opened deserves special attention. The problem of the enforceability of unfounded decisions arises from the fact that the time limit for appeal against a first instance decision only starts to run with the service of the written statement of reasons (Art. 311 para. 1 CPC and Art. 321 para. 1 CPC), but the handing over or service of the (unfounded) decision nevertheless constitutes the opening of the decision. Does the losing party now have to put up with enforcement (cf. Art. 336 para. 1 CPC) if it cannot even appeal against the decision that is unfavourable to it? 42

The question of whether a decision opened in the dispositive is enforceable only arises if the appeal open against it does not have a suspensive effect by law. This applies to appealable decisions (Art. 325 para. 1 CPC) as well as to appealable decisions on precautionary measures and counterstatement requests (Art. 315 para. 4 CPC). 43

In the literature and in cantonal practice, the question of the enforceability of decisions opened in the dispositive is answered differently. A majority of the higher cantonal courts and a part of the doctrine assume that decisions that have only been opened in the dispositive are also enforceable from the time of opening, provided that there is no legal remedy available against them that would impede enforceability. In order to defend itself against the threat of enforcement until the written statement of reasons was available, the losing party could appeal to the appellate court in analogous application of Art. 261 et seq. of the Code of Civil Procedure. CPC, the losing party may apply to the appellate court for a precautionary stay of enforceability. 44

Another part of the doctrine, on the other hand, takes the view that decisions issued in the dispositive are not enforceable until the written statement of reasons is available or until the deadline for requesting such a statement has expired unused. This view is also shared by the Zurich Supreme Court, which assumes that there is a gap in the CPC and applies Art. 112 para. 2 (sentence 3) FSCA by analogy. According to this provision, the decision is not enforceable until the deadline for requesting a written statement of reasons has expired unused or the complete copy has been opened. A ruling of the Federal 45

Supreme Court also points in this direction, although it concerned an appeal decision to which Art. 112 para. 2 FSCA applies directly.

46 In our opinion, the former solution is more convincing. The Zurich Supreme Court justifies its negative position primarily on the grounds that, if the decision opened in the dispositive were immediately enforceable, the losing party would run the risk that its recovery would no longer be recoverable after an unjustified enforcement due to a deterioration of the opponent's assets that had occurred in the meantime. It must be countered that the prevailing party, who cannot yet enforce for lack of justification, faces the same danger. However, insofar as a decision - even if not yet substantiated - exists, the interest of the prevailing party is to be weighted higher than that of the losing party, since in this case there is an increased probability that the claim actually exists.

47 It should also be noted that the practice of the Zurich Supreme Court does not follow a clear line. For example, it has itself relativised its practice in connection with a bankruptcy order in the dispositive and even argued the opposite in a decision concerning the time limit for raising an action for annulment (Art. 83 para. 2 SchKG). However, the question of whether a decision opened in the dispositive is amenable to enforcement should not depend on the individual case, but should be answered uniformly in terms of procedural law and doctrine. An analogous application of Art. 112 para. 2 FSCA would then contradict the wording and the system of the law and would have the consequence that, contrary to Art. 336 para. 1 CPC, decisions subject to appeal would be final upon their opening in the dispositive, but not enforceable.

48 In addition, the ordering of precautionary measures in the decision corresponds to a practical need, especially since the written statement of reasons can be time-consuming even in the case of decisions on measures. This is because, according to the CPC, immediate enforceability is a central element of decisions on measures, which already follows from Art. 315 para. 4 lit. b CPC. If decisions on measures were only enforceable upon presentation of the written reasons for the decision, this would have the consequence that the first instance would in fact be required to always open decisions on measures immediately with written reasons. Only in this way could it be ensured that the measures could fulfil their intended function - to establish a temporary peace order between the parties as quickly as possible. Denying the enforce-

ability of decisions opened in the dispositive would be detrimental to swift and effective legal protection.

For the sake of completeness, it should be noted that appellate courts and only cantonal courts have to cope with these disadvantages under the current law. In the course of the revision of the CPC, however, an adjustment is planned. 49

If one follows the approach according to which the losing party who wants to temporarily prevent the enforcement of a decision opened in the dispositive has to turn directly to the appellate instance, this solution must also apply mutatis mutandis if the decision opened in the dispositive does not contain any enforceable orders. This is the case in particular with dismissal decisions and decisions not to enter proceedings. In such cases (e.g. when a request for measures is rejected), the losing party must be able to apply to the appellate court for protective measures before receiving the written reasons for the decision. 50

The same applies if the prevailing party is threatened with a disadvantage that cannot be easily remedied because an appeal with suspensive effect is available against the decision, enforceability therefore does not yet occur by law and the party would therefore have to wait until the statement of reasons before initiating enforcement. In such cases, it may be justified for the appellate court to order early enforceability even before the reasons for the decision are available. 51

VII. EFFECT OF RES JUDICATA IN THE DISPOSITIVE OF DECISIONS THAT HAVE BEEN OPENED

Another problem that arises in connection with decisions opened in the dispositive concerns the res judicata effect of such decisions. As already mentioned, the opening of decisions in the dispositive is probably the most frequent form of opening in practice. This form of opening may offer certain advantages. However, it also entails risks that should not be underestimated. If neither party requests a written statement of reasons, legal uncertainties may arise with regard to the legal effect of the unfounded decision. 52

According to the case law of the Federal Supreme Court, a decision only becomes legally binding in the form in which it is expressed in the judgment. In 53 many cases, however, the scope of the decision can only be ascertained from the considerations in the judgment. It is therefore possible that the legal effect of a judgment opened in the dispositive remains unclear.

54 This is the case in particular if the final judgment merely states that the action is dismissed. There may be various reasons for this result. It is conceivable that the claim was denied in principle. It is also possible that the action was dismissed because there was a lack of substantive legitimacy, the maturity of the claim or the occurrence of a condition. It would also be possible that the claim was extinguished as a result of offsetting. The dispositive alone does not provide any clarity in this regard.

55 In the case of an alternative objective accumulation of claims, the Federal Supreme Court has even expressly stated that the reasons for the judgment must indicate the extent to which the court has judged the individual causes of action to be legally valid. The same applies in general to cases in which the court has to assess a partial action, since in certain constellations it is only evident from the reasons for the judgment to what extent a certain claim has been examined. However, it goes without saying that recourse to the reasons for the judgment is only possible if such reasons are available at all. This is precisely not the case with decisions opened in the dispositive.

56 The aforementioned ambiguities regarding the effect of res judicata must be avoided. Therefore, if the scope of the decision is unclear, the parties are well advised to request a written statement of the reasons for the decision (unless such ambiguity would give them tactical advantages). In principle, the parties may request an explanation of the decision even after the deadline for requesting a written statement of reasons has expired. An explanation is admissible, inter alia, if the dispositive is unclear (Art. 334 para. 1 CPC), which is always the case if the scope of the res judicata is uncertain. With the explanation, the court makes its original intention known. The prerequisite for this is that the court can still reconstruct the intention of the court, for which there is less and less guarantee as time passes. If the content of the decision cannot be determined and an explanation is not (or no longer) possible, the decision has no legal force.

57 However, it cannot be the sole task of the parties to be concerned about clarifying the legal effect of decisions by requesting a written statement of reasons or an explanation. On the contrary, the courts should refrain from issuing de-

cisions that need to be explained, the scope of which is not clear from the dispositive. This does not necessarily require a (complete) written statement of the reasons for the judgment. Rather, the court may limit itself to stating the relevant reasons for the decision in a note to the operative part, thus clarifying the extent to which the claims in dispute (and any set-off claims) have been assessed.

VIII. CPC REVISION

It is currently difficult to assess what changes the current revision of the CPC will bring about in connection with the opening and justification of decisions, especially since there are still some fundamental discrepancies between the two Councils. Two relevant aspects of the parliamentary deliberations to date are briefly examined below. 58

A. Duty to state reasons for decisions of higher and sole cantonal courts

In the course of the revision of the CPC, Art. 318 para. 2 CPC and Art. 327 para. 5 CPC, according to which appeal and appeal decisions must always be issued with a written statement of reasons, are to be deleted or adapted to Art. 239 CPC. This innovation is to be welcomed in principle and also allows appeal decisions to be opened in the dispositive. 59

The National Council and the Council of States then decided to amend Art. 112 para. 2 FSCA. The revised version should now also allow the courts to issue decisions without a written statement of reasons in accordance with federal law (namely Art. 239 CPC). This provision is also to be welcomed and underlines the fact that even higher and sole cantonal instances can issue their decisions without written reasons. 60

A certain ambiguity remains with regard to the question of the period within which the parties must request written reasons for decisions of higher and sole cantonal instances, especially since Art. 112 para. 2 FSCA provides for a period of 30 days, whereas Art. 239 para. 2 CPC provides for a period of ten days. Since Art. 318 para. 2 CPC and Art. 327 para. 5 CPC (in the version adopted by the National Council and the Council of States) refer to Art. 239 CPC, the ten-day time limit will have to be applied to appeal decisions. There is (so far) no explicit provision in the CPC for decisions of sole cantonal in- 61 stances. Nevertheless, according to the opinion expressed here, the ten-day time limit will also have to be applied to decisions of single cantonal instances, especially since no objective reason for a different treatment of these decisions is apparent. However, a legislative clarification would be appropriate.

B. Enforceability of decisions opened in the dispositif

62 The draft of the revised CPC provided for a new Art. 336 para. 3 CPC, according to which an unfounded decision opened is immediately enforceable if the appeal does not have a suspensive effect and the court has not postponed enforcement. According to the new Art. 239 para. 2bis CPC, this competence should be vested in the court of first instance.

63 The Council of States took a different direction. In the version it adopted, Art. 336 para. 3 CPC clarifies that a decision opened without written reasons should be enforceable under the usual conditions set out in para. 1 of this provision. In addition, the practice already adopted by a majority of the higher cantonal courts, according to which a request for a stay of enforcement can be made to the appellate court even if the reasons for the decision are still outstanding, is to be transferred into law by a new version of Art. 315 para. 5 CPC and Art. 325 para. 2 CPC. In our opinion, this solution proposed by the Council of States deserves preference. However, the National Council subsequently rejected both the Federal Council's proposal and the Council of States' decision after an astonishing vote according to which the current situation did not constitute a known problem, but rather the Council of States' decision would create practical and legal problems. In the view expressed here, it is to be hoped that the Council of States will prevail in the course of further parliamentary deliberations.

64 It should be noted that there are currently no plans to amend the provision in Art. 112 para. 2 FSCA, according to which decisions subject to appeal to the Federal Supreme Court are not enforceable until the deadline for requesting a written statement of reasons has expired unused or until the written statement of reasons is available. This would have the consequence - with the solution adopted by the Council of States - that only decisions of lower cantonal instances that have been opened in the dispositive would be enforceable from the time of opening, but not decisions of higher and sole cantonal instances that have been opened in the dispositive (and are subject to appeal to the

Federal Supreme Court). Whether the resulting unequal treatment of decisions of lower and higher or sole cantonal instances is intended is questionable and would also call for clarification by the legislature.

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COMMENTARY ON

Art. 240 CPC

A commentary by Philip Carr / Tobias Aggteleky

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Art. 240 Notice and publication of the decision

If so provided by the law or if it serves enforcement, the decision shall be published or notice shall be given to the authorities and third parties concerned.

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I. SUBJECT MATTER

Decisions are generally opened only to the parties involved in the proceedings (and to the ancillary parties), the modalities of the opening of the decision being essentially governed by Art. 239 CPC. In extension of this principle, Art. 240 CPC provides that the decision shall also be communicated or published to authorities and third parties concerned to the extent provided for by law or for the purpose of enforcement. 1

The communication of the decision to authorities or third parties does not constitute a formal opening of the decision and the addressees of the communication do not thereby acquire party status. In this respect, the notification of a decision under Art. 240 CPC is also to be distinguished from the opening of family law decisions vis-à-vis the child who has reached the age of 14 (cf. Art. 301 lit. b CPC). 2

Art. 240 CPC does not refer to the making available of decisions pursuant to Art. 54 para. 1 CPC (e.g. by publication at the court, publication in collections of decisions, etc.). Art. 54 para. 1 CPC grants the interested public the right to inspect court decisions under certain circumstances. Judicial notification obligations to authorities under federal or cantonal law also do not constitute a case of application of a notification under Art. 240 CPC. 3

Publication based on Art. 240 CPC must be further distinguished from public announcement under Art. 141 CPC. Public notice under Art. 141 CPC is a form of service (so-called edictal service) that is effected under certain conditions if the other forms of service prove impossible. 4

II. BASIC PRINCIPLES

If there is a statutory basis, the court decides ex officio whether a decision is to be notified or published to authorities or third parties. The persons and authorities to whom the decision is communicated must be expressly named in the decision (Art. 238 lit. e CPC). All addressees of the decision must be indicated in the decision disposition. Subsequent notification is only possible by correcting the decision (Art. 334 CPC). 5

Notification of authorities and third parties is usually effected by delivery of an extract of the decision. Exceptionally, the communication of the complete 6 decision together with the recitals may be necessary if a mere excerpt would not meet the information needs of the addressed authority or third party.

7 If the law provides for publication of the decision, the cantonal law determines the organ of publication, subject to federal requirements (see for example Art. 35 SchKG or Art. 986 para. 2 CO). This is usually the cantonal official gazette.

III. CASES OF APPLICATION (SELECTION)

8 The following is a list, without claiming to be exhaustive, of some examples where, pursuant to Art. 240 CPC, a communication of the decision to authorities (A) or third parties (B) or a publication of the decision takes place (C).

A. Notification of the decision to authorities

9 A communication of the decision to an authority is provided for by law in the following cases, for example:

- In the area of the Civil Code: The court must notify the competent civil registry offices or their supervisory authorities of a large number of decisions relating to family and personal law (e.g. declaration of disappearance, marriage, determination of paternity or civil status; Art. 42 ZGB and Art. 40 and 42 f. ZStV). The dissolution or cancellation of associations and foundations entered in the Commercial Register must be notified to the Commercial Register Office for the purpose of deletion (Art. 79 and Art. 89 para. 2 CC). Restrictions on the disposal of a property by a spouse must be notified to the Land Registry (Art. 178, para. 3 CC). The same applies to court-ordered priority notices of provisional entries (Art. 961, para. 2, CC and Art. 124, para. 1, GBV).
- In the area of the CO: Certain decisions in matters of company law must be notified to the competent commercial registry office (e.g. provisional withdrawal of the power of representation [Art. 565 para. 2 CO], dissolution and registration of the liquidators of the general partnership [Art. 574 para. 2 CO and Art. 583 para. 3 CO] or of the joint-stock company [Art. 737 CO and Art. 740 para. 2 CO]). Judgments on contested rents and other claims by landlords must be notified to the Federal Department of Economic Affairs, Education and Research (Art. 23 para. 2 VMWG).

- In the area of the SchKG: Certain orders in connection with bankruptcy proceedings, such as the opening, revocation of bankruptcy and the discontinuation or conclusion of bankruptcy proceedings, must be notified to the Commercial Register Office (Art. 176 SchKG, Art. 939 OR, Art. 158 para. 1 HRegV). The same applies (subject to Art. 293c para. 2 SchKG) to the granting of a definitive or provisional moratorium (Art. 296 SchKG, Art. 160 HRegV) and the confirmation of the composition agreement with assignment of assets (Art. 308 SchKG, Art. 161 HRegV).
- In the area of intellectual property law: decisions in patent or trademark matters must be served on the Institute of Intellectual Property (Art. 70a PatA, Art. 54 MSchG).
- In the area of cartel law: Decisions taken in application of the Cartel Act must be served on the Secretariat of the Competition Commission (Art. 48 para. 2 KG).

B. Notification of the decision to third parties

Notification of the decision to third parties is provided for by law in the following cases, for example: 10

- In the area of the Civil Code: Decisions on personality violations may be communicated to third parties at the request of a party (Art. 28a para. 2 CC). If the obligated person neglects to fulfil a maintenance obligation, the court may order his or her debtors to make payments in whole or in part to the entitled person (art. 132 para. 2 CC). If a guardianship restricts a person's capacity to act, the debtors must be notified accordingly (Art. 452 para. 2 CC).
- In the area of data protection: In data protection law, the plaintiff may also request that the decision be communicated to third parties (Art. 15 para. 3 FADP and Art. 25 para. 3 lit. b FADP).
- In the area of precautionary measures: Under the conditions of Art. 261 CPC, the court orders precautionary measures. Such a measure may consist, among other things, of an order to a third person (or a registry authority) (Art. 262 lit. c CPC).

C. Publication of the decision

11 Publication of the decision is provided for by law in the following cases, for example:

- In the area of the Civil Code: Decisions on personality violations may be published at the request of a party (Art. 28a para. 2 CC). Under certain circumstances, the withdrawal of a spouse's power of representation may also be published (Art. 174 para. 3 CC). The unknown creditor of a debtor's deed may be publicly requested by the court to report it (Art. 856 para. 1 CC).
- In the area of data protection: In the area of data protection law, the plaintiff may also demand publication of the decision (Art. 15 para. 3 DPA and Art. 25 para. 3 lit. b DPA).
- In the area of the CO: The declaration of invalidity of securities must be published in the Swiss Official Gazette of Commerce and, at the discretion of the court, also elsewhere (Art. 986 para. 2 CO; cf. also Art. 972 CO and Art. 977 CO).
- In the area of the SchKG: the revocation of bankruptcy is made public (Art. 195 para. 3 SchKG). The same applies to the granting of a definitive or provisional moratorium (Art. 296 SchKG, subject to Art. 293c para. 2 SchKG) and the confirmation of the composition agreement with assignment of assets (Art. 308 SchKG).
- In the area of intellectual property law: the court may authorise the prevailing party to publish a patent law decision at the expense of the opposing party (Art. 70 para. 1 PatA).

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COMMENTARY ON

Vorb. zu Art. 261 – 269 ZPO und Art. 261 ZPO

A commentary by Patrick Honegger-Müntener

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Chapter 5 Interim Measures and Protective Letter

Section 1 Interim Measures

Art. 261 Principle

[1] The court shall order the interim measures required provided the applicant shows credibly that:

a. a right to which he or she is entitled has been violated or a violation is anticipated; and

b. the violation threatens to cause not easily reparable harm to the applicant.

[2] The court may refrain from ordering interim measures if the opposing party provides appropriate security.

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I. GENERAL

A. Concept and purpose

Civil proceedings (more or less complex) can take years, even in Switzerland. 1
Precautionary measures are indispensable to protect the plaintiff or the defendant from disadvantages that could occur during the possibly long duration of the proceedings until definitive legal protection is granted. Their institutional purpose lies in the timely realisation of rights and the effective protection of subjective rights. Of course, it should not be overlooked that in practice precautionary measures often also serve other purposes, such as obtaining a quick and inexpensive factual or legal opinion, which enables a better assessment of the procedural prospects of success and can form the basis for a settlement solution, or "sharpening the sword before the big fight" in order to get to know the opposing party's means of defence. In principle, this cannot be seen as an abuse of precautionary measures. Rather, the court must be aware of these secondary functions when issuing precautionary measures.

Precautionary measures are divided into three categories according to their 2
content: precautionary measures (to secure the enforcement of a judgment), performance measures (to provisionally enforce a claim) and regulatory measures (to provisionally regulate a legal relationship).

B. Historical background

Already under the cantonal codes of civil procedure, the federal legislature in- 3
cluded provisions on provisional measures in federal private law to safeguard subjective rights. These provisions experienced different fates when the CCP came into force: while some norms were deleted without replacement or integrated into more specific provisions of the CCP, others continued to apply - sometimes in modified form. In addition, all cantonal codes of civil procedure knew a regulation of the procedure for issuing precautionary measures, whereby the legal nature of the precautionary measure, i.e. its affiliation to the substantive federal private law or to the then cantonal procedural law, was disputed. With the Swiss CCP, this dispute has become less important with regard to the distribution of competences.

4 Art. 261 ff. CCP essentially correspond to the previous standard and are based at least materially on the provisions on the protection of personality under Art. 28c et seq. aZGB, so that the relevant doctrine and case law can continue to be taken into account.

C. Scope of application

5 Federal private law continues to have norms on precautionary measures or comparable institutions after the entry into force of the CCP. It must be clarified in each individual case whether these take precedence as leges speciales or whether Art. 261 et seq. CCP are applicable in addition. Within the CCP, specific norms on precautionary measures can be found in Art. 276 CCP (divorce proceedings), Art. 303 CCP (maintenance and paternity action) and Art. 374 CCP (arbitration proceedings), for which reference should be made to the commentaries on these provisions. Finally, the provisions on the procedure for taking measures are applicable to the taking of evidence on a precautionary basis (Art. 158 para. 2 CCP).

II. PREREQUISITES FOR PRECAUTIONARY MEASURES

A. General

6 For the ordering of necessary precautionary measures, the party making the application must show credibly that a claim to which it is entitled has been infringed or that an infringement is to be feared (Art. 261 para. 1 lit. a CCP; claim for an injunction) and that it is threatened with a detriment from the infringement that cannot be easily remedied (Art. 261 para. 1 lit. b CCP; ground for an injunction).

7 According to the law, stricter requirements apply to the issuance of superprovisional measures, i.e. measures that are issued without hearing the respondent (see Art. 265 CCP), as well as to the issuance of precautionary measures against periodically published media (see Art. 266 CCP). For the specific requirements, please refer to the commentaries on these provisions.

B. Right to an injunction

1. General

The claim for an injunction is the substantive claim that the party seeking the injunction wishes to secure or enforce by means of precautionary measures. In order to establish a claim for an injunction, the petitioning party must therefore allege and credibly demonstrate facts from which the infringement of a (material) claim or the fear of an infringement thereof arises (Art. 261 para. 1 lit. a CCP). For its part, the court must make an assessment of the merits based on the submissions of the party making the application and the respondent's statement. Apart from statutory exceptions (Art. 262 lit. e CCP), the claim for an injunction may not be pecuniary in nature. With regard to claims for monetary benefits, the instruments of the SchKG, in particular the attachment (see Art. 271 et seq. SchKG), take precedence over the precautionary measures under the ZPO (Art. 269 lit. a ZPO). Apart from that, however, claims for performance, claims for the organisation of proceedings and claims for a declaratory judgement can in principle give rise to a claim for an injunction. The infringement of the material claim can either be imminent or already exist or be ongoing. It is also possible that the act of infringement has already been completed and only its repetition is threatened. Whether such an infringement has occurred is basically determined by the substantive law. In contrast, the ZPO itself requires a risk of commission or repetition in the case of a first infringement or a renewed threat of infringement. According to the not uncontroversial, but probably predominant view, this is a specific requirement for a claim, so that if it is negated in the measure proceedings, the request for a measure is rejected. 2. 8

2. Risk of first offence and risk of repetition in particular

A risk of commission or repetition exists if the imminent violation has become so serious that it appears to be imminent. The decisive factor is not the subjective view of the requesting party, but an objective standard. A purely abstract or hypothetical possibility of commission or repetition is not sufficient, as the risk of commission or repetition must also be credible. 9

Admittedly, the risk of commission and repetition depend to a not inconsiderable extent on the formation of the will of the respondent, i.e. on internal facts. The party making the request must therefore in principle only present 10 circumstances that allow the court to conclude from the statements or conduct of the respondent that he or she (probably) intends to commit or repeat the offence. In view of the difficulties in "positive prima facie evidence", the practice regarding the risk of repetition, but not the risk of commission, also makes use of various assumptions. According to the case law of the Federal Supreme Court, an act of infringement usually gives rise to a presumption that it will be committed again, or at least indicates that it will be committed again if a warning had no effect or would be futile. According to case law, the risk of repetition is then regularly affirmed if the defendant denies the unlawfulness of its conduct, since in such a case it can be assumed that it will continue it in reliance on its lawfulness.

11 It is disputed in doctrine and case law to what extent the respondent can invalidate the presumption of the risk of repetition by a declaration that it will not commit any further infringements. In earlier decisions, the Federal Supreme Court stated that strict requirements had to be met to rebut the presumption. The presumption was not overturned either by the mere cessation of the infringement or by the respondent's declaration to refrain from future infringements if the claim was not acknowledged at the same time. Without taking a position on this, the Federal Court also pointed out that under German law even a cease-and-desist declaration was not sufficient if it was not secured by a contractual penalty. Following these considerations, the doctrine also demanded such a "secured cease-and-desist declaration". More recently, however, the Federal Supreme Court has allowed a "formal declaration of discontinuance" to suffice, although it still seems to tend to require an acknowledgement of the claim. Other courts, on the other hand, have found that a declaration of waiver and submission without recognition of a legal obligation and without a penalty is sufficient if it is unconditional and unambiguous.

12 In principle, I believe that, in the absence of a legal basis, neither an acknowledgement of the claim nor a contractual penalty is necessary to invalidate the presumption of the risk of repetition. Rather, the decisive factor must be whether, on the basis of the formal declaration of distance in the specific individual case, a repetition of the infringing act still appears credible. Moreover, the conduct of the respondent which leads to the lapse of the danger of repetition (and thus to the dismissal of the application for a measure) can be taken into account in the allocation of costs.

C. Grounds for the injunction

1. General

The ground for an injunction constitutes the procedural justification for provisionally protecting the claim for an injunction by means of precautionary measures instead of awaiting the definitive outcome of preliminary proceedings. In order to establish a ground for an injunction, the party making the request must allege and credibly demonstrate facts showing that it is threatened with a detriment that cannot be easily remedied as a result of the infringement (or feared infringement) of the claim for an injunction (Art. 261 para. 1 lit. b CCP). For its part, the court must make a prognosis of the disadvantage based on the corresponding submission of the party making the request. According to the not uncontroversial, but probably predominant view, the ground for an injunction is a substantive requirement, so that in its absence, the application for a measure is dismissed and the case is not dismissed. 13

2. Urgency in terms of time

a. Principle and purpose of temporal urgency

The requirement of temporal urgency has not been independently standardised in the law, but is widely recognised in doctrine and case law. Temporal urgency is affirmed if the (final) judgment in the main proceedings cannot be awaited without ordering a precautionary measure, without the requesting party suffering a disadvantage that cannot be easily remedied. However, this in no way implies a subsidiarity of the precautionary measure proceedings compared to other legal options for action. On the contrary, only disadvantages caused by the main proceedings in terms of time can justify precautionary measures. 14

b. Relative urgency in particular

i. Opinion in doctrine and case law

Under the heading of relative urgency, there is a controversial discussion in doctrine and jurisprudence as to the extent to which a delay on the part of the petitioning party in initiating the main proceedings can lead to a lapse of urgency in terms of time. There is widespread agreement that passivity on the part of the requesting party can lead to the dismissal of the application for a 15 measure. The dogmatic basis for the dismissal due to lack of relative urgency is disputed and appears to be partly coincidental. Some argue that in the absence of relative urgency, the temporal urgency as a constituent element no longer exists. Others argue more in the direction of a procedural forfeiture that annuls the right, so that the party making the request can merely no longer invoke urgency due to a breach of good faith, abusive conduct or a lack of interest in legal protection.

16 The concept of relative urgency itself is also unclear. Some argue that this is lacking if the requesting party has allowed a period of time to elapse at the time of filing the application for measures that would probably have sufficed for the conduct of the ordinary proceedings. Others, on the other hand, take the view that relative urgency is already lacking if the main proceedings would have been legally concluded before or only insignificantly after the measure proceedings, provided that the requesting party would have initiated the main proceedings as soon as it was possible for it to do so at the earliest. The difference between the two views is that in the former case it is sufficient for the affirmation of relative urgency if the measure proceedings were initiated within the duration of hypothetical main proceedings, whereas in the latter case the measure proceedings must also be concluded within this duration.

17 For both views, the hypothetical duration of the main proceedings must therefore be determined, and for the second view, the hypothetical duration of the measure proceedings must also be determined. According to doctrine and case law, the hypothetical duration of the proceedings must be determined specifically, taking into account the individual case, and not on the basis of an abstract period of time. According to the prevailing opinion, any appeal proceedings are only to be taken into account to the extent that they have a suspensive effect, since the only decisive factor for the relative urgency is the time by which the petitioning party could have obtained an enforceable judgment in the main proceedings. In other words, for the hypothetical duration of the main proceedings, the appeal proceedings are generally to be taken into account if an appeal against the first instance decision is open (see Art. 315 para. 1 CCP), whereas any Federal Supreme Court proceedings are generally not decisive (see Art. 103 para. 1 FSCA). With regard to the hypothetical duration of the measure proceedings, on the other hand, any appeal proceedings are generally not relevant, as appeals against measure decisions do not usually have a suspensive effect (see Art. 315 para. 4 lit. b CCP).

Despite the fundamentally concrete determination of the hypothetical duration of the proceedings, the practice regularly uses abstract rules of thumb: In its case law, the Federal Patent Court assumes that the average ordinary infringement proceedings last two years, whereas the injunction proceedings last about eight to ten months. Therefore, the claim for the issuance of precautionary measures is procedurally forfeited if the requesting party waits about 14 months from the time when ordinary proceedings could have been initiated before asserting the claim. Cantonal practice and doctrine also generally assume a duration of about two to three years for the main proceedings, especially in intellectual property or competition law proceedings. However, caution is required in individual cases. The Commercial Court of the Canton of Bern, for example, has already assumed a duration of the main proceedings of one and a quarter years (without appeal proceedings) and of seven months for the measure proceedings. 18

The earliest possible time for initiating the main proceedings must then be determined for the relative urgency. Theoretically, this is when the factual basis of the claim is available in such a way that a legally sufficient main action corresponding to the request for a measure could be drafted and substantiated. It should be noted that the requirements of the main proceedings are stricter than those of the measure proceedings, so that further clarification of the facts, possibly even obtaining a private expert opinion, may be necessary. Nevertheless, it must be demanded that the requesting party makes a good faith effort to clarify the facts in a timely manner. According to widespread opinion, the period of relative urgency should then be suspended or not even begin to run as long as the party making the request is conducting settlement talks with the opposing party or issuing a warning. Finally, it is disputed whether the party filing the application must have knowledge of the (imminent) infringement of the injunction claim or whether even negligent ignorance can suffice. In my opinion, the decisive factor must be whether it would have been reasonable in good faith for the requesting party to initiate proceedings on the merits at the relevant time in the individual case, so that negligent ignorance is sufficient in any case. 19

ii. Appraisal and opinion

With the requirement of relative urgency, the Federal Supreme Court moved away from the concept of urgency originally introduced in Germany, according to which the time for preparing the application for a measure was decisive 20 for the duration of the permissible waiting period - admittedly under assessment of the individual case. From this point of view, "standard forfeiture periods" of one to three months were also advocated in Switzerland at the time, which still correspond to the applicable legal situation in Germany today. The Swiss time limits under the concept of relative urgency are thus much more generous. The concept of relative urgency is justified by the purpose of precautionary legal protection. This serves to avert disadvantages due to the long duration of the main proceedings, but does not pursue the goal of eliminating the occurrence of further disadvantages beyond the conclusion of the main proceedings. Its function was therefore limited to the point in time of the (hypothetical) occurrence of the enforceability of the decision on the merits, since it should not be in the hands of the requesting party to postpone this point in time by its (abuse of rights) waiting, because the interests of the opposing party were impaired by the facilitations of the measure proceedings. These considerations are to be agreed with. Viewed in the light of hindsight, however, I believe that this concern, regardless of which concept of relative urgency one may follow, is not or not sufficiently realised by its conception. If one assumes that only the application for a measure must be submitted within the duration of hypothetical main proceedings, it is inherent in the concept that the decision on the measure could only be issued after the conclusion of the hypothetical main proceedings. The measures ordered in this case would therefore also protect the requesting party from disadvantages that only occur or increase after the hypothetical conclusion of the main proceedings. The same applies, however, if it is demanded that the measure proceedings must also be concluded within the hypothetical main proceedings, especially if the conclusion of the measure proceedings and the hypothetical main proceedings are close to each other. It would only be different if - which does not happen in practice as far as can be seen - Art. 268 para. 2 CCP were interpreted to the effect that the precautionary measures ordered would have to be limited to the duration of the hypothetical main proceedings. The relative urgency thus favours the requesting party, without there being any justification for this.

21 In my opinion, the concept of relative urgency should therefore be abandoned. Instead, temporal urgency (in the objective sense) should be joined by subjective urgency as a constituent element. Subjective urgency is lacking if it is clear from the behaviour of the requesting party that it is not in a hurry. This can be assumed, among other things, if the requesting party waits for a

longer period of time before initiating the measure procedure, although it is aware of the infringement or the threat of infringement or could or should have been aware of it in good faith. In view of the structural preferential treatment of the party filing the application in the proceedings for a measure, it can certainly be demanded of the party filing the application, in view of the interests of the party opposing the application, that it initiate the proceedings for a measure as immediately as possible. The permissible duration of the waiting period must, however, be determined in each individual case. The starting point must be the time that the requesting party needs in good faith to prepare the application for a measure. In individual cases, the legal and factual complexity of the case (especially the time for the necessary clarifications), settlement efforts or out-of-court warning attempts must be taken into account. In the absence of special circumstances, however, a time limit of three months from knowledge or the need to know is likely to be the upper limit. The dogmatic support at the level of the facts is preferable, because mere waiting can hardly be seen as an abuse of rights. In addition, it would have the advantage that the subjective urgency would in principle have to be made credible by the party making the request.

3. Threatened disadvantage that cannot be easily remedied

a. General and concept of disadvantage

A disadvantage is any legal or factual impairment of the requesting party in its 22
substantive legal position. The disadvantages may be of a material, i.e. economic, or immaterial nature and may even arise from the mere passage of time in the proceedings. In this respect, the disadvantage within the meaning of Art. 261 para. 1 lit. b CCP differs from the disadvantage under Art. 319 lit. b item 2 CCP and Art. 93 para. 1 lit. a FSCA. The disadvantage must still be imminent, i.e. on the one hand it must not yet have occurred in its entirety and on the other hand it must be credible on the basis of objective indications. The mere possibility of a disadvantage is not sufficient. Likewise, the party filing the application may not be content with merely establishing the credibility of the claim for an injunction or with making general references to advantages of the respondent, but must demonstrate the disadvantage (which cannot be easily remedied) in a legally adequate manner. There is no "presumption of disadvantage" in this sense.

b. Particular disadvantage that cannot be easily remedied

23 According to the wording of the law, the disadvantage described above must be of a qualified nature, i.e. it must not be easily compensated by a later, positive result of the proceedings. A waiver of this qualifying element, as occasionally indicated by the doctrine on the grounds that it is the purpose of the legal system to avoid disadvantages as far as possible, must be firmly rejected, because this view disregards the clear wording of Art. 261 para. 1 lit. b CCP without further justification. Moreover, it fails to recognise that in the measure proceedings, the existence of the claim for an injunction only has to be credible due to limited evidence, and in this respect there is a risk that the precautionary measure could be wrongly ordered. It would be unacceptable to burden the opposing party with this risk (and in turn to refer it to a possible claim for damages under Art. 264 CCP), even though the party making the request would not suffer any significant disadvantages if the precautionary measures were not ordered.

24 A disadvantage that cannot be easily compensated is affirmed if it cannot be compensated or cannot be fully or completely compensated by money. It is disputed in doctrine and jurisprudence whether threatened claims for real performance per se constitute such a disadvantage or whether full compensation can be achieved by monetary payment on the basis of contractual, non-contractual or enrichment-law claims or management without a mandate, so that a precautionary measure presupposes a special interest in real performance.

25 The proponents of the former view derive from Art. 97 CO an unconditional substantive claim to real performance, which must be secured by means of precautionary measures. Compensation for damages, as a secondary benefit per se, cannot constitute full reparation. The opposing view holds that the justification in the main case in the measure proceedings is ultimately still uncertain in view of the reduced standard of proof and the restriction of evidence, and in this respect there can be no absolute claim to real performance. This uncertainty had to be borne by the requesting party, so that a disadvantage that could not be easily remedied could only be assumed if there was (credibly) a special interest in real performance. In addition, the claim for real performance has limits anyway, since even after a judgment in the very last instance, only a claim for damages remains enforceable. The Federal Supreme Court, for its part, initially took the view in an earlier decision that a loss of

profit that could be asserted by means of an action for damages did not constitute a disadvantage that could not be easily compensated. In later decisions, it still described this view as justifiable or not arbitrary, but shortly thereafter at least implicitly rejected it with regard to immaterial claims.

In my opinion, it seems more convincing to require a special interest in the actual performance, since every legal claim and every postponement of the actual performance is associated with a not inconsiderable risk of non-performance, so that in view of the disadvantage of the respondent in the measure proceedings, this cannot be seen as a sufficiently weighty disadvantage that cannot be easily remedied. However, as far as can be seen, the dogmatic dispute has hardly any practical effects in practice. In my opinion, this is primarily due to the fact that the proponents of the requirement of a special interest in real performance regularly affirm this in those cases in which the proponents of the unconditional claim for real performance consider the referral to the secondary (pecuniary) claim to be particularly objectionable, namely, inter alia, in the case of immaterial disadvantages or interests, in the case of emptying or undermining of the claim for real performance, in the case of evidentiary difficulties and in the case of doubtful solvency of the respondent. Nevertheless, the discussion of prejudice remains a delicate matter in practice, involving a certain discretion on the part of the court. 26

In the following - without claiming to be exhaustive - a brief overview of recent practice will be given. A disadvantage that cannot be easily compensated was affirmed in cases of infringement of absolute or immaterial rights, difficulties in proving the damage or causality, market confusion, doubtful solvency of the defendant, imminent loss of a main means of evidence, "imminent difficulty" in conducting a lawsuit after payment of the guarantee amount, or significant restriction of economic freedom of movement. On the other hand, in numerous cases the courts also found that a concrete disadvantage had not been adequately asserted or made credible. In individual cases, a disadvantage due to a declaration of indemnity was denied. 27

c. Principle of proportionality: Weighing up the interests against the disadvantages of the respondent?

i. Opinion in doctrine and case law

28 It is disputed to what extent the disadvantages of the opposing party are to be taken into account within the framework of the disadvantage prognosis for the ordering of precautionary measures.

29 The case law of the Federal Supreme Court is fluctuating. In older decisions on patent law, the Federal Supreme Court stated that if the requirements are met, a measure must be taken "regardless of whether and how severely it could disadvantage the opponent of the application". The law only took into account the possible disadvantage of the opposing party by allowing the court to require the party making the application to provide security (now Art. 264 para. 1 CCP). Nothing prevented the court from setting the security at such a level that the full damage could be compensated after the main proceedings. An actual weighing of disadvantages would turn the legal order into the opposite. However, only two years after confirming this case law, the Federal Supreme Court held in a dispute under unfair competition law that the interests or the disadvantages of the parties had to be carefully weighed against each other in a request for the provisional lifting of a supply ban, without giving detailed reasons for the associated deviation from its previous case law. The requirement of a comprehensive weighing of interests and disadvantages was later confirmed with regard to a prohibition of competition under labour law and then in a general manner, since it was not clear why the prognosis of disadvantages should be carried out according to different rules in different areas of law. At least in the latter decision, the Federal Supreme Court felt compelled to comment on the divergent earlier case law. It stated that in the present case, unlike in the earlier patent law decisions, there was a contractual obligation between the parties and, moreover, it was a matter of provisional enforcement. In my opinion, it is rather doubtful whether the existence of a contractual relationship can actually be relevant for the prerequisites of provisional legal protection. In any case, the patent law decisions were also essentially about provisional enforcement, namely of the patent law claim for injunctive relief. In its most recent case law on the CCP, the Federal Supreme Court again assumes with regard to a trademark dispute that a weighing of disadvantages is not necessary due to the possibility of obliging the requesting party to provide security. "Il suffit que la partie requérante risque un préjudice difficilement réparable (...); il n'est pas nécessaire que ce préjudice soit plus important ou plus vraisemblable que celui qu'encourrait la partie adverse au cas où les mesures requises seraient ordonnées."

In view of this fluctuating Supreme Court case law, it is not surprising that the question is also answered differently in doctrine and cantonal case law. A considerable part of the doctrine requires a weighing of the disadvantages of the requesting party if the provisional measures are not ordered against those of the opposing party if the provisional measures are ordered. There are nuanced differences, inter alia, as to whether all disadvantages or only disadvantages that cannot be easily remedied are to be taken into account in the prognosis of disadvantages. In some cases, the weighing of interests and disadvantages is dogmatically anchored in an independent requirement for an order of "proportionality in the narrower sense" and not in the prognosis of disadvantages. In order to justify a comprehensive weighing of interests and disadvantages, arguments are essentially based on the constitutionally enshrined principle of equality of rights (Art. 8 para. 2 BV) and the principle of procedural equality of arms (Art. 29 para. 1 BV), as well as the principle of proportionality (Art. 5 para. 2 BV and Art. 36 para. 3 BV). These principles required that, even in the area of interim legal protection, a balance of interests be sought between the party making the application and the party opposing the application. Furthermore, the comprehensive weighing of interests should be seen as a correlation to the structural reduction of the guarantee of correctness in the measure procedure. In contrast, another part of the doctrine takes the view that no comprehensive weighing of interests or disadvantages takes place within the scope of the examination of the claim, but that the proportionality test in the sense of necessity and requisiteness is only relevant at the level of the content of the measure. Their representatives argue that there is no legal basis for such a comprehensive weighing of interests and disadvantages. The statute of a comprehensive balancing of interests leads to a mixing of the prerequisites for an order and the structure of the measure, which is not provided for by law. If there was a claim for an injunction and a ground for an injunction, the court no longer had the discretion to decide. Finally, the method of a comprehensive prognosis of disadvantages also lacked practicability, since the quantification of disadvantages or the weighing of disadvantages only led to a "pseudo-accuracy" and considerably inflated the measure procedure. 30

ii. Appraisal and opinion

The dogmatic dispute is occasionally described as "not of a practical nature". 31
In my opinion, this is only correct with regard to the question of whether the comprehensive weighing of interests and disadvantages should be considered

as part of the prognosis of disadvantages or as an independent requirement for an order of "proportionality in the narrower sense". Of practical relevance, on the other hand, is the question of whether a comprehensive weighing of interests and disadvantages is required as a precondition for the measure or whether the interests of the opposing party are only taken into account in the content of the measure within the framework of a proportionality test limited to suitability and necessity, i.e. without an examination of reasonableness or proportionality in the narrower sense.

32 According to the wording of the law, the court takes "the necessary precautionary measures" (Art. 261 para. 1 CCP). According to the Dispatch, a measure is necessary if it is suitable and necessary in terms of time and subject matter to prevent the (not easily recoverable) disadvantage of the requesting party or to protect its credibly asserted claim. For this purpose, the Federal Council refers to the older decisions under patent law, which did not require a comprehensive weighing of disadvantages and interests. The CCP does not provide any indications for a consideration of the disadvantages or interests of the opposing party at the level of the requirements for an order or for an actual decision-making discretion of the court. On the contrary, it should be systematically noted that Art. 261 para. 1 CCP, unlike Art. 266 lit. c CCP for measures against the media, does not standardise the requirement of proportionality (at least in the narrower sense) in positive law.

33 From a teleological point of view, precautionary measures serve to secure the enforcement of substantive law with regard to the duration of the proceedings in the main action. It must be borne in mind that after the main proceedings have been conducted, it is in principle irrelevant how severely the decision on the main proceedings affects the legal position of the opposing party or, in the worst case, even endangers its existence. Admittedly, one may now object that the substantive claim of the petitioning party is only protected in summary measure proceedings with a reduced standard of proof and limitation of evidence. This is correct in itself, but the decision on the measure functionally decides on the bearing of the "risk of disadvantage" for the duration of the main proceedings. The opposite approach would also lead to a serious undermining of the precautionary legal protection, as a precautionary measure would generally not be taken, especially in the case of economically significant acts of infringement (the prohibition of which would generally also threaten the existence of the infringing party). In principle, I therefore agree

with the view that refrains from a comprehensive weighing of interests at the level of the prerequisites for the order and only takes into account the proportionality, limited to suitability and necessity, or the interests of the opposing party at the level of the content of the measure.

D. Examination by the court of the entitlement to the injunction and the grounds for the injunction

1. General

The party making the application must make the claim for an injunction and the grounds for the injunction credible (Art. 261 para. 1 CCP). In adversarial injunction proceedings, the opposing party must also only make its defences and objections credible. The general distribution of the burden of proof according to Art. 8 CC applies, the so-called "burden of credibility". However, due to the reduced standard of proof, this is likely to be of lesser importance, as a "prima facie burden" decision is only conceivable in the case of identical degrees of probability of the asserted legally relevant facts. 34

As the measure procedure is a summary procedure (Art. 248 lit. d CCP), the parties may in principle only use documents to establish prima facie evidence (Art. 254 para. 1 CCP). Other evidence is only admissible if it does not significantly delay the proceedings, the purpose of the proceedings requires it or the court has to establish the facts ex officio (Art. 254 para. 2 CCP). Particularly in the case of technical questions, however, the court will regularly have to obtain expert advice in the form of a brief expert opinion if it lacks its own expertise. 35

2. The concept of prima facie evidence

According to the case law of the Federal Supreme Court, a fact is credible if the court is of the opinion, on the basis of objective aspects, that the fact asserted actually occurred in this way, even if it cannot be ruled out that it could have been otherwise. The standard of proof in the measure proceedings is thus reduced compared to the standard of proof of the court's full conviction that applies in the main proceedings. Nevertheless, the parties are well advised to prove the facts incumbent upon them, as far as possible, in accordance with the standard standard of proof. 36

37 There is a controversial discussion in doctrine and case law on the question of whether the standard of proof of prima facie evidence in measure proceedings is variable or whether it is a decision limit to be applied in all cases. Parts of the doctrine and case law postulate, for example, higher requirements for the prima facie case if the precautionary measures in question are particularly drastic or if they are performance measures that are equivalent to a provisional enforcement measure. Other authors and courts reject such a gradation of prima facie evidence for lack of a legal basis, with a view to procedural equality of arms or with reference to legal certainty. However, the court could meet the specific requirements of the individual case within the framework of the assessment of evidence, as well as impose different requirements on the manner in which the threshold of prima facie evidence was to be reached. Although the Federal Supreme Court considered the qualification of the type of precautionary measure to be decisive for the standard of proof of prima facie evidence in the case of a precautionary non-competition clause, it expressly rejected "a variable standard of proof", at least with regard to the standard of proof of the so-called "overwhelming probability", so that in my opinion the case law is not clear.

38 In my opinion, the dispute as to whether a flexible standard of proof or an abstract standard of proof with consideration of the individual case in the assessment of evidence is to be applied for the establishment of prima facie evidence appears to be predominantly of a theoretical nature, without any practical consequences being associated with it as a rule. This is also supported by the fact that the concept of prima facie evidence has been described in numerous ways, some of which are probably to be seen against the background of the idea of a flexible standard of proof, and that no detailed systematisation has taken place and in this respect it often seems random which formulation the courts use. In this sense, a similar result is likely to result in practice, regardless of whether the court defines the standard of proof of prima facie evidence flexibly or considers the abstract standard of proof to be fulfilled more or less quickly in the context of the assessment of evidence. Nevertheless, from a practical point of view, it should be noted that the question of the correct (possibly also flexible) standard of proof is in principle a question of law, whereas the achievement of the correct (flexible or abstract) standard of proof is considered a question of fact in the context of the assessment of evidence. This distinction is primarily relevant in view of the limited grounds for complaint in appeal proceedings against decisions on measures, which are only

subject to appeal (see Art. 320 CCP). In federal court proceedings, on the other hand, only the violation of constitutional rights can usually be complained of in the case of decisions on measures (Art. 98 BGG). For dogmatic reasons, I believe that the adoption of an abstract standard of proof is to be advocated, since on the one hand the parties have the right to know in advance what degree of conviction is required of the court and on the other hand there is ultimately no legal basis and no need for a different interpretation of the concept of prima facie evidence within the same provision.

3. Prima facie case / intensity of examination

In addition to the existence of the facts giving rise to the claim, the concept of 39 prima facie evidence should, according to the case law of the Federal Supreme Court, also include the examination of whether the claim asserted would result from these facts. In principle, only a summary examination was carried out in the measure proceedings. The claim of the petitioning party was to be protected as a precautionary measure if it did not prove to be futile on the basis of the credibly asserted facts giving rise to the claim. In practice, a more in-depth legal examination is carried out corresponding to increased requirements for the prima facie case of the facts giving rise to the claim, such as in the case of performance measures or provisional enforcement. In such cases, precautionary legal protection should only be granted if the claim appears to be promising or legally justified on the basis of the summary examination.

The establishment of prima facie evidence of the legal case meets with justi- 40 fied criticism in the doctrine, since questions of fact and law are mixed up here dogmatically. The prima facie case, as a (legal) contrast to the strict standard of proof, can per se only refer to the (claim-grounding) facts. The probable legal merits of the injunction claim, on the other hand, can only be examined in greater or lesser detail. In this respect, the standard of prima facie evidence could at most be applied by analogy. In the absence of a statutory provision, however, it is not permissible to impose on the parties, in particular on the party filing the application, the burden of establishing prima facie evidence of the legal situation, since the application for an injunction can be filed without legal justification (see Art. 221 para. 3 in conjunction with Art. 219 CCP).

41 In the doctrine it is then disputed whether a reduction of the legal examination depth in the measure procedure is justified at all. The assessment of this question is difficult not least because, as far as can be seen, no general-abstract criteria have yet been developed to distinguish between the merely (possibly increased) summary and the detailed examination of the legal situation. However, as far as time permits, the court will not make an "order light" anyway, but will assess the legal situation comprehensively, which is why the effects of the dispute will probably manifest themselves rather rarely in practice. From a doctrinal point of view, the principle of iura novit curia, which also applies in the measure procedure, speaks primarily in favour of a comprehensive legal examination on the basis of the (credibly submitted) facts. It must also be considered that the issuance of a precautionary measure not only constitutes a factual prejudice to the merits of the case, but also a serious encroachment on the interests of the opposing party. For this reason, the "principle of equal footing" or procedural equality of arms also requires a comprehensive legal examination. Against this backdrop, the Federal Supreme Court's opinion that it is sufficient in injunction proceedings if the claim for an injunction does not appear to be futile is to be rejected in principle, in line with what is probably the predominant doctrine. Rather, it is generally required that the claim is legally justified in view of the (credibly submitted) facts. In doing so, the court will primarily be guided by the law, the case law of the Federal Supreme Court or the prevailing doctrine, and secondly it will have to make a dutiful decision in the individual case. It should be noted, however, that the comprehensive examination in the measure procedure is not a final one.

III. PROVISION OF SECURITY BY THE RESPONDENT

42 The court may refrain from ordering precautionary measures if the respondent provides adequate security (Art. 261 para. 2 CCP). In light of this, however, the provision of security does not avert the precautionary measure, but is itself - as an expression of the principle of proportionality at the level of the content of the measure - the precautionary measure with special content. The provision of security may therefore only be ordered if the requirements for the issuance of a precautionary measure are fulfilled.

43 Functionally, the provision of security by the opposing party under Art. 261 para. 2 CCP - unlike that of the requesting party under Art. 264 para. 2 CCP -

is not about mitigating the consequences of an unjustified precautionary measure, but rather about effectively satisfying the requesting party's need for protection. This is the crux of the matter, which is why the provision of security by the respondent not only under previous law, but also under the CCP, has a "wallflower existence" in doctrine and case law. If there is a threat of a disadvantage that cannot be easily remedied, the security provided by the respondent, understood as a purely monetary security, can hardly fully satisfy the applicant's need for legal protection, since the security is merely a means of securing the enforcement of a possible claim for damages. The deposit is therefore not suitable to eliminate evidentiary difficulties in connection with the claim for damages or to provide relief for threatened immaterial disadvantages. On the other hand, if a mere security should be sufficient to satisfy the applicant's need for legal protection, the ground for the injunction, i.e. the disadvantage that cannot be easily remedied, should not be given in itself, so that the question of the respondent's adequate provision of security does not arise. It is therefore rightly stated that the respondent can regularly only disprove solvency problems by providing security.

It does not appear to be fully clarified whether other types of security are admissible in addition to the cash deposit or by way of a guarantee in the sense of an analogous application of Art. 100 para. 1 CCP. In the doctrine, for example, it is argued that an adequate security could consist in the fact that the disputed object of purchase is deposited in such a way that it cannot be accessed or that the allegedly unlawful state is removed. On the other hand, a mere written declaration on the part of the opposing party is generally not sufficient as adequate security. It is also discussed whether a cease-and-desist declaration containing the promise of a massive, specifically designated penalty payment in the event of a violation could serve as adequate security. Part of the doctrine rejects this, since the contractual penalty, even if it is substantial, cannot cover more than the disadvantage actually incurred, but does not constitute a penalty and the excess would have to be released by the respondent in the damages proceedings. In my opinion, this reasoning must be rejected. Insofar as the security deposit under Art. 261 para. 2 CCP is structured as a contractual penalty, its assessment is based on substantive law, i.e. the general Code of Obligations. According to Art. 161 para. 1 CO, the contractual penalty is forfeited even if the creditor has not suffered any damage. In this context - subject to an excessively high contractual penalty according to Art. 163 para. 3 CO - the entire contractual penalty is owed even if any effec- 44 tive damage is less than the penalty. However, if the defendant issues a cease-and-desist declaration that is secured by a massive contractual penalty, the claim for injunctive relief, i.e. the risk of first offence or repetition, should regularly cease to exist, so that the question of a security deposit does not even arise.

45 Since the principle of disposition also applies in injunction proceedings, the respondent to the application must submit an application for the provision of security with the application response, which - to the extent that the respondent can be expected to do so - substantiates the type and scope of the security. However, it is also possible to subsequently provide security to lift a precautionary measure that has already been ordered. Finally, the wording of the law in Art. 261 para. 2 CCP speaks of "provides", which indicates that it is not the application or the offer to provide security that is important, but the actual provision of the same by the respondent. This also corresponds to the rather strict case law of the Federal Supreme Court under the previous law. In the doctrine, this is sometimes criticised, as in this case the respondent does not even know how high the appropriate security should be. In fact, the court will have to be granted a certain flexibility in terms of time due to teleological considerations. As a rule, it is likely that the court that wishes to accept the security will set a deadline for the provision of the security after the party making the application has been heard. However, it is also possible to make the decision on the measure and make the measure dependent on the fact that the ordered security is not received within the set time limit. The court has discretion as to which course of action to take and this will probably depend to a large extent on the circumstances of the individual case. In contrast, the court has no discretion - contrary to the wording of the law "may" - with regard to the ordering of a security deposit, insofar as the respondent made a sufficient application and the court considers the security to be appropriate.

IV. PROCEDURE FOR THE ISSUANCE OF PRECAUTIONARY MEASURES

A. Jurisdiction in domestic cases

1. Local jurisdiction

a. General

Pursuant to Art. 13 CCP, unless the law provides otherwise, the court at the place where jurisdiction over the main matter is given (lit. a) or where the measure is to be enforced (lit. b) has mandatory jurisdiction to order precautionary measures. Art. 13 CCP provides the requesting party with an alternative mandatory place of jurisdiction at the place of the court with jurisdiction for the main matter or at the place of enforcement of the measure. The party making the request must establish the facts that give rise to jurisdiction. If the facts are doubly relevant, the court must, in principle, first consider the allegations of the party making the application when examining jurisdiction. 46

The place of jurisdiction at the place where jurisdiction over the substance of the matter is given is determined in accordance with the general rules on jurisdiction under Art. 9 et seq. or Art. 20 et seq. CCP. The place of enforcement is "where the content of the precautionary measure is to be given direct effect by the application of legal compulsion". It depends essentially on the content of the request for the measure. In the case of protective measures, it is usually at the place of the object to be secured and in the case of performance measures at the place of performance or compliance with the injunction. 47

b. Right of choice of the requesting party / coordination problems

Art. 13 CCP gives the requesting party a right to choose between the place of jurisdiction at the place of the main action and that at the place of enforcement. Since the law does not contain a corresponding differentiation, this right to choose exists in principle both for precautionary measures before and for those during the pendency of the main proceedings. 48

According to the prevailing view, however, the petitioning party's right to choose is limited if the main proceedings are already pending. In this case, the 49 petitioning party should no longer be able to choose between all potential courts for the main action, but only between the one where the main action is pending and the one at the place of enforcement. This view must be accepted. For while the main action is already pending, there is in principle no further jurisdiction in the main action that could be invoked for the enforcement proceedings under Article 13(a) CCP due to the barring effect of the pending (main action) proceedings (cf. Article 64(1)(a) CCP). In addition, this view is supported by considerations of procedural economy, as two different courts on the merits should not have to deal with similar issues at the same time.

50 According to the prevailing view, the exercise of the right to choose the measure procedure prior to the pendency of the main action does not oblige the requesting party - in the absence of a fixation effect of the request for measure - to conduct the prosectuion action or the main action before the main action court chosen for the measure procedure. This view is to be agreed with de lege lata, although de lege ferenda it would in my opinion have to be considered whether in this situation there are also weighty procedural-economic reasons for not having two different potential courts of main instance deal with similar questions in the same dispute.

51 The petitioning party's right to choose consequently opens up a forum shopping option worth considering in legal advice. It is possible, for example, to take advantage of any existing differences in domestic and intercantonal jurisdiction, to challenge the respondent in the measure proceedings while the main action is pending at the court of the place of enforcement and thus to open a "second front" or, after a negative measure decision, to initiate the main action proceedings at an alternative (possibly more well-meaning and not pre-judged) main action court.

c. Choice of court agreements

52 In view of the mandatory nature of Art. 13 CCP, it is inadmissible to enter into a jurisdiction agreement that relates solely to the jurisdiction to issue precautionary measures (cf. Art. 9 para. 2 CCP). It is questionable, however, to what extent the agreement on jurisdiction in the main action affects the jurisdiction to take measures under Art. 13 CCP.

53 According to the prevailing view, the prorogation and derogation effect of an agreement on the place of jurisdiction in the main action affects the jurisdic-

tion to take measures at the place of the main action (Art. 13 lit. a CCP), although even in the case of an exclusive agreement on the place of jurisdiction in the main action, jurisdiction to take measures at the place of enforcement (Art. 13 lit. b) still remains. This view is to be agreed with. Art. 13 lit. a of the CCP does not itself regulate the main courts relevant for the jurisdiction to take action, but refers to the general rules on jurisdiction. If an agreement on the place of jurisdiction is permissible in the main action, its prorogation and derogation effect must indirectly affect the scope of application of Art. 13 lit. a CCP. However, in addition to the (if applicable, also exclusively) agreed main proceedings court, the measure jurisdiction at the place of enforcement continues to exist, as this measure jurisdiction is directly declared mandatory by Art. 13 lit. b CCP.

2. Subject-matter jurisdiction

The substantive and functional jurisdiction is in principle governed by can- 54
tonal law (Art. 4 para. 1 CCP). An exception exists if the CCP requires a dispute to be adjudicated by a single cantonal court (Art. 5 para. 1 CCP) or if a canton provides for a commercial court for commercial disputes (Art. 6 para. 1 CCP). In these cases, this court is also mandatorily competent to order precautionary measures prior to the pendency of the main action (Art. 5 para. 2 and Art. 6 para. 2 CCP). According to the prevailing view, the same applies - although not yet provided for by law - in the context of a direct action before the higher court (Art. 8 CCP).

In the doctrine, if the plaintiff (or petitioning) party can choose between the 55
commercial court and the ordinary court according to Art. 6 para. 3 CCP, it is argued for reasons of procedural economy that the choice of the competent measure court for the measure proceedings consumes the choice of the court in the main proceedings. In my opinion, this view must be rejected - despite the undisputed procedural-economic advantages of such an approach. The application for a measure does not have any fixing effect on the main proceedings with regard to the local jurisdiction. From a systematic perspective, nothing else can apply to the subject-matter jurisdiction, especially since, depending on the concrete constellation, a commercial court does not necessarily have to exist at the alternative (local) place of jurisdiction. The argument of procedural economy also fails because the current Art. 13 CCP allows forum shopping. This decision must be accepted de lege lata.

B. International circumstances

1. Jurisdiction

a. International jurisdiction under the IPRG

i. General

56 Within the scope of application of the IPRG, according to Art. 10 IPRG, the Swiss courts or authorities that have jurisdiction as to the substance of the matter (lit. a) or those at the place where the measure is to be enforced (lit. b) have jurisdiction to order provisional measures; in addition, there are further specific measure jurisdictions in the special chapters of the IPRG. Unlike the predecessor provision, the provision based on Art. 13 CCP thus no longer governs only international jurisdiction, but also local jurisdiction.

57 With regard to the determination of the place of jurisdiction at the place of the main action, the relevant provisions of the IPRG must be taken into account. For the place of enforcement, on the other hand, reference can in principle be made to the remarks on Art. 13 CCP.

ii. Right of choice of the requesting party / coordination problems

58 Art. 10 IPRG gives the requesting party the right to choose between the place of jurisdiction at the place of the main action and the place of enforcement. Although Art. 10 IPRG - as well as Art. 13 CCP - does not differentiate between precautionary measures before and during the pendency of the main proceedings, the extent of the right to choose when foreign or Swiss main proceedings are pending is disputed in detail.

59 Under Willkürkognition, the Federal Supreme Court has protected both the view that the Swiss court can in any case have subsidiary jurisdiction based on the place of jurisdiction of the main action if the foreign court already seised has not ordered any precautionary measures, and the view that the undisputed international jurisdiction of the foreign court on the main action precludes the ordering of precautionary measures based on the place of jurisdiction of the main action. Opinions are also divided in the doctrine. There are probably better reasons for denying the Swiss courts jurisdiction to order measures on the basis of a potential Swiss place of jurisdiction for the main issue in pending foreign proceedings on the main issue. It may be argued that despite the

stay of the main proceedings (Art. 9 IPRG), it is not guaranteed that a (measure) decision that can be recognised in Switzerland can be issued in foreign main proceedings that are already pending and that Swiss law bears a residual responsibility for the effective protection of the subjective rights of the parties concerned. However, in my opinion, it is sufficient for this purpose to provide the requesting party with the alternative measure jurisdiction at the Swiss place of enforcement. Even if the main proceedings are pending in Switzerland, the requesting party cannot (as with Art. 13 CCP) choose another potential Swiss court for the main proceedings.

In contrast to Art. 13 CCP, according to the case law of the Federal Supreme Court, the place of enforcement at the Swiss place of enforcement is not available unconditionally if the main proceedings are already pending abroad. According to the case law on Art. 10 aIPRG, which stems from international divorce law, an increased necessity or urgency for the issuance of domestic measures is required for jurisdiction to issue measures at the Swiss place of enforcement when foreign main proceedings are pending. According to the Federal Supreme Court, this is to be affirmed in the following groups of cases: (i) if the law applicable by the foreign court does not have a provision comparable to Art. 276 CCP; (ii) if decisions on measures by the foreign divorce court cannot be enforced at the Swiss domicile of the parties; (iii) if measures are to be ordered to secure future enforcement in property in Switzerland; (iv) if there is imminent danger, or (v) if it cannot be expected that the foreign court will decide within a reasonable period of time. The Federal Supreme Court first referred to this case law in a dispute under inheritance law in relation to Art. 10 aIPRG and then confirmed it also under Art. 10 IPRG. 60

Whether this established case law of the Federal Supreme Court is convincing in all aspects seems questionable. At first glance, it may be argued that, due to respect for the foreign court already seised of the matter and the ideal of international unity of decision-making, it would not be appropriate to affirm unconditional jurisdiction over the Swiss place of enforcement. However, this argument is only partially convincing if one considers that the recognition and enforceability of foreign decisions on measures under the ICCPR is in many cases not secured by supreme court decisions. On the other hand, the fact that precautionary measures of a court can usually be executed more quickly and smoothly at the place of enforcement speaks all the more in favour of unconditional alternative measure jurisdiction at the place of enforcement, es- 61 pecially in international relationships. Against this background, it seems appropriate that the Federal Supreme Court's requirement of increased necessity or urgency is understood generously.

62 Finally, it appears unclear whether the restrictive prerequisites for invoking the place of enforcement are also to be applied in the case of main proceedings already pending in Switzerland. In my opinion, this question could certainly be answered in the affirmative - in view of the far smaller interest of the requesting party in a measure jurisdiction at the Swiss place of enforcement if the main action is pending before a Swiss instead of a foreign main action court. However, since Art. 10 IPRG is largely based on Art. 13 CCP and a corresponding forum shopping is permitted there, there are probably better reasons for affirming an alternative jurisdiction to take measures at the Swiss place of enforcement if the main proceedings are pending in Switzerland, especially since there is in principle no explicit legal basis for the restrictive requirements anyway.

iii. Agreements on jurisdiction

63 According to the prevailing doctrine, the prorogation and derogation effect of a choice of court agreement in the main action is also reflected in the jurisdiction of the court at the place of the main action (Art. 10 lit. a IPRG), so that only the agreed courts can be seised under this title. On the other hand, it is less clear under the IPRG whether or not an exclusive agreement on the place of jurisdiction in the main action retains jurisdiction to take action at the Swiss place of enforcement (Art. 10 lit. b IPRG). In this respect, I believe that two sets of questions must be distinguished: On the one hand, the question arises whether the jurisdiction to take measures at the Swiss place of enforcement - as under the CCP - is of a mandatory nature, so that a derogation effect of an agreement on the place of jurisdiction in the main action must be rejected for this reason alone. On the other hand, it must be examined whether, from the perspective of the parties' intentions, an agreement on the place of jurisdiction in the main action covers the jurisdiction to take measures at the place of enforcement in the specific individual case.

64 The wording of Art. 10 IPRG, unlike Art. 13 CCP, does not explicitly state that the jurisdiction to take action at the place of enforcement is of a mandatory nature. In my opinion, however, it cannot be concluded per se that this is not of a mandatory nature, since the IPRG follows a different regulatory tech-

nique than the CCP. According to the IPRG, the mandatory nature of a jurisdiction is to be determined on the basis of the interpretation of the specific norm. Admittedly, the mandatory nature of Art. 13 lit. b CCP for domestic cases does not automatically mean that the place of jurisdiction at the Swiss place of enforcement is also mandatory under the IPRG. Nevertheless, it may be argued that Art. 10 IPRG was largely based on Art. 13 CCP. Moreover, it does not appear to be entirely congruent in terms of value if one justifies the mandatory nature in domestic circumstances with the fact that a measure can be ordered and enforced more quickly at the place of enforcement, but denies this in international circumstances, although there are considerable uncertainties here, at least under the IPRG, with regard to the recognition and enforcement of foreign decisions on measures. In this sense, I believe that the right to effective legal protection also argues in favour of a mandatory nature of the jurisdiction of the measure at the Swiss place of enforcement.

In the doctrine, on the other hand, the discussion does not revolve around the 65 question of the mandatory nature of the jurisdiction of the measure at the place of enforcement, but rather around that of the will of the parties. Of course, this question only arises if one does not assume the mandatory nature of the jurisdiction to take measures at the place of enforcement. According to a substantial part of the doctrine, the parties are not likely to consider all contingencies of precautionary legal protection when concluding the agreement on jurisdiction in the main matter, so that a derogation of jurisdiction at the place of enforcement does not correspond to the parties' will in case of doubt and its acceptance is only justified in this respect if the agreement explicitly refers to precautionary legal protection. The case law, on the other hand, tends to be more generous in that it generally assumes that the derogation contained in the agreement on the place of jurisdiction also refers to precautionary legal protection. However, the situation in which effective legal protection is thwarted altogether by the exclusive choice of court agreement is no longer covered by the parties' will. In this sense, it must remain possible, despite the agreement on the place of jurisdiction, to seek precautionary legal protection before a court other than the one that is exclusively prorogued, at least if this other court alone is in a position to order an immediately enforceable measure in good time.

b. International jurisdiction under the Lugano Convention

i. General

66 The Lugano Convention applies if the main claim to be secured qualifies as a civil and commercial matter and is not subject to any exclusion. Furthermore, subject to a choice of forum agreement (Art. 23 Lugano Convention) or exclusive jurisdiction (Art. 22 Lugano Convention), the defendant must be domiciled in a Contracting State (Art. 1, Art. 2 and Art. 4(1) Lugano Convention). In its scope of application, the Lugano Convention takes precedence over the IPRG (see Art. 1 para. 2 IPRG).

67 Under the Lugano Convention, the main court designated in accordance with Art. 2 and Art. 5 et seq. of the ICC has primary jurisdiction to order "its" (national) provisional measures. Lugano Convention has primary jurisdiction. Although this is not expressly regulated in the Lugano Convention, it follows from the internationally widely recognised principle, confirmed by the ECJ, that the court with jurisdiction in the main action must also be able to order precautionary measures. In addition, under restrictive conditions, there is also a jurisdiction to order measures under Art. 31 Lugano Convention in conjunction with national law.

ii. Jurisdiction to take measures under Art. 31 Lugano Convention in conjunction with national law

68 In addition to the court having jurisdiction as to the substance of the matter, provisional, including protective, measures provided for by the law of a Contracting State may be applied for in the courts of that State under Art. 31 Lugano even if another Contracting State has jurisdiction as to the substance of the matter. Art. 31 LugÜ is thus a gateway for exorbitant (national) measure courts, which is why practice seeks to limit its scope of application. This restriction is essentially carried out via the autonomous concept of provisional measure and the additional requirement of a real link.

69 According to the ECJ, provisional measures within the meaning of Art. 31 Lugano Convention are only measures intended to prevent a change in the factual or legal situation in order to secure rights whose recognition is otherwise sought before the court having jurisdiction as to the substance of the matter. Moreover, in view of the possibility of circumventing the main courts provided for in the Lugano Convention by means of exorbitant measures, the

ECJ requires that there must be a real link between the subject matter of the requested measure and the territorial jurisdiction of the court seised. The ECJ is even more restrictive in the case of performance measures that result in provisional enforcement of the main claim. For such performance measures, jurisdiction only exists via Art. 31 Lugano Convention if the requesting party guarantees, on the basis of a security deposit, that the opposing party will receive back the amount already paid if it prevails in the main action and the measure only concerns assets that are or should be located in the local jurisdiction of the measure court.

iii. Right of choice of the requesting party / coordination problems

According to the prevailing view, the requesting party may, in principle, choose among all courts with virtual jurisdiction under the Lugano Convention before the pendency of the main action. However, the right to choose can only refer to those main courts that the requesting party could itself bring an action before. 70

On the other hand, it does not appear to be fully clarified whether the right to choose the virtual courts for the main proceedings continues to exist even after the main proceedings have become pending in another contracting state. Part of the doctrine grants the requesting party an unlimited right to choose between the virtual main courts in this case as well. This is justified by the fact that nothing else can be inferred from the Convention and that the contrary view severely limits the effectiveness of precautionary legal protection in Europe. Other doctrines, on the other hand, deny an unlimited right of choice and grant other virtual main courts jurisdiction to take measures only under the restrictive conditions of Art. 31 Lugano Convention in conjunction with national law. In my opinion, the latter view is more likely to be accepted. Since national law regularly provides for jurisdiction to take measures at the place of enforcement or similar places, effective precautionary legal protection is guaranteed by Art. 31 Lugano Convention and national law. Therefore, there is no need for a further unlimited jurisdiction to take measures at a main court that only theoretically has jurisdiction. 71

iv. Choice of Court Agreements

Under the conditions of Art. 23 Lugano Convention, agreements on jurisdiction can also be concluded under the Lugano Convention, which have an effect on the jurisdiction to take measures. The extent of the derogating effect 72 of an exclusive choice of court agreement on the jurisdiction of the court of the place of the main action and on the jurisdiction of the court of the place of the main action under Art. 31 Lugano Convention in connection with national law is not entirely clear.

73 According to the prevailing view, an exclusive choice of court agreement in the main action at any rate derogates from the jurisdiction to take action in other virtual courts for the main action. In my opinion, this view is correct. In this constellation, other main courts no longer have jurisdiction on the merits of the case, so that the jurisdiction to take action of virtual main courts based on the jurisdiction on the merits of the case must also cease under the Lugano Convention. Whether the jurisdiction to take measures under Art. 31 Lugano Convention can also be derogated from in connection with national law, on the other hand, is more difficult to assess. It is already disputed whether this question is to be assessed according to the lex fori or autonomously according to the Lugano Convention. According to the Federal Supreme Court and probably the predominant Swiss doctrine, this question is governed by the lex fori, i.e. in Switzerland by the IPRG. According to the court, an exclusive choice of court agreement on the merits of the case generally also derogates from the jurisdiction to order a measure under Art. 31 Lugano Convention in conjunction with national law, to the extent that this court alone is not in a position to order an immediately enforceable measure in due time. In my opinion, the prerequisites and effects of a choice of forum agreement are governed independently and conclusively by the Lugano Convention, so that despite the blanket reference in Art. 31 Lugano Convention, recourse to national law is not permissible for this question. According to the Lugano Convention, the parties' intention must be decisive for the assessment of the derogation effect, whereby in my opinion, in the absence of an express reference to the jurisdiction to take measures, it must generally be assumed that the parties did not intend to derogate from it. 2.

2. Applicable law

74 The question of the law applicable to provisional measures is very controversial, at least if the IPRG does not regulate the question itself (see e.g. Art. 62 para. 2 IPRG).

75 In the doctrine, a tendency is emerging to subject the question of the claim for an injunction to the lex causae applicable in the main case, but to assess

the other procedural prerequisites and aspects according to the lex fori. A decision of the Federal Supreme Court on attachment also goes in this direction, according to which the question of the maturity of the attachment claim is not simply to be assessed according to Swiss law, but according to the applicable foreign law. In my opinion, this seems appropriate. Precautionary measures are not an end in themselves, but serve the realisation of the substantive law in the main matter. If, however, foreign law is applicable in the main action, the assessment of the claim for an injunction in the measure proceedings cannot, in principle, depend on whether or not it would exist according to the lex fori that may not be applicable in the main action. For the same reason, if the main proceedings are pending abroad, the determination of the lex causae should not be based on the Swiss IPRG, but on the IPR of the foreign court state - insofar as the Swiss court is required to respect its jurisdiction.

Another question, however, is how the content of the foreign law is to be de- 76
termined. In principle, this is also to be assessed in the measure proceedings according to Art. 16 IPRG. According to Art. 16(1) IPRG, the content of the applicable foreign law is to be determined ex officio, whereby the cooperation of the parties may be required. In property matters, the parties may even be required to provide evidence of the foreign law. If the foreign law cannot be ascertained, Swiss law is to be applied as a substitute according to Art. 16, para. 2 IPRG. It should be noted, however, that according to the Federal Supreme Court, the requirements for establishing the foreign law before the court decrease with the increasing urgency of the measure proceedings, so that it is in any case not arbitrary in attachment proceedings (and probably also in other superprovisional measure proceedings) to apply Swiss substitute law directly. In this sense, the requesting party who is interested in the application of foreign law is well advised to provide evidence of the foreign law as far as possible on its own initiative.

3 Recognition and enforcement

a. Recognition and enforcement under the IPRG

The recognition of foreign decisions on provisional measures under Art. 25 et 77
seq. IPRG is controversial in doctrine, unless specifically regulated in special norms of the IPRG (see e.g. Art. 96 para. 3 IPRG), and - as far as can be seen - has still not been clarified by the Federal Supreme Court. A detailed presentation of the state of opinion in all its ramifications is beyond the scope of this

commentary, so that it will be dispensed with here. The discussion mainly revolves around whether precautionary measure decisions can fulfil the prerequisite of formal legal force or finality according to Art. 25 lit. b IPRG. In my opinion, the answer tends to be in the affirmative, since decisions on measures can also be formally final, i.e. they can no longer be challenged by ordinary legal remedies. Decisions on measures can therefore certainly fulfil the first alternative of Art. 25 lit. b IPRG, which is why in my opinion their recognisability and enforceability cannot be denied in principle under the IPRG.

b. Recognition and enforcement under the Lugano Convention

78 Extraterritorial orders for interim relief of a contracting state within the material scope of application of the Lugano Convention are in principle judgments within the meaning of Art. 32 Lugano Convention. As such, they can be recognised in all other Contracting States under the general conditions of Art. 33 et seq. As such, they can be recognised and enforced or declared enforceable in all other Contracting States. In addition to the general requirements, however, certain special features must be observed in the case of decisions on measures.

79 According to the ECJ, for a decision on a measure to be recognised and enforceable, the respondent must have been granted the right to be heard in an adversarial procedure in the state of origin. It is sufficient if the respondent could theoretically have been heard or could theoretically have challenged the order before it was recognised and enforced in the state of origin. This case law has consequences above all for the recognition and enforceability of so-called ex parte decisions or super provisional measures. Under Swiss law, after superprovisional measure proceedings, ex officio provisional measure proceedings take place to ensure that the respondent is heard and to review the superprovisional measure decision (cf. Art. 263 para. 2 CCP). Against this background, it could be questionable whether the (Swiss) superprovisional measure decision can be recognised and enforced under the Lugano Convention already after the right to be heard has been granted, but before the confirmation procedure has been completed in the other contracting states. The right to be heard includes not only the right for the respondent to make its views known, but also - at least to some extent - the duty of the court to take these views into account in its decision. In my opinion, there are better reasons for answering the question in the negative, which means that superprovi-

sional measure decisions under Swiss law cannot be recognised and enforced under the Lugano Convention in the other contracting states. However, the decision confirming the superprovisional measure can be recognised and enforced under the Lugano Convention. Foreign superprovisional measure decisions, on the other hand, can be recognised and enforced in Switzerland under the Lugano Convention if the time limit for appeal or a time limit for conducting adversarial proceedings has already expired without being used.

Special features then exist in the case of decisions on measures that are based 80
on jurisdiction under Art. 31 Lugano Convention in conjunction with national law. According to the ECJ, in the case of such decisions on a performance measure in the context of recognition and enforcement, it must be examined whether, according to the criteria of the ECJ, this constitutes a provisional measure within the meaning of Art. 31 Lugano Convention, i.e. the performance measure was only ordered against a security deposit and only concerns assets that are or should be located in the local jurisdiction of the measure court. The ECJ thereby holds, mutatis mutandis, that this examination is not a proscribed review of the jurisdiction of the court of origin. Whether this dogmatic classification is correct seems at least debatable, since in any case the jurisdiction of the court of origin is de facto reviewed. It does not seem entirely clear to what extent the element of real connection required for jurisdiction under Art. 31 Lugano is to be verified at the stage of recognition and enforcement. With regard to performance measures, the question should in any case be largely superfluous due to the conceptual limitation of provisional measures to assets in the local jurisdiction of the court of origin. From the comparable protective idea that the real link should also prevent circumvention of the rules on jurisdiction in the main action, it seems quite obvious to me that the real link should also be checked for the other types of measures at the stage of recognition and enforcement. According to what has been said, there should therefore regularly be hardly any room for recognition and enforcement of extraterritorial measures based on Art. 31 Lugano Convention in conjunction with national law. In the Brussels I Regulation, the recognition and enforcement of decisions on measures taken under Article 35 of the Brussels I Regulation in conjunction with national law was therefore even expressly excluded (see Article 2(a)(2) of the Brussels I Regulation).

C. Application for a measure

81 The procedure for taking measures is initiated by a request, which in principle must be made in the forms pursuant to Art. 130 of the Code of Civil Procedure, but in simple or urgent cases may also be submitted orally to the court for the record (see Art. 252 of the Code of Civil Procedure). In other respects, the general requirements under Art. 221 CCP (in conjunction with Art. 219 CCP) apply in principle.

82 The extent to which a specification of the requested precautionary measure is necessary is discussed in the doctrine. Some argue that, in view of the broad discretion of the court in determining the content, a generally formulated legal request stating the objective of legal protection is sufficient and that the court is not bound by a specific legal request. The objection is that this contradicts the importance of the legal claim (especially with regard to the opposing party's defence options) and the principle of disposition, seriously jeopardises judicial independence and the requesting party would otherwise be causally liable for a measure that it may not have intended. In principle, the requirement of a specific request for a measure is to be assumed. In view of the court's considerable discretionary power, however, it is permissible in my opinion for the court to order another (more suitable) or a milder measure than the one requested. This is at least as long as the measure is not "more drastic" for the respondent in the matter. In this sense, the principle of disposition applies only to a limited extent.

D. Determination of the legal costs of the measure proceedings and their transfer

83 With regard to the costs of proceedings and their transfer, the general provisions under Art. 95 et seq. of the Code of Civil Procedure apply in principle. CCP apply, whereby according to Art. 99 para. 3 lit. c CCP the respondent cannot demand security for its party compensation. According to Art. 104 para. 3 CCP, the legal costs of the measure proceedings may be decided together with the main matter. A distinction must be made between the measure proceedings before and during the main proceedings.

84 According to the general view, the costs of the measure proceedings during the main proceedings are generally only determined and allocated together with the final decision in the main proceedings (and according to its outcome)

if the request for measure is approved. If the application for a measure is rejected while the main proceedings are pending, the party requesting the measure is liable for the costs of the measure proceedings even if it wins the main proceedings. The court may take this into account either in the decision on the measure or in the decision on the merits.

While the general view is that if the application for a measure is rejected prior 85
to the pendency of the main proceedings, the party making the application must finally bear the costs of the proceedings pursuant to Art. 106 para. 1 CCP, the legal situation is extremely controversial if the application is upheld. In my opinion, the predominant view is rightly that the legal costs of the proceedings for measures of action should in this case be temporarily imposed on the successful applicant party, whereby the obligation to pay compensation to the party is only ordered in the event that prosecution is not carried out. In any case, this corresponds mutatis mutandis to the case law of the Federal Supreme Court on the precautionary presentation of evidence. Nevertheless, in my opinion, in cases in which the opposing party acknowledges the claim for an injunction in a procedurally relevant manner during the ongoing prosecution period, a modification of the transfer of costs in favour of the requesting party in the measure procedure must be reserved via Art. 268 para. 1 CCP.

E. Appeals against decisions on measures

1. Appeals under the Code of Civil Procedure

a. Appeal (Art. 308 ff. CCP)

Appeals against first instance decisions on precautionary measures are in 86
principle open, provided the dispute is not pecuniary or, in the case of a pecuniary dispute, the amount in dispute of the most recently maintained legal claims exceeds CHF 10,000 (Art. 308 para. 1 lit. b and para. 2 CCP) and there is no exception under Art. 309 CCP. The wording of the CCP is not entirely precise in this respect, as only first-instance measure decisions of a lower cantonal court can be considered as an object of challenge on appeal. First-instance decisions on measures by the sole cantonal court (cf. Art. 5 para. 2 CCP, Art. 6 para. 5 CCP), on the other hand, can only be appealed under the Federal Supreme Court Act.

87 Whether first-instance decisions on measures constitute an independent category of decisions is disputed in the doctrine. In my opinion, the question is mainly of a theoretical nature, without any practical consequences. Even those opinions that consider decisions on precautionary measures as a separate type of decision hold that not every decision issued in the measure procedure can be considered a "decision on precautionary measures" within the meaning of Art. 308 para. 1 lit. b CCP (or Art. 319 lit. a CCP). Thus, orders of the measures court that would not qualify as a final or interim decision in the main proceedings (e.g. an edition order) were also procedural orders that were also subject to appeal in the measures proceedings only under the conditions of Art. 319 lit. b CCP. Likewise, decisions of the disciplinary court that were made in the context of the disciplinary proceedings and could be qualified as interim decisions in the main proceedings (e.g. regarding jurisdiction) were in any case subject to the regulation under Art. 237 para. 2 CCP. In this respect, the significance of the explicit naming of decisions on precautionary measures is limited to the decision approving or rejecting the measure or the decision not to enter in the measure proceedings. It seems doubtful whether this justifies the assumption of an independent type of decision, especially since according to the appeal system of the CCP it would in any case not be decisive whether one would like to regard the measure decision as a final, partial or also as an interim decision, since it is subject to the same rules of appeal.

88 It is then disputed whether an appeal is admissible against superprovisional decisions on measures. According to the prevailing opinion, superprovisional measures cannot be challenged with an appeal due to the lack of an interest in legal protection, both when the measure is ordered and when it is refused. In my opinion, this exclusion of the right to appeal is to be rejected, together with a substantial part of the doctrine, at least in the case of refusal of the superprovisional measure. According to Art. 265 para. 1 CCP, the superprovisional measure requires "special urgency", which exists if it appears credible that an abrupt intervention (without hearing the respondent) is necessary in order to avert unreasonable disadvantages. If the court denies such a special urgency and the requesting party has no legal remedy against it, the legal system accepts that an unjustified denial of the special urgency means that no effective legal protection is possible in the "normal measure proceedings". Nevertheless, even the Federal Supreme Court allows a direct appeal to the Federal Supreme Court in the sense of an exception in certain particularly sensitive matters.

It also does not seem to be entirely clear how the amount in dispute or the pecuniary nature of the decision on the measure is determined. The predominant opinion is that the amount in dispute or the nature of the precautionary measure itself is decisive. Others, however, focus on the merits of the case, as in the case of partial and interim decisions. In principle, the Federal Supreme Court follows the latter view for the Federal Supreme Court Act. Insofar as it qualifies the precautionary measure in question as an independently opened interim decision (within the meaning of the Federal Supreme Court Act), it is based on the amount in dispute or the nature of the main matter, insofar as the main matter is still in dispute. Only if it exceptionally qualifies the decision on the measure as a final decision does it generally appear to be based on the amount in dispute of the measure. As far as can be seen, the Federal Supreme Court has not yet made any direct pronouncements on the legal situation under Art. 308 para. 2 CCP. In my opinion, for reasons of congruence of the appellate system, the same principles must be assumed for the CCP as for the Federal Supreme Court proceedings. Accordingly, the amount in dispute or the nature of the main matter must be taken into account, insofar as the measure (still) serves to secure a claim on the main matter. This applies in principle both if the measure was issued during proceedings on the merits and if the precautionary measure was issued before the pendency of the main action. 89

Otherwise, the general provisions pursuant to Art. 310 et seq. CCP apply to the appeal proceedings, although there are certain special features. Since decisions on measures are issued in summary proceedings (Art. 248 lit. d CCP), the appeal period is only 10 days (Art. 314 para. 1 CCP), for which no court holidays apply (Art. 145 para. 2 lit. b CCP). A cross-appeal is inadmissible (Art. 314 para. 2 CCP). Finally, appeals against decisions on precautionary measures do not have suspensive effect (Art. 315 para. 4 lit. b CCP). However, this may be granted by way of exception if the party concerned is threatened with a disadvantage that cannot be easily remedied (Art. 315 para. 5 CCP). According to the Federal Supreme Court, a stay of execution may not be denied if it concerns a performance measure that may have a final effect, unless the appeal appears to be manifestly unfounded or manifestly inadmissible from the outset. 90

b. Appeal (Art. 319 ff. CCP)

91 An appeal may be lodged against decisions of the first instance on precautionary measures that are not appealable (Art. 319 lit. a CCP). Of course, only decisions on measures by a lower cantonal instance can be appealed. The general provisions of Art. 319 ff. of the Code of Civil Procedure apply to the appeal procedure. CCP, whereby the appeal period is only 10 days and no court holidays apply (see Art. 321 para. 2 CCP; Art. 145 para. 2 lit. b CCP).

c. Revision (Art. 328 ff. CCP)

92 Whether precautionary measure decisions are subject to the "emergency remedy" of revision at all does not yet appear to be fully clarified. While some authors generally reject this because a precautionary measure does not become substantively final, another - in my opinion correct - view makes a differentiation. The decisive factor is the extent to which a precautionary measure can be modified or revoked in the case of an order or newly demanded in the case of a refusal. The consequence of this is that, as a rule, decisions on measures are not subject to revision. If, for example, a request for a measure is rejected, it is in principle open to the requesting party to support a new request with facts and evidence that have not yet been taken into account. However, in view of the Federal Supreme Court's practice that, according to Art. 268 CCP, no retroactive amendment or retroactive revocation is possible in the event of changed circumstances or precautionary measures that subsequently prove to be unjustified, cases are certainly conceivable in which the consequences of a measure decision cannot be fully corrected. This is particularly the case if the respondent has already had to pay benefits, in particular provisional maintenance payments, as a result of a performance measure, but cannot retroactively reclaim them either under Article 268 CCP or by means of an action for damages under Article 264(2) CCP or a substantive action for modification. For these cases, it appears necessary from the perspective of the rule of law to allow the revision of a measure decision. In all other respects, the general provisions pursuant to Art. 328 et seq. It should be noted that, in contrast to Art. 268 of the Code of Civil Procedure, only non-genuine novelties can constitute grounds for revision (Art. 328 para. 1 lit. a Code of Civil Procedure).

2. Appeal under the Federal Supreme Court Act

The appeal or complaint decision of the last cantonal instance or the precautionary measure decision of a single cantonal instance can in principle be challenged under the general provisions with an appeal in civil matters (Art. 72 et seq. FSCA) or with a subsidiary constitutional complaint (Art. 113 et seq. FSCA). In both cases, however, as a rule only the violation of constitutional rights can be complained of (see Art. 98 FSCA; cf. also Art. 116 FSCA). 93

For appeals to the Federal Supreme Court, it should be noted in particular that decisions on measures are generally considered to be independently issued preliminary and interim decisions and can therefore only be challenged with both types of appeal if they may cause an irreparable disadvantage of a legal nature, or if the approval of the appeal would immediately bring about a final decision and thus save a significant amount of time and costs (Art. 93 para. 1 FSCA). Otherwise, the appeal decision or the measure decision can only be challenged within the framework of the appeal against the final decision, insofar as it still affects the content of the final decision (Art. 93 para. 3 FSCA), which is hardly ever likely to be the case. 94

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Doctrine and case law are taken into account until July 2022.

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I. ARBITRATION AS AN ALTERNATIVE DISPUTE RESOLUTION METHOD

Arbitration is systematically subsumed under the term Alternative Dispute 1
Resolution (ADR), but this is questioned by some of the doctrine. In contrast to a state court, arbitration cannot be conclusively classified because it presupposes two contradictory characteristics. On the one hand, the parties to the dispute conclude their arbitration agreements on a voluntary basis, while on the other hand they explicitly undertake to participate in the arbitration proceedings. It is precisely this combination of voluntary and obligatory initiative that has the advantage that arbitration proceedings can be agilely directed towards an amicable solution.

The prevailing view is that arbitration is a hybrid legal institution sui generis 2
because it combines the two opposing elements. In other words, it is characterized as a procedural institution with elements of contract law. In arbitration, the parties to the dispute typically appoint a third party who, in his or her function as arbitrator, not only conducts the arbitration proceedings (as is the case in mediation or ADR proceedings), but who also exercises binding decision-making power over the entire dispute. In the case of commercial disputes, there is a clear trend away from state jurisdiction to private jurisdiction, as globalized corporations mostly prefer arbitration to settle their commercial disputes in private.

A. Common Arguments in Favor of Arbitration

Arbitration is characterized primarily by professionally tailored procedures. In 3
addition, the recognition and enforcement of awards from domestic arbitration is guaranteed by the CPC and from international arbitration in almost all countries of the world by the New York Convention. Another advantage is the free choice of the arbitration panel in order to appoint arbitrators with the best qualified expertise. Moreover, the secrecy or confidentiality of the contents of the proceedings (Art. 44 para. 1 and 2 Swiss Rules 2021; Art. 8 Appendix I - Statutes of the International Court of Arbitration) is important, because this can save the delicate business relationship for the future and also protect it from reputational damage. Recently, however, there has been a tendency to promote transparency by publishing the arbitral awards - provided that the

parties explicitly agree to the publication (Art. 44 para. 3 Swiss Rules 2021; Art. 34 para. 5 UAR).

4 In principle, arbitration is considered to be time and cost efficient compared to state court judgments. Although high lump-sum costs are to be expected for recourse to the arbitral tribunal, this statement must be put into perspective: It is true that the costs of litigation before state courts can be considerably lower in first instance proceedings than in arbitration proceedings - especially when the amount in dispute is up to CHF 30,000 and the simplified procedure applies (Art. 243 et seq. CPC). However, if the amount in dispute is higher, and especially if it can be assumed that the decision will be appealed to the courts of appeal, the costs of the proceedings before the arbitral tribunal are effectively less significant than the total costs in the state court proceedings. Furthermore, it should be noted that according to Art. 380 CPC, needy parties are not granted free legal assistance in arbitration proceedings and therefore both parties are obliged to advance or bear the costs of the arbitration proceedings, even if their financial situation is difficult.

5 Finally, the arbitration courts also relieve the state courts. In return, efficient international agreements, such as the New York Convention, are ratified, which in turn can strengthen arbitration.

B. Historical Development

6 It is impossible to determine with certainty when and where arbitration got its start, precisely because arbitration is rather considered the universal archetype of dispute resolution. Commercial disputes were already settled by arbitration in ancient times. These first forms of arbitration continued to evolve throughout the Middle Ages with the emergence of trade across the seas and through the colonial era into modern times. With globalization, trade associations and chambers of commerce have also grown, promoting access for cross-regional or international trade, not least by ensuring efficient arbitration rules. They specialized their services and today offer their members tailor-made arbitration and mediation procedures.

7 Arbitration, especially ad hoc arbitration, also has a long tradition in Switzerland, which can be traced back to the Middle Ages. The Canton of Geneva had codified arbitration law as early as 1819, and subsequently various German-speaking Swiss cantons also included provisions on arbitration in their

civil procedure codes. With the Concordat of March 27, 1969 on Arbitration (KSG), all cantons then joined a uniform internal arbitration law. Finally, this concordat was superseded or replaced by the CPC, which came into force on January 1, 2011. It should also be noted that the Chambers of Commerce of the cantons of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich had already drawn up additional joint arbitration rules - the Swiss Rules of International Arbitration - in 2004. The revised version of the Swiss Rules entered into force on June 1, 2021 (hereinafter: Swiss Rules 2021).

II. TERMINOLOGY

A. Definitions

An arbitral tribunal may be defined as "a body of arbitrators established by the parties to render binding decisions on disputes in lieu of the state courts normally having jurisdiction." Arbitral tribunals are thus private courts for civil disputes designed by private or public entities and may be invoked by the parties to the dispute pursuant to a memorandum of understanding agreed upon in private. Specifically, one arbitrator or a panel of several arbitrators is appointed in each case to arbitrate a dispute between the private parties and to settle it by means of a bindingly rendered and enforceable judgment. 8

Arbitration lacks an actual definition laid down in the law. Rather, it is presupposed, as it were, by the provisions on procedure and arbitrability (Art. 353 et seq. CPC and Art. 176 et seq. PILA). "Arbitration is first and foremost a contractual creation whose objective is to present a neutral framework for the settlement of a dispute in accordance with the will of the parties." 9

1. Institutional Arbitration

Switzerland has played a leading role in the institutionalization of international arbitration. Founded by the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Lucerne (Central Switzerland), Neuchâtel and Zurich, the Swiss Arbitration Centre formerly Swiss Chambers' Arbitration Institution (SCAI), offers international and domestic arbitration. But other important arbitration institutions are also based in Switzerland, e.g. the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) based in Geneva, the Court of Arbitration for Sport (CAS) in Lausanne, the World Trade Organization (WTO) in Geneva, the United Nations 10

Compensation Commission (UNCC) also in Geneva and the Claims Resolution Tribunal for Dormant Accounts (CRT) in Zurich. For domestic arbitration, the latter arbitral institutions are of little relevance, as they tend to specialize in international matters.

11 For international matters, the choice of arbitral institution is of great importance. Renowned arbitration institutions such as the International Court of Arbitration of the International Chamber of Commerce (ICC) based in Paris, the London Court of International Arbitration (LCIA) based in London or the China International Economic and Trade Arbitration Commission (CIETAC) based in Beijing are often used. However, in order to settle disputes within the framework of domestic arbitration, it must be remembered that the seat of the arbitral tribunal must be in Switzerland (Art. 353 para. 1 CPC). However, the seat of the arbitral institution is not the same as the seat of the arbitral tribunal, since the latter can usually be freely chosen by the parties (Art. 355 para. 1 CPC; see also Art. 17 Swiss Rules 2021; Art. 18 ICC Rules of Arbitration; Art. 18 UAR). Thus, in principle, arbitral institutions located abroad may also be called upon for domestic arbitration proceedings.

12 Institutional arbitration tribunals offer professional services and also assume certain tasks in the administration of the proceedings. Often, as part of the administrative services, the arbitral institutions also take control of the approved budgets and charge the running costs on the basis of standardized tariffs. The parties to the dispute make use of this administrative support already in the preparatory phase of the proceedings. This can be particularly useful when appointing the arbitral tribunal, for example, to guarantee a mutually acceptable choice of arbitrator.

13 Important advantages of institutional arbitration are customer-oriented administration and constructive support of the arbitration proceedings. It is also advisable to have professional support in the event that the proceedings stall because the parties to the dispute are unable to reach agreement on sensitive issues. In this way, the parties to the dispute can be accompanied in their own search for consensus, even on a selective basis as needed. In concrete terms, the aim is to mediate the dispute in a goal-oriented manner and to ensure that the dispute is resolved as amicably as possible, so that there is no need to refer the matter to the public courts.

Institutional arbitration courts also draw up the rules of procedure, which are of great importance in practice, as they can control or safeguard the course of the proceedings in a targeted manner. The parties, who decide to appeal to an existing arbitration institution, usually also submit to the corresponding arbitration rules or their procedural rules. 14

2. Ad Hoc Arbitration

Ad hoc arbitration is the most common form of dispute resolution. The ad hoc arbitration courts are called in the context of an arbitration agreement and especially for such disputes that do not require administration by an arbitration institution. In this case, the parties to the dispute first appoint the desired arbitrator or arbitration panel to whom they wish to entrust the dispute resolution. At the end of the proceedings, the arbitral tribunal is dissolved again. An ad hoc arbitration court administers itself and does not require institutional administration, which can save time and money in individual cases. However, there is no conclusive answer to the question of whether institutional or ad hoc arbitration is more cost-effective, because the costs are primarily caused by the course of the proceedings themselves and not by the administrative service. 15

Ad hoc arbitration proceedings are touted as particularly flexible because the proceedings can be advantageously adapted to their situational course. It can be proactively steered toward consensual dispute resolution by the parties or the arbitral tribunal in advance or only when a dispute is pending. Also, the ad hoc process is advantageous because it offers more comprehensive confidentiality or secrecy. This is the case because it is not administered by third parties - as in the institutional procedure - but by the persons already involved and the circle of informed persons - who must, for example, maintain an industrial secret - is limited. 16

Flexibility can have a disadvantage, especially if the arbitration clause has not been formulated clearly enough. This is because ad hoc arbitration tribunals constitute themselves independently and - without the structuring assistance of an arbitral institution - run a greater risk of delaying the proceedings. The efficiency of this immediate procedure also depends directly on the constructive cooperation or the ability to compromise of the parties to the dispute. In addition, there is the risk that state courts at the seat of the arbitral tribunal may be called upon to provide the necessary assistance, which may negate 17 some of the advantages such as cost efficiency and confidentiality. Finally, arbitral tribunals in ad hoc proceedings perform their administrative tasks completely independently - i.e. without resorting to institutional services - and are thus comparatively more burdened.

B. Delimitations

1. International and Domestic Arbitration

18 Swiss arbitration has a dualistic structure in the legal system: First, the rules on domestic arbitration are set forth in Part 3 of the CPC (Art. 353-397 CPC) and, second, those on international arbitration are set forth under Chapter 12 of the PILA (Art. 176-194 PILA). National arbitration under the CPC can only be applied if all parties to the dispute have their seat or domicile in Switzerland when the arbitration agreement is concluded and the seat of the arbitral tribunal is in Switzerland (Art. 353 para. 1 CPC in conjunction with Art. 176 para. 1 PILA). International arbitration under the PILA applies if one of the parties has its seat or domicile outside Switzerland (Art. 176 para. 1 PILA). However, the parties to the dispute are free to apply Art. 176 et seq. PILA also for internal cases, provided that they have so agreed.

2. Arbitration versus conciliation and mediation

19 Both conciliation and mediation are subsumed under ADR by their design. Both methods aim to support the parties as constructively as possible in their dispute resolution process so that they can settle their dispute amicably themselves, and not to arbitrate the dispute on their behalf. These ADR procedures also offer greater freedom of design than arbitration courts, which allows the mediator or arbitrator to find agile situational solutions with the parties to the dispute. If a conciliation or mediation procedure has been successful, the agreement is recorded in a contract. This contract can then lead to a settlement decision, which ultimately has consequences similar to a judgment. Arbitration proceedings, on the other hand, end with a judgment. If a conciliation or mediation procedure ends without results, the parties to the dispute can consider further arbitration methods. Thus, the binding nature is considered a qualifying feature that distinguishes arbitration from mediation and conciliation, whereas arbitration courts - like state courts - impose one on the parties. In other words, mediators or arbitrators propose a solution to the dis-

puting parties, while arbitration courts - like state courts - render a binding judgment.

3. Arbitration versus Arbitrator's Opinion

The arbitrator's opinion is an independent procedural instance. According to Art. 189 CPC, the parties to a dispute may formally agree to obtain an arbitrator's expert opinion on disputed factual and closely related legal issues from one or more expert third parties who are neither involved in the dispute resolution nor asked to settle the disputed case. Rather, these independent arbitrators are charged with clarifying legally relevant facts or making binding decisions on individual elements of a legal dispute. In contrast, arbitral tribunals settle disputes authoritatively, which includes the answering of factual and legal questions as well as the decision on the claim (incl. adjucation), while arbitral expert opinions are primarily obtained to determine the legally relevant facts for the attention of the parties and, under certain circumstances, an (arbitral) court. 20

In contrast to an authoritative arbitral tribunal, the parties to the dispute can agree to request an arbitral opinion, provided that the body called upon has this far-reaching right of review. It is also important to distinguish whether an expert called in is commissioned to assess only individual decision elements of the dispute or whether he or she is to assess it in a binding manner - i.e. instead of the competent court. In practice, the parties to the dispute delegate their technical issues to specifically qualified arbitrators in advance, whereas they then call upon an arbitral tribunal for the actual settlement of the dispute. Unlike the arbitral award, the arbitral award is not directly enforceable, but must be enforced by means of a court decision. 21

Although the arbitrator's award is only occasionally requested in Switzerland, it offers an advantageous alternative method of putting certain facts in an ongoing or pending lawsuit out of dispute from the outset: Specifically, it helps to preventively defuse or eliminate elements of dispute by efficiently and emotionlessly clarifying specific legally relevant facts in advance. In this way, a hopeless lawsuit can be prevented or put on hold. 22

III. DOMESTIC ARBITRATION IN THE CPC

23 The 3rd part of the CPC has an independent nature and - even though concepts of classical civil procedure law are certainly adopted - it should in principle be applied like an independent law. The regulations for state courts cannot be used to fill the gaps in domestic arbitration. Because the former Concordat on Arbitration (KSG) was suitable for domestic courts, it also served as a basis for Part 3 of the CPC and thus the proven doctrine as well as the confessed advantages in practice can continue to exist.

A. Arbitrability

1. Principle of Arbitrability

24 Arbitration courts cannot arbitrate all arbitrary disputes, because according to Art. 354 CPC, only disputes over which the disputing parties can freely dispose are considered arbitrable. In addition to the classic commercial arbitration and the intra-association dispute resolution courts (sports arbitration), labor, construction or inheritance disputes can also be adjudicated by an arbitration court within certain limits. Of particular practical importance is institutionalized arbitration in labor law (for disputes under individual or collective labor law), which is based on arbitration clauses in collective labor agreements (CLA).

2. Arbitration in labor law

25 It follows from the prohibition of waiver under employment law pursuant to Art. 341 para. 1 CO that claims under Art. 361 as well as 362 CO cannot be freely disposed of. Thus, claims arising from mandatory provisions of employment contract law may not be waived during the current employment relationship and up to one month after its termination. The Federal Supreme Court also considers internal labor disputes (with only a few exceptions) to be non-arbitrable. This negative stance is mainly aimed at better protecting the rights of employees in Switzerland. Arbitration clauses in employment contracts cannot be excluded a priori, but they can be challenged or limited in scope if the dispute is subject to civil social proceedings.

26 The situation is different in the case of disputes over social plans, where there is an obligation to arbitrate. If the parties cannot agree on a social plan in the

case of a mass dismissal, an arbitration court must be appointed in accordance with Art. 335j CO, which establishes a social plan by means of a binding arbitration award. Although this arbitration tribunal does not belong to the classical arbitration jurisdiction, it is nevertheless a dispute resolution mechanism because a neutral third party is called in to resolve the dispute between the labor parties in a binding manner. This arbitration panel is exclusively active in shaping the contract and works out a binding contract or a concrete social plan in consultation with the social partners. However, it has no authority to issue an arbitration award on disputed legal claims with legal effect and direct enforceability.

Finally, the Federal Conciliation Board (EES) and the cantonal conciliation 27
boards for disputes arising from collective and standard employment agreements must be mentioned. The EES is a conciliation body under public law consisting of a so-called umpire proposed by the Federal Council and two assessors proposed by the leading associations, representing the employee side and the employer side. If mediation fails, arbitration proceedings are initiated. However, the EES only conducts arbitration proceedings with the express mutual agreement of the social partners. This is because at the end it issues an arbitration award with binding effect, which is enforceable like a court judgment (Art. 5 EES in conjunction with Art. 387 CPC). The EES also acts preventively in order to mitigate or avert potential conflicts as far as possible. In conclusion, the EES can either aim at a consensual solution in its mediation role, or it can pronounce a binding judgment in its arbitration role - with the explicit concession of the parties to the dispute.

3. Arbitration in Construction Disputes

Arbitration is considered well established in the construction industry for real 28
estate disputes. The SIA Standard 150:2018 was launched as a new arbitration regulation with efficiency-promoting specifications for proceedings before an arbitration tribunal. With solution-oriented facilitations, such as tighter time limits, the choice between voluntary and compulsory settlement negotiations, and simplified party submissions, it efficiently focuses on consensual dispute resolution.

29 Although this SIA standard is geared to arbitration proceedings in the Swiss construction industry, it also applies to international construction disputes and other disputes. In addition to the expert reports ordered by the court, the

parties are now also allowed to obtain expert reports from specifically qualified experts, provided that their reports reflect their own assessment (Art. 24 para. 4 SIA 150:2018). Simplified proceedings also come into play if the amount in dispute is less than CHF 250,000 or if the parties so agree. In the simplified procedure, a sole arbitrator shall render a decision within six months after only one written exchange or oral hearing or, if so agreed by the parties, also on the basis of documentary evidence.

4. Arbitration in rental matters

30 As the Federal Supreme Court has ruled, claims arising from rental matters in connection with the rent of business premises or also with rent customary in the locality or quarter are arbitrable without restriction.

31 In contrast, disputes in matters arising from rent and lease of residential premises are in principle not arbitrable, unless the locally competent or state arbitration authority for rental disputes is appointed as an arbitral tribunal (Art. 361 para. 4 in conjunction with Art. 200 CPC). If an arbitration hearing takes place, a joint commission will try to reconcile the disputing parties in order to avoid going to court.

5. Arbitration in matters of succession

32 A pending division of an estate or future transfer of a legacy often involves a potential risk of conflict for the community of heirs. Consequently, the question arises whether inheritance actions can also be brought before arbitration courts. In particular, the action for the division of the estate (Art. 604 CC), the action for information (Art. 607 and 610 CC) and the interpretation of the will are considered arbitrable. Künzle also considers arbitrability to exist for actions for invalidity (Art. 519 ff. CC), actions for reduction and also for equalization (Art. 626 ff. CC).

33 Arbitration courts have jurisdiction over inheritance matters if a testator concluded an inheritance contract during his or her lifetime or if the heirs submit a contract after death. The division of an estate can take a long time and, especially in the case of estates from a family business, it is essential for the continued existence of the business to have the separation of the generations arranged at an early stage. The testator can make provisions in this regard during his or her lifetime and appoint an arbitrator in the inheritance contract,

who would settle the dispute in the event of an action for the division of the estate.

B. Arbitration agreement

Arbitration agreements (Art. 358 CPC) are either arbitration contracts or arbitration clauses. Thus, by means of an arbitration clause, the parties agree in advance that they wish to refer any dispute to arbitration. If, on the other hand, they wish to submit a currently existing dispute to arbitration, this is stipulated in an arbitration agreement. It must be clearly stipulated which arbitration court is to have jurisdiction. The waiver of the state court must be explicitly formulated, otherwise it is considered voidable due to inadmissible self-restriction of personal freedom (Art. 27 para. 2 CC). 34

In the arbitration agreement or arbitration agreement, the parties contractually stipulate that in the event of a dispute they wish to have recourse to an arbitration court instead of a state court. There is no legal definition of an arbitration agreement in either the CPC or the PILA. The Federal Supreme Court has defined the arbitration agreement as an agreement "by which two or more specific or determinable parties agree to submit one or more, existing or future disputes to binding arbitration in accordance with a directly or indirectly determined legal order, to the exclusion of the original state jurisdiction". Whether arbitration agreements are to be assessed as a contract of procedural law or of substantive private law, or even as a hybrid form, is disputed in the doctrine. 35

If the dispute relates to the validity of a contract with an arbitration clause, this clause remains valid irrespective of whether the contract is voidable or voidable, and the arbitral tribunal may be seized in accordance with these requirements. In other words, if the arbitral tribunal finds the contract null and void, it does not automatically follow that the arbitration clause is invalid (Art. 23 para. 2 Swiss Rules 2021; Art. 23 para. 1 UAR). 36

C. Appointment of the Arbitral Tribunal

According to Art. 361 para. 1 CPC, full party autonomy prevails in the appointment of the arbitral tribunal, i.e. the parties may determine the appointment procedure themselves in their arbitration agreement. In their arbitration agreement, they may, for example, determine that they wish to appoint a spe- 37 cific sole arbitrator or several specific arbitrators. If there is no clear prior party election, each party shall appoint the same number of members (Art. 361 para. 2 CPC; Art. 11 para. 1 Swiss Rules 2021; Art. 9 para. 1 UAR). The elected arbitrators must then unanimously select another person to chair or preside (Art. 361 para. 2 CPC; Art. 9 para. 1 UAR). According to Art. 368 para. 1 CPC, no party may exercise a predominant influence on the appointment of the members. The arbitral tribunal is not operational until all members have been accepted. Should one or the other party fail to appoint its members to the arbitral tribunal in due time, a third party or the state court, as juge d'appui, shall be mandated to appoint them in its place (Art. 362 CPC).

D. Arbitration at a Glance

1. Procedural principles

38 Arbitral tribunals may render final or enforceable arbitral decisions in lieu of public or state courts, provided that they meet the requirements of the rule of law or ensure fair hearings at all times and under all circumstances. Thus, according to Art. 373 para. 4 CPC, arbitral tribunals must: "ensure the equal treatment of the parties and their right to be heard, and conduct adversarial proceedings." These procedural principles for arbitral proceedings are formulated congruently in Art. 373 para. 4 CPC as well as in Art. 182 para. 3 PILA and correspond to the general procedural guarantees under Art. 29 para. 1 and 2 FC, i.e. the explicitly stipulated claims "to equal and fair treatment" as well as "to a fair hearing", except for the right "to be judged within a reasonable time".

39 Arbitral tribunals must sufficiently guarantee the procedural principles and thus in principle guarantee an independent and impartial administration of justice (Art. 12 Swiss Rules 2021; Art. 11 UAR; Art. 11 ICC Rules of Arbitration). If these procedural guarantees or the principles of equal treatment of the parties or the right to be heard have been violated, this constitutes a complaint pursuant to Art. 393 lit. d CPC and can be objected to accordingly.

2. Jurisdiction

40 An arbitral tribunal is competent to decide on a legal dispute if the parties have stipulated this in an arbitration agreement and the matter is arbitrable. If the competence of the arbitral tribunal is disputed, according to Art. 359 para.

1 CPC it is entitled to decide on the matter in its own competence (so-called competence competence; see also Art. 23 para. 1 Swiss Rules 2021). On the other hand, it is the state court and not the arbitral tribunal that is responsible for ensuring that the arbitral tribunals are constituted in accordance with the law. For example, according to Art. 356 para. 2 lit. a CPC, it is the sole responsibility of the public court to decide on a request by the parties to challenge, dismiss or replace a challenged arbitrator.

3. Arbitration Rules in Particular

The parties to a dispute may determine in their arbitration agreement which form of procedure they wish to agree upon. Pursuant to Art. 373 para. 1 CPC, they are free to settle their dispute themselves in a tailor made procedure or, preferably, to determine arbitration rules of their choice - e.g. the Swiss Rules 2021, the UNCITRAL Arbitration Rules (UAR) or the ICC Rules of Arbitration. As a third option, a state procedural law may be designated (Art. 373 para. 1 lit. c CPC). If the parties to the dispute have failed to determine the form of procedure, then the arbitral tribunal is competent to order these rules of procedure (Procedural Rules). 41

If the parties to a dispute decide to call upon an arbitral institution, the arbitration rules of this institution are usually adopted at the same time. In the case of ad hoc arbitration, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) are chosen by the majority, but reference can also be made to the arbitration rules of an arbitral institution - such as the ICC Rules of Arbitration or the Swiss Rules 2021. 42

a. Swiss Rules 2021

In order for the Swiss Rules to apply in a national or international arbitration, the arbitration agreement between the parties must explicitly refer to them (Art. 1 para. 1 Swiss Rules 2021). After general procedural principles under Art. 1-7 Swiss Rules 2021, Art. 8-15 Swiss Rules 2021 specify the procedure for the composition of the arbitral tribunal. The arbitration procedure is governed by Art. 16-32 Swiss Rules 2021 and specifies, among other things, the procedure and time limits for the exchange of written submissions and the oral hearing. 43

b. ICC Rules of Arbitration

44 The Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (ICC) aim to provide a neutral framework for the resolution of international disputes, covering a wide range of legal traditions, cultures and professions. The Rules of Arbitration govern the initiation of proceedings (Art. 4-6 ICC Rules of Arbtriation), appointment of the arbitral tribunal (Art. 11-15 ICC Rules of Arbtriation) and the dispute resolution process (Art. 16-30 ICC Rules of Arbtriation), while allowing the parties to adapt the procedure to their needs.

c. UNCITRAL Arbitration Rules

45 The UNCITRAL Arbitration Rules (UAR) provide a comprehensive set of procedural rules for ad hoc but also institutional arbitration tribunals. According to Art. 1 para. 1 UAR, full party autonomy applies, so that the specifications of the UAR can be freely amended by the parties to a large extent and adapted to their respective needs. The procedure itself is not particularly different from other regulations. However, the UAR has particularly efficient rules with regard to the appointment of the arbitral tribunal, which virtually makes any delay impossible. If the parties have not regulated the appointment separately, the so-called appointing authority takes over the appointment of the arbitration panel. This appointing authority can be chosen by the parties themselves (Art. 6 para. 1 UAR); if they cannot agree on the appointment, the so-called designating authority - in casu the Secretary General of the Permanent Court of Arbitration in The Hague - is designated.

4. Termination of the Arbitration

46 Upon termination of the arbitration proceedings, the arbitral tribunal shall render its award, which shall be communicated to the parties (Art. 381 et seq. CPC). All members of the arbitral tribunal shall participate in the deliberation and voting on the award. If one of the members refuses to participate, the others may nevertheless deliberate and decide, unless otherwise agreed (Art. 382 para. 1 and 2 CPC).

47 The arbitral award may first be issued orally and then be reasoned in writing, provided that the parties do not waive this (Art. 34 para. 2 and 3 Swiss Rules 2021; Art. 34 para. 2 and 3 UAR). No provision is made for an appeal. If the parties succeed in reaching an early agreement by acknowledging or with-

drawing the claim or by ending the dispute with a settlement already in the course of the proceedings, the arbitral tribunal must, at the request of both parties, pronounce this in the form of an award which shall become final and enforceable (Art. 385 CPC).

5. Remedies

Due to their autonomy, the parties are also entitled to determine the arbitral appeal procedure themselves. In this context, "all possibilities of further appeal shall be considered which - according to the will of the parties - do not yet terminate the arbitral proceedings and therefore close the appeal to the state court (cf. Art. 391 CPC)". 48

a. Arbitration Appeal

The doctrine cannot conclusively classify the civil appeal as an ordinary or extraordinary remedy because the grounds of appeal against arbitral awards are limited (Art. 393 CPC). This is because state courts may not, in principle, interfere with private autonomous arbitral jurisdiction with a substantive review of correctness, but may only review the prerequisites of properly functioning arbitration. According to Art. 390 para. 1 CPC, the parties may, as an alternative to the Federal Supreme Court, appeal to the cantonal court (Art. 390 para. 2 in conjunction with Art. 356 CPC). The appeal is only admissible after exhaustion of the arbitral remedies provided for in the arbitration agreement (Art. 391 CPC), i.e. it has subsidiary effect. 49

b. Revision

According to Art. 396 para. 1 CPC, a revision of an arbitral award must be brought before a higher cantonal court. The grounds for revision correspond to those which, according to Art. 328 CPC, also apply to state court proceedings. The competence of the competent revision authority is limited to the annulment of the arbitral award and the remittal to the original arbitral tribunal for reassessment (Art. 399 CPC). 50

6. Legal force and enforcement

Arbitral awards acquire the effect of an immediately final and enforceable court decision upon their oral opening or upon their service (Art. 387 CPC). The enforcement of arbitral awards is implemented by the judicial authorities 51 in the same way as that of a state judgment. Accordingly, they are also competent to certify the enforceability of the arbitral awards upon request. The arbitration proceedings are deemed to be settled insofar as the first-instance arbitral award has not been challenged and the so-called enforcement order thus has legal force.

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COMMENTARY ON

Art. 407f CPC

A commentary by Jan Heller

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Chapter 7: Transitional Provision to the Amendment of 17 March 2023

Art. 407*f*

Articles 8 paragraph 2 second sentence, 63 paragraph 1, 118 paragraph 2 second sentence, 141a, 141b, 143 paragraph 1bis, 149, 167a, 170a, 176 paragraph 3, 176a, 177, 187 paragraph 1 third sentence and 2, 193, 198 letters bbis, f, h and i, 199 paragraph 3, 206 paragraph 4, 210 paragraph 1 introductory sentence and letter c, 239 paragraph 1, 298 paragraph 1bis, 315 paragraphs 2-5, 317 paragraph 1bis, 318 paragraph 2, 325 paragraph 2, 327 paragraph 5 and 336 paragraphs 1 and 3 also apply to proceedings that are pending when the Amendment of 17 March 2023 comes into force.

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I. INTRODUCTION AND STRUCTURE OF THE COMMENTARY

1 On **January 1, 2025**, the revision of the CPC *"Improving practical suitability and law enforcement"* of March 17, 2023, will come into force and bring with it numerous changes. In view of the transition from the previous to the new law, the transitional provision in Art. 407*f* CPC is of central importance. As so-called **intertemporal law**, this norm is dedicated to the demarcation of civil procedural provisions that follow one another over time. The term **transitional law** is used synonymously. Intertemporal law determines whether the old or new civil procedural provision applies to a specific (procedural) set of facts (*"either-or law"*).

2 *"Art. x aZPO"* is used if reference is made to a provision of the CPC that is in force until December 31, 2024. The new civil procedure law is referenced with *"Art. x nZPO"* (also changes in the PILA, SchKG and BGG). If no *"a"* or *"n"* is placed in front of it, both the (unchanged) law before and after January 1, 2025 is meant.

3 The commentary begins with the **history of the origin** of Art. 407*f* CPC (N. 4 et seq.). Subsequently, the **fundamentals** are explained (N. 9 et seq.). This raises the question, among other things, of whether the list in Art. 407*f* CPC is exhaustive (N. 17 f.). The following Chapter IV is devoted to each of the **in Art. 407*f* CPC contained standards** (N. 33 ff.). Finally, Chapter V deals with the transitional provisions of the norms **not included in Art. 407*f*** CPC (see below N. 89 et seq.). These also include the **amended provisions of the PILA, SchKG and BGG**, unless they have already been discussed in the previous chapter in connection with the amendment of a provision of the CPC. Editorial changes to the French and Italian texts are not discussed.

II. LEGISLATIVE HISTORY

4 Neither the **preliminary draft** nor the **draft** contained any transitional provisions. Neither the **explanatory report** nor the **message** commented on transitional law. The representative of the Federal Office of Justice stated in the Legal Affairs Committee of the Council of States that transitional law was anchored at the end of the CPC. For this reason, no separate transitional provision was included in the draft. What is important here is that the principle

applies in procedural law (although not explicitly stated in the law) that it comes into force immediately, i.e. when an amendment comes into force (see below N. 11). The law only contains exceptions to this principle (in particular with regard to jurisdiction and procedural coordination). **Art. 404–407 CPC** apply to these.

In order to clarify the situation, the Council of States' Committee for Legal Affairs inserted a transitional provision into **Art. 407 CPC**, which contains the same mechanism as the current Art. 407*f* nCPC by **listing certain amended provisions**. The Council of States followed the lead of its committee. Since the Council of States had no intention of overwriting the existing Art. 407 CPC, the National Council created the new **Art. 407*e* CPC** from it. 5

Due to the transitional provision being designed as a catalog of amended CPC provisions, the definitive wording of Art. 407*e* CPC could only be determined once it was clear what the National Council and the Council of States had materially decided. For this reason, the catalog in Art. 407*e* CPC was adapted to the respective decisions by the secretariat of the commission in collaboration with the administration. Art. 407*e* CPC was then adapted to reflect the status of the parliamentary deliberations. Art. 407*e* CPC later became the new **Art. 407*f* nCPC**. Art. 407*e* CPC contains the transitional provision concerning the civil procedural provisions that came into force with the new FADP on September 1, 2023. 6

Historical interpretation seeks to determine the meaning of a norm in its genesis. In doing so, the materials, including the message and the official bulletin of the National Council and the Council of States, are taken into account. Central aspects of Art. 407*f* nZPO arise from the protocols of the parliamentary commissions (see below N. 17 and N. 20). The Federal Supreme Court and the majority of legal scholars take the **committee minutes** into account when conducting a historical interpretation. According to Art. 4 para. 2 let. c ParlVV, the committee minutes serve, among other things, the subsequent interpretation of enactments. According to Art. 47 para. 1 ParlA, the deliberations in the committee are confidential. The commission minutes are to be made available for the application of the law and for scientific purposes (Art. 7 para. 1 ParlVV). It should be noted that the commission minutes can only be inspected after a vote in a possible referendum (see Art. 7 para. 1 ParlVV). 7

8 There are justifiably critical voices regarding the use of the commission protocols because they are not publicly accessible. It is argued that secret material that is not publicly accessible should not be taken into account in the historical interpretation. As a result, the population is unaware of how the law could be interpreted. Therefore, in the future it is desirable that the ideas under transitional law are already explained in the dispatch or that the statements of the commissions are repeated in parliament. This would make them readily accessible to the general public. Since the commission protocols are taken into account in practice, this commentary is also based on the statements contained therein.

III. FUNDAMENTALS OF ART. 407*F* NZPO

9 Before discussing transitional issues with regard to individual norms, a general presentation of the mechanism enshrined in Art. 407*f* nZPO will be provided. First, its **mode of operation** is explained (N. 11 f.). Thereafter, the question is clarified as to whether the catalog contained in Art. 407*f* nZPO is exhaustive (N. 17 f.). The following comments deal with Art. 407*f* nZPO in relation to the **general transitional provisions in Art. 404 et seq. CPC** (N. 19 et seq.). Numerous provisions of **cantonal administrative procedural law** refer to the CPC. This raises the question of whether these are dynamic references that always refer to the current version of the CPC. If this is the case, then article 407*f* of the new CPC also plays a role in cantonal administrative procedural law from a transitional law perspective (N. 30 et seq.).

10 In this context, it is irrelevant whether the old or new law applies if the new law merely codifies **federal court case law developed under the old law** (e.g. N. 68, 81, 93, 100, 105, 112 f., 158, 167 and 180). Also insignificant are **editorial changes** without substantive significance (e.g. N. 65, N. 159 and N. 172). In the absence of substantive changes, the law applicable in terms of time is not relevant.

A. How the list in Art. 407*f* of the new Swiss Code of Civil Procedure (CPC) works

11 Art. 407*f* of the new CPC, like other transitional provisions of the CPC, stipulates that the new law applies to **proceedings that** are **legally pending when it comes into force**. This is in line with the intertemporal principle,

according to which procedural law applies immediately, i.e. from the time it comes into force. In contrast to other revisions, Art. 407*f* nZPO does not declare the entire new law to be applicable, but only individual provisions listed in a catalog (see below N. 33 et seq. for the list). Finally, Art. 407*f* nZPO also does not contain any special provisions that only apply to the transition period. Art. 407*f* nZPO declares various provisions of the new law applicable to proceedings pending before January 1, 2025 (see below N. 33 et seq.). Of importance is, on the one hand, the lis pendens and, on the other hand, the concept of *"proceedings"* (see below N. 13 et seq. and N. 16).

The new law applies to proceedings that become **legally pending** after January 1, 2025. These proceedings have no relation to the period of validity of the old law. However, the period to which the **material legal relationship forming the subject matter of the dispute** (i.e. the facts of the case) belongs is irrelevant. 12

1. Point in time of the legal pendency

The **filing of** an application for conciliation, a statement of claim, a petition or a joint petition for divorce gives rise to lis pendens (Art. 62 para. 1 CPC). The decisive factor is the date of submission of the document instituting the proceedings to Swiss Post or a Swiss diplomatic or consular representation (see Art. 143 para. 1 CPC). In the case of oral statements, the time of signing the minutes is decisive (see Art. 202 para. 1, 244 para. 1 and Art. 252 para. 2 CPC). In the case of a **newly submitted or forwarded submission**, the date of the first submission is deemed to be the decisive point in time (Art. 63 para. 1 CPC; see also below N. 35). 13

The action becomes pending only to the extent of the legal requests asserted. If an **amended or new claim** is submitted in terms of Art. 227 CPC, it only becomes pending with this submission or the protocol declaration. A **counterclaim** becomes pending independently by filing it in the conciliation proceedings or when it is raised in the statement of defense (see Art. 209 para. 2 let. b and Art. 224 para. 1 CPC). 14

For **arbitration proceedings**, Art. 372 CPC applies as a *lex specialis* to determine pending cases (see below N. 211 f.). 15

2. The concept of *"proceedings"* in art. 407*sq.* new CPC

16 The term *"proceedings"*, which is used in art. 407*sq.* new CPC and in other provisions of the CPC, is not clearly defined in the CPC, in legal doctrine or in case law. The CPC also uses the term *"litigation"*. According to the dictionary, a *"procedure"* is a series of legal acts that serve to resolve a legal matter and take place before authorities or courts. Within the scope of application of the CPC, a procedure is deemed to exist if the **court decides on a private legal relationship between at least one private (natural or legal) person**. In my opinion, the term *"process"* is a synonym for *"procedure"*.

B. Nature of the list in Art. 407 *et seq.* of the new Code of Civil Procedure

17 It is debatable whether the list in Art. 407 *et seq.* of the new Code of Civil Procedure is exhaustive. The wording suggests that it is exhaustive because the addition *"in particular"* is missing. In addition, when such a catalog is inserted, it is generally assumed that it contains all the standards. It is clear from the history of the bill that the administration and the commission intended to keep the transitional provision up to date with the debate on the revision of the CPC of March 17, 2023 (see above N. 6).

18 Legal scholars identified an initial norm early on, which is erroneously missing in Art. 407*f* nZPO. Art. 133 let. d nZPO concerning the summons when using electronic means such as a video conference should be included in Art. 407*f* nZPO because Art. 407*f* nZPO contains the remaining provisions for the use of electronic means. In such cases, the catalog of Art. 407*f* nCPC should be logically extended or an editorial error assumed (also below N. 38). As far as can be seen, no other provision is missing in Art. 407*f* nCPC (see, for example, below N. 148).

C. Relationship to the transitional law in Art. 404 et seq. CPC

19 When the Federal CPC entered into force on January 1, 2011, Arts. 404–407 CPC contained the transitional law. According to the heading of the corresponding chapter, the provisions only apply when the entire CPC enters into force for the first time and not in the event of further partial revisions (*"Transitional Provisions of December 19, 2008"*). The first step is to clarify whether Art. 404 et seq. CPC also apply to the revision of the CPC of March 17, 2023

(N. 20). Thereafter, the general transitional provisions used for the present commentary are briefly explained (N. 21 et seq.). For Art. 407 CPC concerning the transitional law in arbitration, please refer to the following commentary (N. 212 and N. 214).

1. Applicability of Art. 404 et seq. CPC

20 It is disputed in legal doctrine whether Art. 404 et seq. CPC also applies to later partial revisions. At first glance, the addition *"of December 19, 2008"* suggests that the transitional provisions of Art. 404 et seq. CPC only apply to the change from cantonal law to the federal CPC. However, this addition was only added together with Art. 407*a* CPC. At the time of the introduction of the CPC, Art. 404 et seq. CPC as general transitional provisions. The administration also assumes that Art. 404 et seq. CPC are to be observed in the event of later revisions (see also above N. 4). The general principle, according to which new civil procedural law is to be applied immediately, would be impractical for numerous provisions of the revision of March 17, 2023. For this reason, Art. 407*f* nCPC contains only those provisions to which this principle applies. If the legislator had assumed that the general provisions of Art. 404 et seq. CPC would not apply, Art. 407*f* nCPC would be a meaningless provision. According to the general principle, the revised provisions would be immediately applicable to all pending proceedings. Accordingly, Art. 404 et seq. CPC will also be applicable in the event of the revision of 17 March 2023, provided that Art. 407*f* nCPC does not deviate from it (N. 33 et seq.). For those provisions that are not included in the catalog of Art. 407*f* nCPC, Art. 404 et seq. CPC, i.e. the general transitional law, applies (see below N. 89 et seq.).

2. General transitional law

a. Continued application of the previous law (Art. 404 CPC)

21 According to Art. 404 para. 1 CPC, the previous procedural law applies to proceedings that are pending when it comes into force **until the conclusion before the instance concerned**.

22 It is undisputed that the instance is the **court of first instance** and the **cantonal court of appeal**. However, the classification of the **arbitration authority** as an *"instance"* is disputed. According to the case law of the Federal Supreme Court and the courts of Graubünden, as well as some legal literature,

the conciliation authority is not considered a separate instance. The Zurich High Court and another part of the doctrine consider the conciliation authority to be a separate instance. The fact that the new procedural law is being applied as early as possible speaks in favor of the latter view. It should be noted that when the CPC was introduced, the difficulties of **various cantonal concepts of lis pendens** were argued. This problem no longer arises with the present amendment to the CPC. In my opinion, the conciliation authority should therefore be regarded as a separate instance. This is the best way to implement the principle of the immediate applicability of the new civil procedural law (see above N. 4 and N. 11). The following comments are based on the case law of the Federal Supreme Court. Due to the controversial situation at the outset, the constellation in which the conciliation authority is regarded as an *instance* is also addressed in some cases (see below N. 163).

23 The Federal Supreme Court considers proceedings before an instance to be concluded if a legally binding decision has been made. If the court of appeal sets aside a decision and refers it back to the lower court for a new decision, the proceedings are not concluded. The proceedings are restored to the state in which they were before the contested decision was made. Therefore, the court of first instance must continue to apply the previous procedural law after the remittal decision, or apply it again (**principle of unity of the instance**). This also applies if the appeal proceedings were subject to new law (on the appeal proceedings, see N. 28 f.).

b. Amended actions and several actions or petitions in one proceeding

24 In one proceeding, one **action** or **petition** is adjudicated. In this case, it is clear that the applicable procedural law, i.e. the old or the new law, is determined on the basis of the pendency of this action or petition. The same point in time can also be used for **subjective and objective joinder of claims**, because in this case too – thanks to the simultaneous filing of the action in a single statement of claim – the point in time at which all the claims become pending is identical.

25 questions arise in the case of **amended and multiple claims in one action** whose point in time of becoming pending differs (see above, N. 14). One example is an action that became pending at the end of 2024, and the associated counterclaim that only became pending at the beginning of 2025. Another example would be an additional action subsequently added by means of an

amendment to the action. Several actions are treated in the same proceedings, subject to a separation within the meaning of Art. 125 let. b and let. d CPC. It is also questionable how the transition law would deal with the situation if the court **combined** a claim that had become pending by December 31, 2024, with a claim that had become pending from January 1, 2025, in a different proceeding (see Art. 125 let. c CPC).

26 Regardless of the assessment in the same proceedings, **each claim is materially independent**. This means that, in principle, a decision is made for each claim as if separate proceedings were conducted for it. In terms of transitional law, this would mean that the old civil procedure law would apply to the claim that became pending before January 1, 2025, provided that the new legal provision is not included in the catalog of Art. 407 et seq. In my opinion, this approach is impractical because the court would have to apply different procedural law to different claims within the same proceedings. Therefore, in my opinion, the applicable law should be determined exclusively on the basis of the **lis pendens of the first claim** as the starting point of the proceedings. This claim also initiated the proceedings. It should be noted that the court may not use the consolidation of actions to influence the applicable law in the intertemporal aspect. This means that the old procedural law must be applied to a **counterclaim** that the court has separated from an action that became pending in 2024, despite the counterclaim being pending in 2025. When combining an **independent action** brought in 2025, the court may not apply the old procedural law to this action simply because the action in the other proceedings was brought in 2024. In this exceptional case, the court must apply separate procedural law to the two actions. If this is impracticable, the court must refrain from combining the actions.

c. Local jurisdiction (Art. 404 para. 2 CPC)

27 Art. 404 para. 2 CPC provides for the **principle of favorability** for **local jurisdiction**. Accordingly, local jurisdiction is determined in accordance with the new law as soon as it comes into force. In addition, jurisdiction under the old law remains (*perpetuatio fori*). Thanks to Art. 404 para. 2 CPC, a lack of jurisdiction under the old law is remedied. According to the prevailing opinion, Art. 404 para. 2 CPC is not applicable to **material jurisdiction**. In these cases, Art. 404 para. 1 new CPC applies. The provisions on local jurisdiction

remain unchanged by the revision. In contrast, there were changes to the provisions on material jurisdiction (see below N. 91 and N. 96 f.).

d. Appeals (Art. 405 CPC)

28 The law in force at the time of the **issuance of the judgment** (opening statute; Art. 405 para. 1 CPC) applies to the admissibility of the appeal and the appeal proceedings. This includes the right of appeal, the right of complaint, as well as the right of explanation and correction. This includes all decisions, i.e. in particular interim decisions. The **appeal on points of law** of decisions that have been opened under the previous law is governed by the new law (Art. 405 para. 2 CPC; see below N. 201). The new law also applies to the proceedings to be continued after an appeal on points of law has been granted (so-called renewal proceedings).

29 It is unclear what is meant by the **time of issue**. In principle, a decision is deemed to have been issued when it has been communicated to the parties orally or in writing. The written operative part, which can be issued without grounds, is used for this purpose. If a decision has been issued in writing to at least one of the parties, the date of posting is used. Otherwise, it is possible that two different dates are decisive because both parties received the decision at a different time. However, if it is established that both parties received the decision after the amendment came into force, the new law applies regardless of the date of posting. Whether a judgment is issued during the judicial vacations is irrelevant for the determination of the legal remedy in accordance with Art. 405 para. 1 CPC. Service during the vacations is only relevant for calculating the time limit for an appeal (see Art. 146 para. 1 CPC). By contrast, Art. 132 para. 1 BGG is based on the date on which the decision was issued (see below N. 80).

D. Excursus: Reflex effect on cantonal administrative procedural law

30 The laws on cantonal administrative justice regularly refer to the provisions of the CPC (e.g. in the taking of evidence) (so-called external references). This raises the question of whether these are static or dynamic references. This must be determined by interpreting the cantonal reference norm. In principle, dynamic references are to be assumed if the cantonal administrative law does not refer to a specific version of the CPC. The uniform application of all pro-

cedural laws in the canton also speaks in favor of **dynamic references**. If dynamic references are present, cantonal law would change without the involvement of the cantonal parliament and, possibly, the cantonal population in a referendum. This argues in favor of **static references**. In my opinion, however, dynamic references should be assumed in principle.

If **dynamic references** exist, the changes of the revision of March 17, 2023 are also decisive for cantonal law, provided that the cantonal law refers to them in the relevant area, for example in the taking of evidence. This means that interrogations, for example, could be carried out with the new provisions on the use of electronic means (see below N. 38 et seq.). In this case, the transitional question arises as to whether Art. 407*f* nZPO is also applicable or the transitional law of the cantonal administrative law. In my opinion, the transitional law of the cantonal administrative law is to be relied upon, because the reference to the CPC does not cover the transitional law of an audit. However, it is also conceivable, in particular in the absence of suitable cantonal provisions, to apply Art. 407*f* nZPO as subsidiary cantonal law. The cantonal individual case is decisive in each case. 31

The provisions of the CPC are deemed to be **cantonal law** in the cantonal administrative proceedings. The Federal Supreme Court reviews the application of cantonal law only with **arbitrary cognizance** (see Art. 95 BGG). This means that the Federal Supreme Court can only examine to a limited extent whether cantonal instances rightly applied or did not apply Art. 407*f* nZPO in the administrative proceedings. The Federal Supreme Court also has only limited scope to review whether a dynamic or static reference is involved, unless there are constitutional concerns about the dynamic reference in an individual case. 32

IV. REVISED LAW WITHIN THE SCOPE OF APPLICATION OF ART. 407*F* NZPO

This chapter deals with the individual provisions listed in Art. 407*f* nZPO from a transitional law perspective. 33

A. Direct action before the higher court (Art. 8 para. 2 second sentence nZPO)

34 According to Art. 8 para. 2 second sentence nZPO, the sole cantonal court is also competent to order precautionary measures before the commencement of the lis pendens. This is a clarification that corresponds to the prevailing view on the applicable law. The only cantonal court is therefore also competent to deal with applications for the issuance of a provisional measure that became pending before January 1, 2025. However, as in the previous law, the consent of the opposing party is required for this (see Art. 8 para. 1 CPC). In particular, in the case of super-provisional measures, there is usually no corresponding consent, which is why the higher court has no jurisdiction.

B. Lis pendens in the absence of jurisdiction and incorrect type of proceedings (Art. 63 para. 1 nZPO)

35 Art. 63 para. 1 nZPO now additionally provides that in the case of a submission forwarded in accordance with Art. 143 para. 1^{bis} nZPO, the date of the first submission shall be deemed to be the date of lis pendens. This also applies to submissions that were erroneously submitted to an incompetent Swiss court before January 1, 2025 and were finally forwarded by that court after January 1, 2025 in application of Art. 143 para. 1^{bis} nZPO ex officio (see below N. 47 et seq.).

C. Free legal aid for the taking of evidence in the form of provisional measures (Art. 118 para. 2 second sentence nZPO)

36 The Federal Supreme Court has so far rejected legal aid in the case of provisional evidence within the meaning of Art. 158 CPC. The legislator has followed the criticism of prevailing doctrine and now states in Art. 118 para. 2 second sentence nZPO that legal aid can also be granted for the provisional taking of evidence.

37 Thanks to Art. 407*f* nZPO, legal aid can also be granted for proceedings for the taking of evidence that were pending before January 1, 2025. If the proceedings for the taking of evidence have already been concluded, a subsequent application for legal aid is no longer possible. An application for legal aid may be submitted before or after the case becomes pending (Art. 119 para.

1 CPC). Accordingly, it is also possible to apply for legal aid for proceedings for the taking of evidence initiated before January 1, 2025. However, according to Art. 119 para. 4 CPC, free legal aid can only be granted retroactively in exceptional cases. However, the retroactivity mentioned in Art. 119 para. 4 CPC is factual and not intertemporal. This means that the retroactive effect within the meaning of Art. 119 para. 4 CPC applies to expenses incurred in the past and not to a change in the legal situation. Accordingly, in terms of the *ratio legis* of Article 118, para. 2, second sentence, of the new Code of Civil Procedure, legal aid is also to be granted for costs already incurred because the legislature did not want to grant wealthy persons access to the taking of evidence for the purposes of prevention immediately, i.e. when the new law came into force.

D. Digitalization in civil proceedings

1. Use of electronic means (Art. 141*a*, f., Art. 170*a*, Art. 187 para. 1 third sentence, Art. 193 and Art. 298 para. 1^{bis} nZPO)

The revision of the CPC of March 17, 2023 introduces various provisions on the use of electronic means for the **transmission of sound and images for the purpose of conducting oral procedural acts**. With the exception of Art. 133 let. d nCPC concerning the summons, all of these provisions are included in the catalog of Art. 407 *et seq.* nCPC. With regard to Art. 133 let. d nZPO, the doctrine rightly assumes that this is an editorial mistake on the part of the legislator, because the provisions on the use of electronic means would be meaningless without the simultaneous possibility of a summons (see above N. 18). 38

Conducting oral proceedings by means of electronic audio and video transmission requires, among other things, that **all parties agree to** it (Art. 141*a*, para. 1 of the new Code of Civil Procedure *in fine*). The **transmission of the image** may exceptionally be **waived** with the consent of the persons concerned if there is particular urgency or other special circumstances in the individual case (Art. 141*b* para. 2 nZPO). In my opinion, these consents can be given before January 1, 2025. However, the corresponding oral procedural act may not be carried out until January 1, 2025. In my opinion, the **summonses** to the procedural acts may already be issued before January 1, 2025. Firstly, consent is only a requirement for the validity of the procedural act and not the 39 procedural act itself. Since the legal basis has been in place since March 17, 2023, the parties know the legal framework to which they are consenting. If the parties wish to await the ordinance issued on the basis of Art. 141*b* para. 3 CPC, they may provisionally refuse to give their consent (see N. 40 below). Secondly, obtaining consent before 1 January 2025 promotes the expeditious preparation and conduct of proceedings required by Art. 124 para. 1 CPC.

40 The Federal Council regulates the technical requirements and the requirements for data protection and data security in the **Ordinance on the Use of Electronic Means for Sound and Image Transmission (VEMZ)** (see Art. 141*b* para. 3 nZPO). Art. 11 VEMZ stipulates that the ordinance also applies to proceedings that are pending when the VEMZ comes into force.

41 Art. 170*a* nZPO provides for the **examination of witnesses** by video conference or other electronic means of sound and image transmission. Such examination is already permitted in proceedings that became pending before 1 January 2025 (Art. 407*f* nZPO). The summons may be issued before 1 January 2025. The above also applies to the **examination of parties**, the **taking of evidence** and the **oral submission of an expert opinion** or the **explanation of a written expert opinion** in the proceedings, because Art. 187 para. 1 third sentence and Art. 193 nZPO refer to Art. 170*a* nZPO. The provisions mentioned are also included in the list of Art. 407*f*. nZPO.

42 The use of electronic means for sound and image transmission during the **hearing of a child** in family law proceedings remains inadmissible under both the old and the new law (see Art. 298 para. 1^{bis} nZPO).

2. Minutes of recordings (Art. 141*b* para. 1 let. b, Art. 176 para. 3, Art. 176*a*, Art. 187 para. 2 and Art. 193 new CCP)

43 The introduction of the use of electronic means also led to regulations concerning the **recording of recordings** (see Art. 176a ZPO). When electronic means of sound and image transmission are used, a recording is made during the examination of witnesses, the questioning of parties, the giving of evidence and personal hearings. Recording is expressly excluded for the free discussion of the subject matter in dispute and settlement negotiations (see Art. 141*b* para. 1 let. b nZPO).

44 The previous option of recording by means of tape recording, video or other suitable aids – apart from video conferencing – remains in force (Art. 176

para. 2 and Art. 235 para. 2 CPC). Art. 176*a* nCPC also applies to the examination of witnesses. The content of Art. 176 para. 3 aZPO is now contained in Art. 176*a* lit. b and lit. c nZPO. Art. 176*a* lit. a nZPO now stipulates that the **minutes are to be drawn up retrospectively on the basis of the recording**. Accordingly, in proceedings that were pending before January 1, 2025, the protocol can be created retrospectively from January 1, 2025 in such cases if the court records the testimony.

For the rest of the proceedings, Art. 235 para. 2 CPC applies, according to 45
which statements of a factual nature must be recorded in terms of their essential content if they are not contained in the parties' written submissions. Art. 235 para. 2 CPC makes no reference to Art. 176*a* nCPC concerning the subsequent recording of testimony. This is a legislative oversight, which is why Art. 176*a* nZPO also applies in this case. In terms of transitional law, this means that for proceedings that were pending before January 1, 2025, procedural acts such as party and closing submissions that took place after January 1, 2025, may be recorded retrospectively if the court has recorded them.

Art. 176*a* nZPO will also apply from January 1, 2025 to the **recording of witnesses** in proceedings that were already pending before January 1, 2025. Art. 46
176a nZPO applies *by virtue of* reference (Art. 187 para. 2 and Art. 193 nZPO) to the **oral submission** or **written explanation of an expert opinion** as well as to the **party questioning** and **evidence**.

E. Adherence to deadlines (Art. 143 para. 1^{bis} nZPO)

Art. 143 para. 1^{bis} nZPO stipulates that submissions that are **submitted in error to a Swiss court that is not competent by the deadline** are deemed to 47
have been submitted **in good time**. Furthermore, the provision states that if another court in Switzerland is competent, the **submission is to be forwarded** to that court **ex officio**. This also applies to submissions in proceedings that were pending before January 1, 2025 (see Art. 407*f.* nZPO). Lis pendens occurs as soon as the action or request is filed (see above N. 13). Consequently, these submissions are to be forwarded from January 1, 2025.

Even before Art. 143 para. 1^{bis} nZPO came into force, the Federal Supreme 48
Court considered that the time limit for an appeal is deemed to have been met if the appeal or complaint was submitted to the lower court. In such cases, the lower court must forward the appeal to the competent court of appeal

without delay. In such cases, there is no need to wait for Art. 143 para. 1^{bis} nZPO to come into force. The submission is to be forwarded in advance.

49 If several other courts have jurisdiction, the plaintiff should be heard before the referral. In the interests of procedural economy, this hearing or the request for it may, in my opinion, take place before January 1, 2025.

F. Restoration Procedure (Art. 149 nZPO)

50 Art. 149 nZPO expressly provides that the court shall not make a final decision on the reinstatement if the refusal of reinstatement results in the **definitive loss of rights**. This means that an appeal is possible. The Federal Supreme Court has already introduced a corresponding restriction to Art. 149 aZPO in the event of a definitive loss of rights. Since the legislator did not define the concept of a definitive loss of rights, the previous case law of the Federal Supreme Court is to be assumed (definitive loss of *"the action or the means of appeal"*). From a transitional law perspective, it is irrelevant whether Art. 149 aZPO or Art. 149 nZPO applies. From a formal point of view, the new version is also applicable to proceedings that were pending before January 1, 2025, thanks to Art. 407*f* nZPO.

G. Law of Evidence

1. Right to refuse regarding the activity of an internal corporate legal department (Art. 167*a* nZPO)

51 With regard to the activities of an **internal corporate legal department**, Art. 167*a* nZPO provides for a right of refusal in the taking of evidence. Thanks to Art. 407*f* nZPO, this applies to proceedings that were already pending before January 1, 2025. This may significantly change the parties' prospects of success in court. From a transitional law perspective, various tricky questions arise.

52 It is questionable whether a party and a third party may **retroactively invoke the new right of refusal in Art. 167*a* nZPO** as of January 1, 2025. In other words, can a party demand that **documents and interrogations already carried out be removed from the files**? The fact that the same law should apply to all evidence would seem to suggest so. This idea also arises from Art.

404 para. 1 CPC, according to which the proceedings before the court seized shall be concluded under the same law.

On the other hand, there is an argument for an **analogous application of Art. 448 para. 2 CrimPC**. This provision stipulates that procedural acts that have been ordered or carried out before the entry into force of the CrimPC shall retain their validity. This principle is an expression of the principle of legality, according to which evidence is to be collected in accordance with the law as it stands and cannot be retrospectively rendered inadequate by a change in the law. If Art. 448 para. 2 CrimPC were applied by analogy, documents accepted and statements made before January 1, 2025 would be valid if they were admissible under the old law. 53

By contrast, the analogous application of Art. 448 para. 2 CrimPC is not practicable in civil procedure law. The **principle of equal treatment or equality of arms** requires that the same law of evidence applies to all parties. Furthermore, different laws of evidence also lead to one party trying to delay the proceedings. It is conceivable that a party could file a motion to postpone the main hearing to a date after January 1, 2025, thereby obtaining the application of Art. 167*a* nZPO in its favor. Therefore, **Art. 167*a* nZPO should, in my opinion, be applied to the entire proceedings that were pending before January 1, 2025.** This means that the right of refusal within the meaning of Art. 167*a* nZPO must already be observed for previously submitted documents and statements. This also applies in appeal proceedings to evidence taken in the first-instance proceedings. 54

Pursuant to Art. 161 para. 1 CPC, the court shall inform the parties and third parties about the right to refuse, among other things (duty to provide information). From January 1, 2025, the court must therefore draw the attention of parties and third parties to the right of refusal under Art. 167*a* nZPO and set them a deadline within which they can request that certain documents and statements be disregarded in the judgment. The court's taking cognizance of the documents to be excluded from the proceedings will only constitute a ground for recusal in extreme cases (see Art. 47 para. 1 let. f CPC). 55

If a party **pending before January 1, 2025, proceedings in bad faith delayed** to still be able to benefit from Art. 167*a* nZPO, this standard is exceptionally not applicable even after January 1, 2025 (see Art. 52 para. 1 CPC). The opposing party bears the burden of proof for the violation of good faith. 56

2. Private expert opinion (Art. 177 new CPC)

57 Under the new law, the **private expert opinion is considered a document** and thus, according to Art. 168 para. 1 let. b CPC, as evidence (Art. 177 new CPC). In this way, the legislator corrected the case law of the Federal Supreme Court, according to which private expert opinions are not considered evidence, but as mere assertions by the parties.

58 Since Art. 177 nZPO is included in Art. 407*f* nZPO, it is rightly argued that a private expert opinion submitted in proceedings already pending before January 1, 2025 can no longer be dismissed as a mere party assertion as of January 1, 2025. The party that submitted the private expert opinion now offers it as evidence. From January 1, 2025, it will be admissible evidence that the court must accept unless there are other reasons not to (see Art. 152 para. 1 CPC). It is not necessary to resubmit it after January 1, 2025. If necessary, it is advisable to draw the court's attention to the private expert opinion.

59 From a transitional point of view, the question arises as to whether a private expert opinion can be submitted as a genuine novelty after the conclusion of the case from January 1, 2025. For proceedings pending on January 1, 2025, Art. 229 aZPO is decisive (see below N. 171). The definition of (genuine and spurious) novae has not changed (see below N. 169). With regard to the introduction of novae into the proceedings, Art. 229 aZPO is stricter (see below N. 169 et seq. for details). A distinction must be made between private opinions that have already been prepared and those that have yet to be prepared.

60 **Genuine novelties** only arise after the case has been closed (Art. 229 para. 1 let. a aZPO or Art. 229 para. 2 let. a nZPO). In the case of a private expert opinion that has already been written, it would not be a matter of *"actual creation"*, but rather, thanks to Art. 177 nZPO, a *"legal creation"*. In my opinion, the definition of the genuine novum is to be extended in the context of transitional law to the *"legal creation"*. This also helps to avoid unequal treatment between the parties. If a claimant submitted the reply under the old law, Art. 177 aZPO would be decisive. In contrast, if the defendant submitted the reply after January 1, 2025, Art. 177 nZPO would be applicable, which is why the reply would be allowed to submit a private expert opinion as evidence. In this case, the claimant could also submit a private expert opinion as a genuine novelty.

If the private expert opinion has not yet been prepared, this constitutes a **genuine novelty** due to *"actual emergence"*. If it could have been prepared earlier, it is a **potestative novelty**. These are treated like **non-genuine novelties**. Accordingly, potestative novae are only admissible if they cannot be submitted in advance **despite reasonable care (**Art. 229 para. 1 let. b aZPO and Art. 229 para. 2 let. b nZPO). It can be argued that the preparation of a private expert opinion was not required under the regime of the old law, which is why the late submission is excusable. In order to give the Contingency Maxim as much effect as possible, parties can be expected towards the end of 2024 to prepare the expert opinion with the entry into force of Art. 177 nZPO on January 1, 2025 in mind and thus not to wait until the beginning of 2025. 61

In the **appeal proceedings**, Art. 317 para. 1 CPC must be observed with regard to the subsequent submission. According to Tappy, acting without delay requires that the private expert opinion of the respondent in the appeal be submitted before the expiry of the response to the appeal (in particular if the time limit for the response to the appeal runs entirely or mostly in 2025). Since, according to the case law of the Federal Supreme Court, it is sufficient for the novae to be submitted in the statement of appeal or statement of defence, in my opinion this also applies to the private expert opinion. In **appeal proceedings**, the private expert opinion can no longer be submitted due to the prohibition of novae (see Art. 326 para. 1 CPC). 62

If a party to proceedings pending before January 1, 2025, delays the proceedings in bad faith in order to benefit from Art. 177 nCPC, that provision will exceptionally not be applicable even after January 1, 2025 (see Art. 52 para. 1 CPC; see above N. 56). The opposing party bears the burden of proving a breach of good faith. 63

H. Conciliation proceedings

This section is devoted to the **provisions of the conciliation procedure, which Art. 407*f* nZPO lists**. Art. 204, 209 para. 4 and Art. 212 para. 3 nZPO are not among them, which is why these provisions are commented on below in N. 158 et seq. 64

65 Instead of *'proposed judgment'*, the term *'proposed decision'* will be used from 1 January 2025. This is a terminological adjustment that has no impact on the content. Therefore, there are **no transitional legal issues**.

1. Exemptions from the conciliation procedure (Art. 198 let. b^{bis}, f, h and i nZPO)

66 Various exceptions to the mandatory mediation requirement have been amended (Art. 198 let. b^{bis}, f, h and i of the new Code of Civil Procedure). These exceptions are included in the list in Art. 407*f.* of the new Code of Civil Procedure.

a. Maintenance claims and other child-related matters (Art. 198 let. b^{bis} of the new Code of Civil Procedure)

67 The conciliation procedure is not applicable for any claims concerning the **maintenance of minor and adult children** and **all other child-related matters** (Art. 198 let. b^{bis} nZPO). According to Art. 198 let. b^{bis} aZPO, the conciliation procedure is only not applicable if one of the parents has already referred the matter to the KESB before filing the action. Therefore, a maintenance claim that was pending before January 1, 2025 and is adjudicated after January 1, 2025 does **not require a prior conciliation procedure**, even if Art. 198 let. b^{bis} aZPO would have required a conciliation procedure.

b. Disputes within the jurisdiction of a single cantonal authority (Art. 198 let. f nZPO)

68 Art. 198 let. f nCPC now states that the mediation procedure is not applicable to disputes arising from supplementary insurance to social health insurance if a single cantonal instance within the meaning of Art. 7 CPC is responsible for them. This codifies the case law of the Federal Supreme Court, according to which a different treatment of Arts. 5, 6 and 7 CPC is not justified. Therefore, the Federal Supreme Court considered that the conciliation procedure is also no longer applicable to disputes arising from supplementary insurance. Since there is no reason to treat Art. 5, 6 and 7 CPC differently, it is inexplicable to Honegger-Müntener/Rufibach/Schumann why no voluntary conciliation procedure is possible for disputes arising from supplementary insurance. These authors again assume that this is a legislative oversight. It can be assumed, although these authors have not explicitly stated this, that they also consider

voluntary arbitration to be admissible for disputes arising from supplementary insurance. Since the wording of the law and the message are clear, it cannot be assumed in my opinion that voluntary arbitration is possible. In addition, the Federal Supreme Court spoke out convincingly against arbitration proceedings under the old law because the arbitration authority lacks the necessary specialist knowledge and because of the decision-making authority within the meaning of Art. 212 CPC, a double cantonal instance arises.

Art. 198 let. f of the old CPC provided that the conciliation procedure was not applicable in the case of actions brought before the sole cantonal court within the meaning of Art. 5 CPC and the commercial court within the meaning of Art. 6 CPC. These exceptions were deleted in the new law because an optional mediation procedure was introduced for these actions (see Art. 199 para. 3 new ZPO; see below N. 74 f.). The prevailing doctrine under the old law was that a mediation authority does not have to conduct a mediation procedure if an exception within the meaning of Art. 198 aZPO applies. Instead, it was held that the conciliation authority should issue a decision of non-admission. From January 1, 2025, the conciliation **proceedings must be conducted in any case, even if the request for conciliation was submitted in 2024 (**see Art. 407*f.* nZPO). However, this does not apply if the arbitration authority has already issued a decision of non-admission in 2024. In this case, a new application for arbitration must be submitted. If the original lis pendens is to be maintained, the new application for arbitration must be submitted within one month of the decision of non-admission (see Art. 63 para. 1 CPC). 69

According to Art. 135 no. 2 CO, the **statute of limitations** is interrupted by, among other things, a request for mediation. In this case, lis pendens is decisive (Art. 64 para. 2 CPC). The commercial courts of the cantons of Zurich and Bern are of the opinion that there is no backdating of the lis pendens within the meaning of Art. 63 para. 1 CPC if an action is brought directly before the competent commercial court after the statement of claim has been issued. A decision of non-admission by a court of ordinary jurisdiction that lacks jurisdiction or a withdrawal of the action due to lack of jurisdiction before this court would be required first. Under the new law, conciliation proceedings may be conducted before the commercial court is seised (Art. 198 let. f and Art. 199 para. 3 nZPO *a contrario*). Therefore, the transitional question arises as to whether the limitation period is interrupted in the case of a request for conciliation submitted before January 1, 2025, if the action is sub- 70 sequently filed with the commercial court. The interruption of the limitation period would represent a deviation from the commercial court rulings cited in footnote 144. However, in my opinion, the interruption of the statute of limitations

does not occur under the new law either. The statute of limitations is a **substantive legal institution**. Accordingly, the substantive transitional law applies. The legal effects of facts that occurred before the entry into force of this law will continue to be assessed under the old law (**principle of non-retroactivity**; Art. 1 para. 1 SchlT CC). For this reason, the cited Zurich and Bern commercial court rulings will also be decisive from January 1, 2025 if a complaint is filed directly with the commercial court after the conciliation procedure has been carried out. In addition, according to Art. 49 para. 4 of the Final Provision of the CC, the new law on the statute of limitations will only apply from the date of its entry into force, i.e. in this case on January 1, 2025. The same problem must be solved in the same way for the sole cantonal instance within the meaning of Art. 5 of the CPC. In contrast, in my opinion, voluntary conciliation proceedings are not possible for disputes arising from supplementary insurance (see above N. 68). Therefore, the question at hand does not arise in such disputes.

c. Related actions with a court-set deadline (Art. 198 let. h nCPC)

71 According to Art. 198 let. h nCPC, the mediation procedure now also does not apply to actions that are factually related to an action for which the court has set a deadline (see Art. 263 CPC). This exception to the conciliation procedure applies, among other things, to **claims for compensation for work** that are to be asserted together with the definitive entry of the construction craftsman's lien. According to the case law of the Federal Supreme Court on Art. 198 lit. h aZPO, claims for compensation for work cannot be asserted without a conciliation procedure.

72 Art. 198 lit. h nZPO is included in the catalog of Art. 407*f* nZPO. Accordingly, the **claim for compensation for work** can be raised as early as the end of 2024 together with the **claim for definitive entry of the construction craftsman's lien**. From January 1, 2025, it will no longer be possible to dismiss the claim for lack of an arbitration procedure with regard to the claim for compensation for work. The courts of jurisdiction will fall apart (e.g. in the case of a jurisdiction agreement for the claim for compensation for work).

d. Actions before the Federal Patent Court (Art. 198 lit. i nZPO)

According to Art. 198 let. i CPC, the mediation procedure is not applicable to actions brought before the Federal Patent Court. Even under the old law, legal scholars agreed that actions brought before the Federal Patent Court do not require a mediation procedure. In this respect, there was a **legislative oversight** due to the fact that the Federal Patent Court did not yet exist when the CPC was enacted. This is evident from the fact that the message on the introduction of the CPC already stated that a corresponding **exception was to be** provided for when the Federal Patent Court was established. Since **Art. 198 let. i nCPC does not introduce any new element**, *a priori* **no transitional legal questions** arise. 73

2. Waiver of the conciliation procedure (Art. 199 para. 3 nCPC)

A new **voluntary mediation procedure** is possible for disputes under Art. 5, 6 and 8 CPC (see Art. 199 para. 3 nCPC). Since the mediation procedure is voluntary, Art. 199 para. 3 nCPC stipulates that the plaintiff may file the action directly with the court. Art. 199 para. 3 nZPO is included in the catalog of Art. 407*f* nZPO. This means that, from January 1, 2025, a voluntary mediation procedure must also be carried out if the request for mediation was submitted before that date and the procedure thus became pending before that date (see above N. 69). 74

According to Art. 8 para. 1 CPC, the claimant may, with the consent of the defendant, apply directly to the higher court if the amount in dispute is at least CHF 100,000. Under the previous law, mediation proceedings had to be conducted before the higher cantonal court could be called upon, although the parties could waive this *jointly* (Art. 199 para. 1 CPC). Under the new law, if there is an agreement under Art. 8 para. 1 CPC, the plaintiff can decide *alone* whether or not they wish to go through with conciliation proceedings before appealing to the higher cantonal court (Art. 199 para. 3 nCPC). Due to the inclusion in the catalog of Art. 407 *et seq.* nCPC, a prorogation in favor of the higher cantonal court within the meaning of Art. 8 para. 1 CPC, which was agreed before January 1, 2025, means that the **claiming party** can decide independently whether the mediation procedure is waived. 75

3. Fine for default in the conciliation proceedings (Art. 206 para. 4 nZPO)

76 Now, a **defaulting party** in the conciliation proceedings can be fined up to CHF 1,000 (Art. 206 para. 4 nZPO). Previously, the Federal Supreme Court ruled that failure to appear at a conciliation hearing constitutes a **disruption of business operations** or **malicious or wilful litigation** pursuant to Art. 128 para. 1 and para. 2 CPC. These **special qualifying circumstances** no longer apply with the entry into force of Art. 206 para. 4 nCPC. The fine must also be threatened under the new law (e.g. in the summons to the conciliation hearing; Art. 147 para. 3 CPC).

77 Thanks to Art. 407*f.* nCPC, this provision already applies to conciliation proceedings that were pending before January 1, 2025. Accordingly, the conciliation authority may impose an administrative fine as per Art. 206 para. 4 nZPO at the end of 2024 in the **summons to** a conciliation hearing that takes place after January 1, 2025. If the arbitration authority merely threatens a fine (under the old law) pursuant to Art. 128 para. 1 and para. 3 CPC, the defaulting party may not be subject to the stricter summary fine pursuant to Art. 206 para. 4 nCPC as of January 1, 2025. This is because the corresponding notice is a prerequisite for the new legal fine.

4. Decision proposal (Art. 210 para. 1 let. c nZPO)

78 In order to increase the settlement rate of the conciliation authorities, Art. 210 para. 1 let. c nZPO provides for the possibility of submitting a decision proposal to the parties in the case of other proprietary disputes involving an amount in **dispute of up to CHF 10,000**. The conciliation authority may also submit corresponding proposals for a decision in proceedings that were already pending before January 1 and are still pending on January 1, 2025 (see Art. 407 *et seq.* nZPO).

I. Initiation and statement of grounds for cantonal rulings (Art. 239 para. 1, 318 para. 2 and 327 para. 5 new CPC)

79 The CPC revision results in changes concerning **the initiation and statement of grounds for rulings**. Art. 239 para. 1 of the new Code of Civil Procedure stipulates that the decision of the court of first instance is to be issued without written grounds as a rule and that the decision is to be issued with

grounds as an exception. This also applies by analogy to the decision and grounds of **cantonal appeal and complaint decisions** (Art. 318 para. 2 and Art. 327 para. 5 of the new Code of Civil Procedure). In order to make it possible for the cantonal courts of first instance to issue their rulings without stating reasons, Art. 112 para. 2 BGG also had to be amended. Before January 1, 2025, Art. 112 para. 2 aBGG provided for an exception to the requirement to state reasons only in the case of a cantonal legal basis, which did not include the CPC as federal law. Art. 112 para. 2 nBGG now stipulates that the cantonal court shall issue its decision promptly and without stating reasons, provided that federal or cantonal law so requires. The concept of federal law includes the new Art. 239 para. 1, 318 para. 2 and 327 para. 5 nZPO.

The new provisions in the CPC are included in the catalog of Art. 407 et seq. 80
This basically means that the decision in a case that is already pending before January 1, 2025, under the new regulation, must generally be opened (unfounded). In contrast, there is no transitional provision for Art. 112 para. 2 nBGG. In my opinion, this is a legislative oversight, because during the parliamentary deliberations it was not considered that the amendment of other decrees can also have transitional legal effects. The legislature has deliberately decided that Art. 239 para. 1, 318 para. 2 and 327 para. 5 nZPO shall apply to already pending proceedings. The legislative decision cannot be reversed for sole cantonal instances and cantonal appellate courts on the grounds that Art. 112 para. 2 nBGG is not yet applicable to these proceedings. Incidentally, the transitional provision in Art. 132 para. 1 BGG can also be applied by analogy. It stipulates that for the entry into force of the BGG, i.e. on January 1, 2007, the BGG is applicable to appeal proceedings if the cantonal decision was issued on or after January 1, 2007. A **decision is deemed to have been issued if it has been** issued. The date of issue is therefore not decisive (unlike Art. 405 of the CPC; see above N. 28 f.). This would mean that it can be argued that the new Art. 112 para. 2 nBGG applies if the cantonal decision was issued on or after January 1, 2025. This means that Art. 112 para. 2 nBGG will also apply to proceedings that are already pending as of January 1, 2025.

J. New facts and evidence in appeal proceedings (Art. 317 para. 1^{bis} nZPO)

Insofar as the facts of the case are to be investigated ex officio (**unlimited in-** 81
vestigation maxim), Art. 317 para. 1^{bis} nZPO stipulates that in the appeal pro-

ceedings, new facts and evidence can be taken into account **up to the deliberation on the judgment**. In this way, the legislature codifies the case law of the Federal Supreme Court. Art. 317 para. 1^{bis} nCCP is included in the catalog of Art. 407*f* nCCP, which is irrelevant, however, because, as mentioned, the case law is codified (see above N. 10). This regulation thus applies, already based on the previous case law, to already pending proceedings.

82 For **Art. 229 nZPO** concerning the right of **appeal in first instance proceedings**, see below N. 169 ff.

K. Suspensive effect and enforceability (Art. 315 para. 5, 325 para. 2 and Art. 336 para. 1 and para. 3 nZPO)

1. Enforcement of unfounded judgments

83 Under the old law, there was uncertainty regarding the **enforceability of decisions issued without written reasons** in accordance with Art. 239 para. 1 aZPO. This uncertainty is resolved by Art. 336 para. 3 nZPO, which stipulates that such decisions are enforceable under the same conditions as a decision issued with written reasons. Since Art. 336 para. 3 nZPO is included in Art. 407*f* nZPO, this also applies to **decisions in proceedings that were already pending on January 1, 2025.** This will certainly apply to those decisions that are handed down from January 1, 2025. Decisions that were opened before January 1, 2025 without a statement of reasons are also enforceable from January 1, 2025. Thanks to Art. 407*f* nZPO, the unfounded decision takes immediate effect under the new law from January 1, 2025. As a result, the court of appeal can decide on the postponement of enforceability before it deals with the appeal or the complaint (Art. 315 para. 5 and Art. 325 para. 2 nZPO; see below N. 87 f.).

84 Art. 112 para. 2 last sentence BGG provides that the decision is not enforceable as long as the time limit for requesting a written statement of reasons has not expired unused or the complete execution of the cantonal decision has been opened. The CPC revision did not adapt this provision. Engler wonders whether this is a legislative oversight. If a **legislative oversight** is assumed, there is a substantive change. In **terms of transitional law**, Art. 132 para. 1 BGG can be applied by analogy (see above, N. 80).

2. Appeal against a judgment on the merits

Art. 315 para. 3 nZPO stipulates that an appeal against a judgment **on the merits** always has a suspensive effect. This was already the case under the previous law (Art. 315 para. 3 aZPO). This is merely a linguistic change with **no substantive or transitional relevance** (see above N. 10). 85

3. No suspensive effect in the appeal proceedings in the case of the debtor's order and the securing of maintenance (Art. 315 para. 2 lit. c and d nZPO)

Art. 315 para. 2 lit. c and d nZPO now stipulate that an appeal against decisions regarding the **debtor's instruction** and the **securing of maintenance** has no suspensive effect. Pursuant to Art. 407*f* nZPO, this change will also apply to pending proceedings as of January 1, 2025. If an appeal is already pending on January 1, 2025, the suspensive effect will no longer apply. In my opinion, the **instructed third party** must make payment to the maintenance creditor from this point in time, provided that the debtor order has been notified to him. In my opinion, the appeal court should issue the notification in order to ensure that the maintenance claim is quickly enforced by means of a debtor order. From January 1, 2025, the maintenance creditor may also demand that the maintenance debtor provide **security for the maintenance**. 86

4. Grant of early enforceability and suspension of the right to appeal by the court of appeal (Art. 315 paras. 4 and 5 and 325 para. 2 nZPO)

If the affected party is threatened with a **not easily remediable disadvantage**, the **court of appeal** may, upon request, grant early enforceability and, if necessary, order protective measures or the provision of security (Art. 315 para. 4 let. a nZPO). If the affected party is threatened with a disadvantage that cannot be easily remedied, the court of appeal may, upon request, exceptionally postpone enforceability in the cases subject to appeal under Art. 315 para. 2 nZPO and in the case of decisions subject to appeal (Art. 315 para. 4 lit. b and 325 para. 2 nZPO). The court of appeal may decide before the appeal is filed. The order shall lapse without further ado if no statement of grounds for the first-instance decision is requested or the time limit for appeal expires unused (Art. 315 para. 5 and 325 para. 2 nZPO). 87

88 These provisions apply immediately in all proceedings from January 1, 2025 (see Art. 407*f.* nZPO). Therefore, in my opinion, the application can be submitted at the beginning of the appeal or complaint period at the end of 2024 and the **appellate court** will decide on it after January 1, 2025.

V. REVISED LAW OUTSIDE THE SCOPE OF APPLICATION OF ART. 407 *ET SEQ.* NZPO

89 Numerous amended norms are not included in the catalog of Art. 407 *et seq.* nZPO. Questions of transitional law are to be answered with the help of general transitional law according to Art. 404 et seq. CPC (see above N. 19 et seq.). The solutions developed here, along with the case law of the Federal Supreme Court, assume that the conciliation procedure is not an instance of its own within the meaning of Art. 404 para. 1 CPC (see above N. 22). If the opposite view is taken, it should be noted that in those proceedings in which the action – after the conciliation proceedings have been conducted – is not filed until after January 1, 2025, the new law is already applicable in the court proceedings. It is debatable whether the general transitional law also applies to amendments outside the CPC. In my opinion, this should be affirmed in principle because these provisions are related to the revision of the CPC. However, if the other laws have their own transitional provisions, these must be applied (*lex specialis derogat legi generali*; see above N. 80 and N. 84 and below N. 154).

A. Actions against the Confederation (Art. 5 para. 1 let. f and Art. 10 para. 1 let. c nZPO)

90 The new law stipulates that the sole cantonal court is only competent for actions against the Confederation with a **value in dispute of over CHF 30,**000 (Art. 5 para. 1 let. f nZPO). Since the ordinary courts of first instance have jurisdiction for actions involving an amount in dispute of CHF 30,000 or less, Art. 10 para. 1 let. c nZPO has also been amended. It now only contains the local jurisdiction and no longer the functional jurisdiction. In these cases, the conciliation procedure is mandatory (Art. 199 para. 3 nZPO *a contrario*; see also above N. 74).

91 If **before January 1, 2025, an action** against the Confederation involving an amount in dispute of up to CHF 30,000 has been brought before the sole can-

tonal court, the **material jurisdiction of the sole cantonal court** remains (Art. 404 para. 1 CPC). This is a matter of **substantive jurisdiction**, which is why Art. 404 para. 2 CPC does not apply (see above N. 27). Accordingly, in the case of an action with a value in dispute of up to CHF 30,000 that was brought by December 31, 2024, it cannot be argued that the ordinary court of first instance is now competent to hear the case. The substantive jurisdiction continues to be assessed according to the old law. This solution makes sense because otherwise the ordinary court of first instance would have to judge a claim for which the mandatory conciliation procedure was not followed (see above N. 90 *in fine*).

B. Commercial court (Art. 6 paras. 2, 3, 4 and 6 new CCP and Art. 5 para. 3 let. c new PILA)

92 Art. 6 CPC concerning the commercial court has been amended in various ways. Regarding English as the language of proceedings, see below N. 140 f.

1. Commercial disputes (Art. 6 para. 2 new CCP)

93 According to Art. 6 para. 2 let. b new CCP, the amount in dispute must exceed CHF 30,000 or the matter must be a non-pecuniary dispute. In this way, the legislator codified the Federal Supreme Court's case law, according to which the regulation of the type of proceedings takes precedence over that of substantive jurisdiction. For this reason, the commercial court must decline jurisdiction in accordance with the Federal Supreme Court if the **simplified procedure** is applicable on the basis of a matter as defined in Art. 243 para. 2 or on the basis of a value in dispute of up to and including CHF 30,000 in accordance with Art. 243 para. 1 CPC. Since only the case law of the Federal Supreme Court has been codified, there are **no transitional issues** (see above N. 10).

94 Art. 6 para. 2 lit. c nZPO now expressly states that the parties must be registered as **legal entities** in the Swiss commercial register or a comparable foreign register. This is a result of the Federal Supreme Court's case law, according to which a natural person registered as an **organ** does not fulfill this requirement. Since, according to the Federal Supreme Court, this requirement already applied under the old law, **no transitional issues** arise (see above N. 10).

95 In contrast, Art. 6 para. 2 let. d nZPO introduces an innovation, at least in part, by deviating from the case law of the Federal Supreme Court. According to Art. 6 para. 2 let. d nZPO, a dispute arising from an employment relationship, under the AVG or from the rental and lease of residential and commercial premises as well as agricultural leases is **not commercial law**. This means that the Federal Supreme Court's case law no longer applies, according to which the commercial court has jurisdiction in the case of **disputes arising from** the **rent or lease of residential and business premises**, unless the simplified procedure is applicable (see Art. 243 para. 2 let. c CPC). Whether the commercial court has jurisdiction in the case of **labor disputes** has been controversial to date and has not been decided by the Federal Supreme Court.

96 From a transitional point of view, Art. 404 para. 1 CPC applies, according to which the procedural law in force remains applicable until the conclusion of the proceedings before the court or tribunal concerned (see above N. 21 et seq. and N. 89). This is a question of **substantive jurisdiction**, which is why Art. 404 para. 2 CPC is not applicable (see above N. 27). Accordingly, the existence of a commercial dispute is determined by the law in force at the time of the lis pendens.

97 A **rental or lease action** that was properly brought before the commercial court under the old law must continue to be judged by the commercial court on the merits even after January 1, 2025. If an action is brought before a regular first-instance (rental) court before January 1, 2025, when it should have been brought before the commercial court, the first-instance (rental) court must issue a decision of non-admission (see Art. 404 para. 1 CPC). The plaintiff cannot invoke the new substantive jurisdiction of the court of first instance (rental court) under the new law because Art. 404 para. 2 CPC is not applicable with regard to substantive jurisdiction (see above N. 27). A new action after the decision to dismiss must be filed with the commercial court within one month, with the date of the first filing being decisive for determining the lis pendens (Art. 63 para. 1 CPC; see above N. 13). Therefore, subject-matter jurisdiction continues to be determined according to the old law. If the action is not submitted to the commercial court within one month, the original lis pendens no longer applies. In this case, the subject-matter jurisdiction of the new law applies, which is why the court of first instance (rental) court or the conciliation authority is responsible for the action.

98 A **labor law suit** filed by an employee with the commercial court by December 31, 2024, is to be judged by the commercial court if it is considered to be within the jurisdiction of the commercial court under the old law (Art. 404 para. 1 CPC; see above N. 95).

99 If the Federal Supreme Court sets aside the **decision of the commercial court and refers the matter back to the commercial court,** the latter will continue to have jurisdiction after January 1, 2025 for certain tenancy and, where applicable, labor law disputes that were already pending before January 1, 2025 (see above N. 23).

2. Right to choose the plaintiff (Art. 6 para. 3 nZPO)

100 The plaintiff's choice of forum contained in Art. 6 para. 3 nZPO has been adapted to Art. 6 para. 2 nZPO. Where only Federal Supreme Court case law has been codified, there are **no transitional problems** (see already above N. 10 and N. 93 f.).

101 Since **rental and labor disputes** will not be considered commercial disputes as of January 1, 2025, the plaintiff's choice of forum can no longer be exercised for such disputes from that point on. If it has been exercised before, the commercial court remains competent (see above Art. 404 para. 1 CPC; above N. 21 et seq.). However, this only applies if jurisdiction was not already excluded under the old law (for more details, see above N. 95 et seq.).

3. International commercial disputes (Art. 6 para. 4 lit. c nZPO and Art. 5 para. 3 lit. c nIPRG)

102 Art. 6 para. 4 lit. c nZPO provides that the cantons may also declare the commercial court to have jurisdiction over **international commercial disputes** that cumulatively fulfill the following conditions: *(i)* business activities of at least one party are affected, *(ii)* the amount in dispute is at least CHF 100,000, *(iii)* the parties agree, and *(iv)* at the time of the agreement, at least one party is domiciled, habitually resident or has its registered office abroad. **Cantons without a commercial court** may set up an independent judicial chamber for international commercial disputes within their higher court within the meaning of Art. 8 CPC. In both cases, such a court may only **refuse** its **jurisdiction** if **cantonal law** provides for this (Art. 5 para. 3 let. c nIPRG). The **Cantons of Bern, Zurich** and **Geneva** are planning to set up such an inter-

national commercial court. Legal scholars have rightly pointed out that a large number of these disputes already fall under Art. 6 para. 2 nZPO.

103 From the perspective of transitional law, the question arises as to whether the parties can agree on their **agreement** before the cantonal implementing provisions come into force (see Art. 6 para. 4 let. c no. 3 nZPO). Since this is an aspect of the **legislative sovereignty of the cantons**, **cantonal (transitional) law** is primarily relevant. In the absence of such, the transitional provisions of the CPC shall apply. This consent is not an agreement on the choice of court, as it does not stipulate local jurisdiction. Therefore, Art. 406 CPC is not (analogously) applicable to substantive jurisdiction. In my opinion, Art. 407 para. 1 CPC is to be applied by analogy. According to this provision, the validity of arbitration agreements in the context of the transitional law is assessed according to the more favorable law (**principle of favorability**; *in dubio pro arbitrato*). The international commercial court is an alternative to arbitration. The parties should be able to choose this alternative to the same extent as arbitration. Therefore, an agreement under which the international commercial court is to have jurisdiction is possible even before the cantonal implementing legislation comes into force. The question is what happens if the cantonal implementing legislation for international commercial disputes has not yet come into force, but the dispute has already arisen. Since a large number of disputes already fall under Art. 6 para. 2 nZPO, the commercial court can usually be called upon without any problems. Otherwise, in my opinion, a party cannot be denied the right to call upon another court, for example to interrupt the statute of limitations, if the cantonal implementing legislation comes into force with unreasonable delay for the respective party. It is recommended that the agreement already provide for a corresponding solution, i.e. an alternative court.

4. Joinder of parties (Art. 6 para. 6 nZPO)

104 According to Art. 6 para. 6 nZPO, the **ordinary court** has jurisdiction in the case of actions brought by several parties to the dispute who are not all registered as legal entities in the commercial register or in a comparable foreign register (**attraction of jurisdiction**). The ordinary court already has jurisdiction in these cases under the applicable cantonal law and cantonal court practice. The Federal Supreme Court prohibited a transfer of jurisdiction in favor

of the commercial courts. Accordingly, Art. 6 para. 6 nZPO does not change the legal situation. Therefore, **no transitional issues** arise (see above N. 10).

C. Discovery of the ground for recusal (Art. 51 para. 3 and 328 para. 1 lit. d nZPO)

105 According to Art. 51 para. 3 nZPO, the provisions on revision only apply if the ground for recusal, which was only discovered **after the conclusion of the proceedings**, cannot be asserted with any other legal remedy. With the **primacy of the other legal remedy**, i.e. the appeal or the complaint, the legislator codified the case law of the Federal Supreme Court. In addition, the discovery of a reason for recusal after the conclusion of the proceedings was added to the list of conclusive grounds for revision in Art. 328 para. 1 CPC. Here too, the prerequisite is that no other legal remedy is available (Art. 328 para. 1 let. d nCPC). The newly introduced let. d is thus merely a completion of the previously incomplete catalog. As this is a codification of the previous case law, there are **no transitional issues** (see above N. 10).

D. Incorrect instructions on rights of appeal (Art. 52 para. 2 nZPO)

106 Art. 52 para. 2 of the new CPC stipulates that **incorrect instructions on the right of appeal** are effective vis-à-vis all courts to the extent that they favor the party invoking them. The purpose of this provision is to prevent a party from incurring disadvantages. However, it is not intended to allow new or different legal remedies than those provided for in the CPC. If an **unenforceable decision** contains information on the right of appeal, this circumstance should be taken into account in the decision of the court of appeal not to hear the case (e.g. with regard to the cost consequences). What is new is that **parties represented by an attorney** are also protected against incorrect information on the right of appeal. Several votes in parliament emphasize that Art. 52 para. 2 nZPO is also applicable to parties represented by an attorney. Clear errors remain reserved (e.g. in the case of obvious misspellings such as an appeal period of 3,000 instead of 30 days). Previously, the Federal Supreme Court generally considered that the party represented by a lawyer should have recognized the incorrect appeal instruction.

107 It is questionable whether the Federal Supreme Court's case law on incorrect instructions on the right of appeal should be corrected before the revision of March 17, 2023, comes into force. In connection with the appeal against detention under Art. 222 CrimPC, the Federal Supreme Court considered that the legislature – aware of the Federal Supreme Court's case law – had clearly spoken out against a right of appeal for the public prosecutor's office against decisions on the ordering, extension and lifting of pre-trial or preventive detention, and had thus not adopted the Federal Supreme Court's case law. This is a rare case in which the legislature has stated that, contrary to the view of the Federal Supreme Court, there is no legislative oversight, but that a right of appeal for the public prosecutor's office is not actually desired. On the basis of this better understanding, according to which the public prosecutor's right of appeal cannot be based on the CrimPC, the Federal Supreme Court returned to its practice, which it had recognized as incorrect, and adapted it on its own initiative *before the entry into force* of the new Art. 222 CrimPC. In my opinion, such a case does not exist in the case of incorrect instructions on the right of appeal. Art. 52 para. 2 nZPO is a new norm. In contrast, Art. 222 CrimPC was already enshrined in the CrimPC and the new case law of the Federal Supreme Court merely led to the already applicable legal text being implemented.

108 From a transitional law perspective, the question arises as to when **lawyers** can also invoke incorrect instructions on rights of appeal. Art. 52 para. 2 nZPO is not included in Art. 407*f* nZPO. Since Art. 52 para. 2 nZPO has an impact on the right of appeal, Art. 405 para. 1 CPC is applicable under transitional law. Accordingly, the law in force at the time of the **opening of the first-instance decision** applies (see above N. 29). Lawyers can therefore rely on incorrect instructions on rights of appeal in those decisions that are handed down from January 1, 2025. This also applies to proceedings that were already pending before January 1, 2025.

109 According to Art. 49 BGG, the parties must not suffer any disadvantage as a result of the decision not being properly notified. This includes, in particular, **incorrect or incomplete information on the right of appeal** and the **absence of information on the right of appeal** (see Art. 49 BGG). This provision applies to **appeals to the Federal Supreme Court**. Honegger-Müntener/Rufibach/Schumann take the view that this norm should also be applied more generously in the future to parties represented by lawyers. If this view is

correct, the question arises under transitional law from which point in time female lawyers will also benefit from the protection of Art. 49 BGG. Art. 132 para. 1 BGG can be applied analogously in this regard. Accordingly, the BGG applies to appeal proceedings if the contested decision was made after the BGG came into force (see above, N. 80). Article 49 BGG is therefore to be applied more generously to decisions made after January 1, 2025.

E. Right of reply (Art. 53 para. 3 nZPO)

The right to reply is now expressly enshrined in Art. 53 para. 3 of the new 110
Code of Civil Procedure (nZPO). According to Art. 53 para. 3 nZPO, the parties may comment on all submissions of the other party. The court sets them a **deadline of at least ten days** for this purpose. This can be extended as a court deadline in accordance with Art. 144 of the Code of Civil Procedure (CPC). If the deadline is not met, it is assumed that the parties have waived their right to reply. Under the old law, the Federal Supreme Court provided that the parties could simply be served with the submissions without the court having to set a formal deadline. There had to be sufficient time between the submission of the submission and the issuance of the decision to allow the party to submit its response. If the party that received a submission **without a deadline being set** and wanted to comment on it, it had to do so immediately or at least request an extension. Otherwise, the Federal Supreme Court assumed that the party waived the right to make a further submission.

Art. 53 para. 3 nZPO is not included in Art. 407*f.* nZPO, which is why Art. 404 111
f. CPC apply (see above N. 20 et seq.). For **proceedings that were pending** on January 1, 2025, the previous case law continues to apply (see Art. 404 para. 1 CPC). The previous law does not preclude the **setting of deadlines**. This means that courts can set deadlines regardless of the date of lis pendens. This considerably simplifies the day-to-day work of the courts, as they issue numerous orders on a daily basis and do not have to check the lis pendens. In **appeal proceedings**, Art. 53 para. 3 nCPC is applicable provided that the judgment was handed down on or after January 1, 2025 (see Art. 405 para. 1 CPC; supra N. 29).

F. Simple joinder of parties (Art. 71 nCPC)

112 Art. 71 nZPO has been reformulated and restructured, but **no changes have been made to the content**. Art. 71 para. 1 lit. c nZPO stipulates that in the case of simple joinder of parties, the **same court** must have **material jurisdiction**. This codifies the previous case law of the Federal Supreme Court. In the absence of substantive changes, **no transitional legal issues** arise (see above N. 10).

G. Third-party proceedings (Art. 81 and Art. 82 para. 1 nZPO)

113 All the requirements for third-party proceedings are now contained in Art. 81 para. 1 nZPO. Art. 81 para. 1 lit. a nZPO now stipulates that the claims must be **factually connected to the main action**. This is intended to make it clear that, in addition to (potential) recourse claims, warranty and indemnity claims can also be asserted by means of a third-party notice action. This was already undisputed under the previous law. The requirement of substantive jurisdiction has so far been derived from the case law of the Federal Supreme Court and is now explicitly codified (see Art. 81 para. 1 lit. b nZPO). Art. 81 para. 1 let. c nZPO stipulates that both the main action and the third-party action are to be assessed in the ordinary proceedings. Art. 81 para. 3 of the old Code, according to which third-party proceedings were inadmissible in simplified and summary proceedings, was deleted because it would have been redundant with Art. 81 para. 1 let. c of the new Code. The Federal Supreme Court and prevailing opinion already required that **both actions** be subject to the **ordinary procedure**. In this regard, in the absence of substantive changes, there are **no transitional issues** (see above N. 10).

114 The addition of the words *"[claims] that it fears from the person summoned to the dispute"* expressly provides in the new law that the third-party action can also be a **negative declaratory action** (Art. 81 para. 1 nZPO). The prevailing doctrine rightly affirmed this under the previous law. In contrast, Göksu rejects the negative declaratory action as a third-party action under the previous law. Only if one follows Göksu, the question arises from a transitional law perspective as to when a negative declaratory action can be filed as a third-party action. If the main action was already pending before January 1, 2025, the third-party action can only be judged in the same proceedings if it is admissible under the old law (Art. 404 para. 1 CPC). According to Göksu, the action for negative declaratory judgment is inadmissible, which is why it would

not be admissible. This regulation also makes sense if one agrees with Göksu (*quod non*). As a result, it is foreseeable for the plaintiff when raising his claim which third-party actions brought by the defendant can also be assessed in the same proceedings.

115 If the relief sought in the third-party action concerns the same performance as that to which the third-party is obliged in the main proceedings, these do not have to be quantified (Art. 82 para. 1 nZPO *in fine*). Accordingly, **recourse actions** do not **have to be quantified** in the application for admission. This avoids the risk of the party giving notice of the action bringing an action for recourse that is too broad or too narrow, which can also lead to cost consequences if the action is too broad. For proceedings or main actions that were pending before January 1, 2025, the previous law applies (see Art. 404 para. 1 CPC). Accordingly, in these proceedings, a recourse action, as provided for under the previous law, must also be quantified from January 1, 2025. There is no indication of a legislative oversight. Art. 82 para. 1 nZPO was already included in the draft, which is why it cannot be assumed that this provision was inadvertently not integrated into Art. 407*f* nZPO. Moreover, it is clear from the commission minutes that Art. 82 para. 1 nZPO *in fine* is one of the provisions of procedural coordination that were expressly not intended to be included in Art. 407*f* nZPO (see also above N. 4).

H. Setting of a time limit for the quantification of an unquantified claim (Art. 85 para. 2 nZPO)

116 The previous law did not specify a time limit for **subsequently quantifying** an unquantified claim. A **time limit** for subsequent quantification by the court is now provided for (Art. 85 para. 2 nZPO). The court must set a time limit for quantifying the claim after the conclusion of the evidence proceedings or after the parties or third parties have provided information. Case law has denied the court's obligation to set a deadline, at least in the case of parties represented by lawyers. Some scholars advocated a court deadline.

117 Since there is no evidence of an editorial error, according to which the insertion of Art. 85 para. 2 nZPO in Art. 407*f* nZPO was forgotten, the **general transitional law** is applicable. Therefore, in proceedings that were suspended before January 1, 2025, the plaintiff may not rely on the court setting a deadline for the quantification of the claim (see Art. 404 para. 1 CPC; supra N. 21 et seq.).

I. Objective joinder of claims (Art. 90 para. 2 nZPO)

118 Art. 90 para. 2 nCPC provides that objective joinder of claims is also admissible if a difference in substantive jurisdiction or type of proceedings is based solely on the amount in dispute. This codifies the Federal Supreme Court's case law, according to which the admissibility of objective joinder of claims is based on the amount in dispute pursuant to Art. 93 CPC. However, the objective joinder of claims is excluded if the different types of proceedings are based on the nature of the individual claims (e.g. protection against termination under tenancy law within the meaning of Art. 243 para. 2 let. c CPC with pecuniary claims of more than CHF 30,000, which would be assessed in the ordinary proceedings). In a recent decision, the Zurich Commercial Court considered that in the event of an objective aggregation of claims, only the amount in dispute of the main claim was decisive because the amount in dispute of the alternative claim was not added in accordance with Art. 91 para. 1 CPC. The commercial court therefore admitted the possible objective aggregation of claims, although the amount in dispute of the alternative claim was less than CHF 30,000. In the absence of a substantive change, **no transitional issues** arise (see above N. 10).

119 If different procedural types are applicable for the individual claims, they are assessed together in the **ordinary procedure** in accordance with Art. 90 para. 2 nZPO. In this way, the legislator makes it clear, on the one hand, that there is no mixing of different procedural types. In addition, it follows from the legislative history that individual provisions of the simplified procedure are not applied in the ordinary procedure. If one were to assume the opposite of the view presented here – contrary to the view presented here – the previous law still applies to those proceedings that were already pending before January 1, 2025 (see Art. 404 para. 1 CPC; above N. 21 et seq.).

120 The Federal Supreme Court left open the question of whether there must be an **objective connection** between the accumulated claims. The legislator implicitly decided against it because this requirement – despite being mentioned in the preliminary draft – was not included in the final version. If this requirement is assumed under the current law, an objective connection would have to be examined for the proceedings **that had already become pending before January 1, 2025** (see Art. 404 para. 1 CPC; supra N. 21 et seq.).

J. Amount in dispute and costs law

121 The amendments in the area of the amount in dispute and costs law are **not included in Art. 407** ***et seq.*** **nZPO.** Accordingly, for proceedings that were already pending on January 1, 2025, the previous costs law applies until the conclusion before the instance concerned (see Art. 404 para. 1; above N. 21 et seq.). For the determination of court costs and party compensation in the decision-making procedure before the conciliation authority in accordance with Art. 212 para. 3, see below N. 164 f.

1. Amount in dispute in the case of a negative declaratory counterclaim (Art. 94 para. 3 nZPO)

122 If the **main action is a partial action**, the procedural costs are calculated according to Art. 94 para. 3 nZPO solely on the basis of the **amount in dispute of the main action**. This limits the plaintiff's risk of procedural costs if the defendant files a counterclaim for a negative declaration. The wording, which also covers other counterclaims in the case of partial actions, is to be restricted teleologically, since the legislature only wanted to reduce the cost risk there. The higher amount in dispute of the counterclaim for a negative declaration is therefore not decisive. Thus, the defendant who raises the counterclaim does not bear any additional legal costs risk. Meanwhile, the party compensation is also calculated only on the basis of the amount in dispute of the partial claim.

123 In **proceedings with a partial claim and a negative declaratory counterclaim that were already pending on January 1,** 2025, the previous law applies (see Art. 404 para. 1; above N. 21 et seq.). It is questionable whether this also applies if only the partial claim was pending and the counterclaim for a negative declaration only becomes pending after January 1, 2025. This case arises if the statement of defense with a counterclaim for a negative declaration is abandoned after January 1, 2025. In my opinion, Art. 94 para. 3 nZPO is not applicable in this constellation. This main action was already pending under the previous law, which is why the previous law continues to apply based on Art. 404 para. 1 CPC (see N. 26 above). Since the other changes regarding the amount in dispute and the law on costs are also not included in Art. 407*f* nCPC (see above N. 121), it cannot be assumed that Art. 94 para. 3 nCPC was inadvertently not included in the catalog of Art. 407*f* nCPC.

124 Art. 94 CPC also applies in **appeal proceedings**. If the judgment in the proceedings concerning the partial claim is handed down after January 1, 205, Art. 94 para. 3 nCPC applies to the appeal proceedings (Art. 405 para. 1 CPC; supra N. 28 f.). This is a new instance (cf. Art. 404 para. 1 CPC; supra N. 22).

2. Representative actions (Art. 94*a* new CPC)

125 Under the current law, in the case of negatory representative actions within the meaning of Art. 89 CPC, the court sets the amount in dispute based on Art. 91 para. 2 CPC if the parties are unable to agree on it or if the information provided is manifestly incorrect. In doing so, the court based its decision on the **collective interests of the persons concerned**. Article 94*a* nZPO therefore provides that the court shall set the amount in dispute at its discretion if the parties are unable to agree on it or if the information provided is obviously incorrect. In doing so, the court must take into account the **interests of the individual members of the group concerned** and the **significance of the case**, in accordance with the message.

126 Negatory class actions that were already pending before January 1, 2025, do not benefit from Art. 94*a* nZPO. Since Art. 94*a* new CPC also applies in appeal proceedings, this provision is also applicable in appeal proceedings for class actions already pending before January 1, 2025, if the first instance decision was issued on or after January 1, 2025 (Art. 405 para. 1 CPC; see above N. 28 f.).

3. Tariffs and entitlement to representation (Art. 96 nZPO)

127 For reasons of clarity and transparency, Art. 96 para. 1 nZPO expressly reserves the regulation of fees under Art. 16 para. 1 SchKG to the cantons' authority over tariffs. Under the old law, Art. 16 SchKG was already considered a *lex specialis* to the CPC, which is why court costs were determined in accordance with Arts. 48 and 61 GebV SchKG. In the absence of substantive changes, Art. 96 para. 1 nZPO does not give rise to **any transitional problems** (see above N. 10).

128 Art. 96 para. 2 nZPO provides that the **lawyer** has an **exclusive claim to the fees and expenses awarded as party compensation**. Such regulations (so-called *distraction des dépens*) exist in French-speaking Switzerland. In the **Canton of Vaud**, a corresponding norm still exists today in Art. 47 para. 1 LPAv (*"L'avocat a un droit personnel exclusif aux honoraires et débours qui*

sont alloués par le jugement ou l'arrêt à titre de dépens, sous réserve de règlement de compte avec son client."). Under the previous law, this standard is not applicable due to the primacy of federal law (see Art. 49 para. 1 FC).

From a transitional law perspective, the question arises as to when cantonal 129
legislation within the meaning of Art. 96 para. 2 nCPC applies. When the CPC was enacted, the transitional law for areas within the **cantonal jurisdiction** fell within the **legislative sovereignty of the cantons**. If there is no legislation, an analogous application of Art. 404 f. CPC. However, with regard to Art. 96 para. 2 nZPO, the federal transitional law applies, i.e. Art. 404 f. CPC, because this area will only fall under the jurisdiction of the cantons with the revision of March 17, 2023. Previously, there was no possibility of *distraction de dépens* under federal law. Accordingly, the previous federal civil procedural law applies to proceedings that are pending when such a regulation comes into force, which is why lawyers in these proceedings have no exclusive claim to the fees and expenses that apply as party compensation. For the appeal proceedings, the cantonal regulation concerning a *distraction de dépens* applies if the first-instance decision was opened after the cantonal regulation came into force (Art. 405 para. 1 CPC; see above N. 29). In the **canton of Vaud**, Art. 47 para. 1 LPAv can be reactivated. This means that from January 1, 2025, a cantonal regulation within the meaning of Art. 96 para. 2 nZPO will exist in the canton of Vaud.

4. Advance on costs (Art. 98 nZPO)

Pursuant to Art. 98 nZPO, the court may demand an advance payment from 130
the claimant up to the amount of the presumed court costs. Art. 98 para. 1 nZPO stipulates that the court may demand a maximum of **half of the presumed court costs**. This is intended to make it easier to enforce a claim. Art. 98 para. 2 nCPC provides for the following exceptions to the principle in Art. 98 para. 1 nCPC: *(i)* **international commercial disputes** within the meaning of Art. 6 para. 4 lit. c nCPC (see above N. 102 f.) and **direct actions before the higher court** within the meaning of Art. 8 CPC, *(ii)* **conciliation proceedings**, *(iii)* **summary proceedings** with the exception of provisional measures and family disputes under Articles 271, 276, 302 and 305 CPC and *(iv)* **appeal proceedings**. In all exceptions, the court may – as under the previous law – demand an advance payment of up to the total amount of the presumed court costs (Art. 98 para. 2 nCPC).

131 In the case of **proceedings that were already pending on January 1, 2025,** the previous law applies in accordance with Art. 404 para. 1 CPC (see above N. 20 et seq.). Accordingly, the portion that exceeds half of the advance on costs will not be reimbursed. Jent-Sørensen mentions that the appeal could already have *"advance effects"* because the advances on costs would have to be set lower beforehand. She is also right to mention that there is no entitlement to this.

132 Since an advance payment of up to the amount of the presumed court costs can still be requested for **appeal proceedings**, it is irrelevant with regard to the advance payment of costs whether the appeal proceedings are subject to the previous or the new law (Art. 98 para. 2 let. d nZPO; see above N. 10).

5. Principles for the allocation of costs in the event of multiple parties (Art. 106 para. 3 nCPC)

133 Art. 106 para. 3 CPC governs the allocation of procedural costs in the event of **several main and/or secondary parties**. Art. 106 para. 3 sentence 1 of the new CCP specifies that the court shall determine the share of the legal costs *"in proportion to their participation"*. This is merely a clarification and does not constitute a substantive change. Therefore, **no transitional issues** arise with regard to Art. 106 para. 3 sentence 1 of the new CCP (see above N. 10).

134 Art. 106 para. 3 sentence 2 nZPO will in future only allow **joint and several liability** in the event of a **necessary joinder of parties**. Under the previous law, the court could also rule on joint and several liability in the event of a simple joinder of parties (Art. 106 para. 3 aZPO). This reduced the high risk of legal costs in the event of (larger) joinder of parties in mass damage cases. Art. 106 para. 3 aCPC (Art. 404 para. 1 CPC; supra N. 21 et seq.) applies to proceedings that were already pending on January 1, 2025. Art. 106 CPC also applies in appeal proceedings. Accordingly, if the first-instance decision was issued on or after January 1, 2025, the new law applies in the appeal proceedings (Art. 405 para. 1 CPC; above N. 28 f.). If the court of appeal leaves the allocation of the costs of the appeal proceedings to the lower court in the remittal decision, in my opinion the lower court must also apply Art. 106 para. 3 nZPO when allocating the costs of the appeal proceedings. This also applies if the lower court in turn has to apply the previous law to its own proceedings (see above N. 23). This is because the procedural costs of the appeal proceed-

ings are not an aspect of the first-instance proceedings, which is why the previous law does not apply to them.

6. Liquidation of procedural costs (Art. 111 paras. 1 and 2 nZPO)

Under the old law, the **prevailing plaintiff** bore the **collection and insolvency risk** for the court costs, in that the advances he had made were offset against the court costs (Art. 111 para. 1 aZPO). The unsuccessful defendant liable for costs had to pay the advances made to the successful plaintiff (Art. 111 para. 2 aZPO). Under the new law, the costs advance paid by the claimant can only be offset if the claimant loses the case (at least in part). Otherwise, the **advance must be refunded** and the court must collect the court costs from the defendant (Art. 111 para. 1 nZPO). This means that the **collection and insolvency risk** will in future lie with the **canton**. 135

For those proceedings that were pending on January 1, 2025, the cantons will continue to benefit from the previous law, i.e. Art. 111 aCPC (Art. 404 para. 1 CPC; supra N. 21 et seq.). Art. 111 CPC also applies in **appeal proceedings**. If the first instance judgment was handed down on or after 1 January 2025, Art. 111 nCPC applies in the appeal proceedings (Art. 405 para. 1 CPC; see above N. 28 sq.). 136

7. Advance on court costs and security for acts of judicial assistance (Art. 11*b* nIPRG)

Art. 11*b* PILA concerns the advance for presumed court costs and the security for a possible party compensation in the event of **legal assistance in civil matters** to be carried out in Switzerland. The reference in Art. 11*b* nPILA continues to be made to the CPC, with only the abbreviation being used instead of the full reference with date. It is therefore only an editorial adjustment. In the absence of a substantive change, there are **no transitional issues** here (see above N. 10). In practice, it should be noted that various international treaty provisions take precedence over the CPC. 137

K. Language of proceedings (Art. 129 para. 2, 251*a* para. 2 and 356 para. 3 sentence 2 nZPO and Art. 42 para. 1bis nBGG)

1. Ordinary civil proceedings (Art. 129 para. 2 let. a nZPO)

138 From January 1, 2025, cantonal law may provide that a **different national language** be used at the request of all parties (Art. 129 para. 2 let. a nZPO). These are national languages that have not already been designated as official languages in the relevant court region. **Neither party may waive** the official language of the competent canton within the meaning of Art. 129 para. 1 CPC before the dispute arises. A statement of defence in the same national language as the statement of claim, which was itself written in an official language other than those referred to in Art. 129 para. 1 CPC, is to be regarded as implied consent by the defendant to the plaintiff's claim (*"Einlassung"*).

139 The **cantons** are autonomous within the framework of Art. 129 para. 2 nZPO with regard to the admission of other national languages as procedural languages. Accordingly, the cantons may also create a transitional legal provision. However, cantonal regulations that are applicable to proceedings **already pending on January 1, 2025** would be inadmissible. This is because previously, under the Federal Code of Civil Procedure, there was no cantonal competence (see also above N. 129). Otherwise, Art. 404 para. 1 CPC applies, according to which proceedings that are already pending when the cantonal regulation comes into force are to be continued under the previous law (above N. 21 et seq.). If a first-instance judgment was handed down after the cantonal regulation came into force, the parties may request another national language in the appeal proceedings (Art. 405 para. 1 CPC; supra N. 28 f.).

2. International commercial disputes (Art. 129 para. 2 let. b nCPC)

140 In international commercial disputes within the meaning of Art. 6 para. 4 let. c nZPO before the commercial court or the ordinary court, the parties may, if permitted by cantonal law, agree to use **English as the language of the proceedings** (Art. 129 para. 2 let. b nZPO). In contrast to Art. 129 para. 1 let. a nZPO, a prior waiver of the official language is also permissible. Therefore, the parties can already stipulate (in the choice of court agreement) that English be the language of the proceedings. In this case, the choice of court agreement is to be qualified as a request by the parties. Likewise, the defen-

dant may implicitly consent to the plaintiff's application by using English in the statement of defense (*"Einlassung"* – statement of defense).

From a transitional law perspective, the same applies as stated in N. 139 regarding Art. 129 para. 2 let. a nZPO. Accordingly, it must be determined in each case whether a cantonal transitional provision exists. The choice of English as the language of proceedings can – subject to any cantonal law to the contrary – be made even **before the cantonal regulation** within the meaning of Art. 129 para. 2 let. b nZPO comes into force. This allows the principle to be realized that new procedural law is generally applicable immediately (see above N. 4 and N. 11). In addition, this strengthens the autonomy of the parties. Finally, it should be noted that the question of English as the language of proceedings does not arise in appeal proceedings because the commercial court or the higher court has final and binding authority in international commercial disputes (Art. 6 paras. 1 and 8 para. 2 CPC). 141

3. Arbitration (Art. 251*a ZPOa* para. 2 and 356 para. 3 sentence 2 nZPO)

In **summary proceedings** under national and international arbitration law, cantonal law may provide that **English be used as the language of the proceedings** at the request of all parties, provided that English is used for the arbitration agreement or clause or as the language of the proceedings in the arbitration (Art. 251*a para.* 2 and Art. 356 para. 3 sentence 2 nZPO). Since **appeals and revisions against arbitral awards** are excluded from the scope of the summary proceedings, in my opinion, cantonal law cannot provide for English as the language of proceedings in these proceedings (see Art. 356 para. 3 in conjunction with para. 1 lit. a CPC). This follows, on the one hand, from the systematic position of Art. 251*a* CPC in Title 5 of the CPC on summary proceedings. On the other hand, appeals and applications for review are more extensive proceedings, which is why a cantonal court requires more expertise and resources to conduct them in English. Therefore, in my opinion, it can be assumed that the legislature did not want to grant the cantons this option. 142

From a transitional point of view, the same applies as stated in N. 139. Of course, Art. 251*a* para. 2 and Art. 356 para. 3 sentence 2 nZPO also apply to summary proceedings whose associated **arbitration agreement or clause was concluded before the cantonal provision came into force**. Since a request from all parties is required in any case, only one additional option is 143 provided. This does not result in any disadvantages for the parties to the arbitration proceedings.

4. Proceedings before the Federal Supreme Court (Art. 42 para. 1^{bis} nBGG)

144 If the lower court in a civil matter conducted the proceedings in English, the **legal documents** in the proceedings before the Federal Supreme Court may be drafted in English (Art. 42 para. 1^{bis} BGG). However, the Federal Supreme Court conducts the proceedings in an official language (Art. 54 para. 1 BGG). It is rightly proposed that in the case of English-language decisions, an official language of the cantonal court of lower instance should be used because the Federal Supreme Court opens its judgment to the cantonal court of lower instance.

145 In terms of transitional law, Art. 132 para. 1 BGG (by analogy) is applicable (see above N. 80 for details). If the **cantonal judgment was rendered after January 1, 2025,** Art. 42 para. 1^{bis} nZPO applies as new law. In this case, the parties may submit their written submissions in English.

L. Content of the summons (Art. 133 let. d nZPO)

146 Art. 133 let. d nCCP was enacted in connection with the **use of electronic means** (see above N. 38 et seq.). When electronic means are used to transmit sound and images, the summons must indicate the **required availability**. Since all provisions on the use of electronic means are contained in Art. 407*f.* nCCP, this is likely to be an editorial oversight. Art. 133 lit. d nZPO will therefore also apply **from January 1, 2025** in all proceedings, although summonses to the corresponding procedural acts may already be issued before January 1, 2025. In this regard, reference is made to the comments above in N. 18 and N. 38 et seq.

M. Start of the time limit for A Mail Plus (Art. 142 para. 1^{bis} new CPC)

147 Art. 142 para. 1^{bis} new CPC concerns *"other mail"* within the meaning of Art. 138 para. 4 CPC, i.e. **not summonses, orders and judgments**. The latter are served by registered mail or in some other manner against receipt (Art. 138 para. 1 CPC). These items are delivered by means of **A Mail Plus**. There is no

receipt by the recipient. However, there is a **tracking option until the letter is dropped in the letterbox or P.O.** Box. Under the previous law, a period of time begins on Saturday when a delivery is made by A Mail Plus (see Art. 142 para. 1 CPC). If the letterbox or P.O. box is emptied after the weekend, this is not readily apparent. To do so, the label "A+" would have to be scanned, for example, which would allow the delivery date to be determined using the Swiss Post app. Art. 142 para. 1^{bis} nZPO now stipulates that delivery is deemed to have taken place on the **next working day** if delivery of an *'other item'* as defined in Art. 138 para. 4 CPC takes place on a Saturday, Sunday or a public holiday recognized by federal or cantonal law at the place of jurisdiction. If a document is served at the weekend, it is deemed to have been served on Monday and the time limit does not start to run until Tuesday. In practice, the *"other consignments"* within the meaning of Art. 138 para. 4 CPC are generally not consignments that trigger a time limit. Therefore, Art. 142 para. 1^{bis} nCPC is of little practical relevance. As an exception, Jeandin cites a delivery that the court interprets as information but that is perceived by one of the parties as a decision and is contested with an appeal (see Art. 319 para. 2 let. b CPC).

Art. 142 para. 1^{bis} nZPO could easily be applied immediately, i.e. from January 148
1, 2025, to all proceedings, like the provisions in Art. 407*f* nZPO. Since there is no evidence of an editorial error, according to which the insertion in Art. 407*f* nZPO was forgotten, it can be assumed that the **general transitional law is applicable**. Accordingly, in the case of proceedings that are already pending, the previous law continues to apply until the conclusion of the proceedings before the instance concerned (Art. 404 para. 1; above N. 21 et seq.).

N. Suspension of time limits (Art. 145 para. 4 nCPC and Art. 56 para. 2 nSchKG)

Art. 145 para. 4 nCPC and Art. 56 para. 2 nSchKG are intended to simplify the 149
coordination of the suspension of time limits between the CPC and the SchKG. Art. 145 para. 4 nZPO stipulates that the suspension of time limits under the CPC applies to *"actions under the SchKG"*. Similarly, Art. 56 para. 2 nSchKG refers to the suspension of time limits under the CPC for actions under the SchKG. The provisions of the CPC also apply to the **time limits for filing an action** under the SchKG (e.g. the action to contest the debt [Art. 83 para. 2 SchKG]). According to the prevailing view, **requests in summary proceedings** are not included in the *"actions under the SchKG"* mentioned in Art.

145 para. 4 nZPO. The court vacations according to the CPC do not apply in summary proceedings (Art. 145 para. 1 let. b CPC). In the event of an **appeal to the cantonal supervisory authority**, the suspension of the deadlines under the CPC is not applicable – as in the previous law (Art. 145 para. 4 sentence 2 new CPC). The **(exceptional) extension or reinstatement** of (action) deadlines under SchKG is also governed by Art. 33 paras. 2 and 4 SchKG under the new law. Art. 145 para. 4 nZPO only regulates the scope of the suspension of deadlines.

150 Previously, the Federal Supreme Court applied the debt collection holiday if the period was triggered by an **enforcement action within the meaning of Art. 56 SchKG**. According to the previous case law of the Federal Supreme Court, for example, the period for filing an action for denial within the meaning of Art. 83 para. 2 SchKG begins with the commencement of debt enforcement proceedings, which is why the provisions on the debt enforcement holidays are applicable. Accordingly, the period for filing an action for denial is extended in accordance with Art. 63 sentence 2 SchKG. If the end of the period falls during the debt collection holidays, the period is extended until the third day after the end of the holidays, whereby Saturday, Sunday and state-recognized holidays are not counted (so-called **expiration suspension**). According to the message on the enactment of the Federal CPC, this also applies to actions of objection, joinder and attachment.

151 For those proceedings that are already pending on January 1, 2025, the suspension of the limitation period is assessed according to the previous case law of the Federal Supreme Court (Art. 404 para. 1 CPC; above N. 21 et seq.). If the decision was issued after January 1, 2025, the new law applies to the appeal proceedings, including the time limit for the appeal, i.e. Art. 145 para. 4 nCPC (Art. 405 para. 1 CPC; above N. 28 f.).

152 The question arises as to which deadline regulation applies to the deadlines for action **provided for in the SchKG for actions under the SchKG**. The amendment has an effect, for example, on the action to deny within the meaning of Art. 83 para. 2 SchKG (see above N. 149 f.). The question arises as to what happens if the decision to allow the objection is served before January 1, 2025. The law does not provide a clear answer to this. The following examples illustrate how the time limit for the action to deny recognition runs:

153 The decision to allow the objection is served on the debtor on December 17, 2024 (i.e., before the debt collection and court vacations). The following variants are conceivable:

- **Application of the previous law**: The debt collection vacation within the meaning of Art. 63 SchKG does not suspend the deadline. The deadline falls on **January 6, 2025** and thus not during the debt collection vacation, which expires on January 1, 2025. Therefore, there is no suspension of the period within the meaning of Art. 63 sentence 2 SchKG (see above N. 150).
- **Application of the new law**: When the new law is applied, the period is suspended from December 18, 2024 to January 2, 2025 (Art. 145 para. 1 let. c and 146 para. 1 CPC). The twenty-day period therefore begins on January 3, 2025 and ends on **January 22, 2025** (Art. 146 para. 1 CPC).
- **Application of the previous and the new law (mixed variant)**: Until December 31, 2024, the running of the deadline was not suspended due to Art. 63 SchKG and 14 days of the deadline expired). On January 1 and 2, 2025, the deadline is suspended. The deadline expires on **January 8, 2025** (remaining 6 days).

154 **No express transitional provisions** exist with regard to the law of time limits. The mixed variant is ruled out *a priori* because intertemporal law generally leads to the application of either the previous or the new law (*"either-or law"*; supra N. 1). The existing gap can be resolved by referring to **Art. 2 para. 2 SchlB SchKG**. This is the transitional provision of the partial revision of the SchKG of December 16, 1994, which came into force on January 1, 1997. Art. 2 para. 2 SchlB SchKG stipulates that the previous law applies to the length of deadlines that began before January 1, 1997. By implication, this means that the other aspects, including compliance with and calculation of the time limit, are governed by the new law. **Compliance with the time limit for the action to deny the debt** is thus governed by the **new law**, which is most favorable for the debtor. This also implements the principle that new procedural law is in principle to be applied immediately (see above N. 11). Nevertheless, as a **precaution,** it is recommended to apply the **previous law**.

155 The judgment to vacate the judgment debt is **served on the debtor on December 18, 2024** (i.e. during the debt collection and court vacations). The following variants are conceivable:

- **Application of the previous law**: The service of the judgment to set aside the objection, which constitutes a debt enforcement act, took place during the debt enforcement vacation. According to the Federal Supreme Court, the debt enforcement act is neither void nor contestable during the debt enforcement vacation, but takes legal effect on the first day after the debt enforcement vacation. Thus, the decision is deemed to have been served on January 2, 2025. The time limit for filing the action to contest the debt collection order thus begins on January 3, 2025 (Art. 31 SchKG in conjunction with Art. 142 para. 1 CPC). Accordingly, the time limit expires on **January 22, 2025**.
- **Application of the new law**: The decision to allow the appeal is served during the court vacations (see Art. 145 para. 1 let. c CPC). If the decision is served during the court vacations, the time limit begins on the first day after the end of the court vacations (Art. 146 para. 1 CPC). The period therefore begins on January 3, 2025, and this day is deemed to be the first day of the period. The period therefore expires on **January 22, 2025**.
- **Application of the previous and new law (combined variant)**: During the debt collection vacation in December 2024, the decision has no legal effect. On January 1, 2025, it is a matter of service during the judicial vacations, which is why the period is suspended until January 2, 2025 (see Art. 145 para. 1 let. c and 146 para. 1 CPC). The period thus begins on January 3, 2025, with this day being deemed the first day of the period. Accordingly, the period expires on **January 22, 2025**.

156 This example leads to the **same result** for all variants, which is why **no transition-related problem** arises. Otherwise, the same would also apply to the previous example (see <u>N. 154</u> above).

O. Conciliation proceedings

157 Some provisions on the conciliation proceedings are not contained in Art. 407 *et seq.* nZPO and are commented on in this section. For the provisions contained in Art. 407 *et seq.* nZPO, see above <u>N. 66</u> et seq.

1. Personal Appearance in Conciliation Proceedings (Art. 204 para. 1 sentence 2, para. 2 and para. 3 let. a and let. d nCPC)

158 Art. 204 CPC governs personal appearance in conciliation proceedings. Failure to comply with the obligation to appear in person will result in **default of appearance** in accordance with Art. 206 CPC (see above N. 76 f.). The CPC now explicitly regulates how the obligation to appear in person at the conciliation hearing is to be interpreted in the case of a legal person as a party (Art. 204 para. 1 nCPC). The new Art. 204 para. 1 nZPO reflects the case law of the Federal Supreme Court, according to which an **organ** or a **person who has a commercial power of attorney to conduct proceedings and conclude a settlement and is familiar with the subject matter of the dispute** must appear. Since the case law of the Federal Supreme Court has been codified, it is irrelevant that Art. 204 para. 1 nZPO only applies to proceedings that become pending as of January 1, 2025 (see above N. 10).

159 Art. 204 para. 2 nZPO speaks of the *"parties"* and not, as in Art. 204 para. 2 aZPO, of *"they"*. This linguistic adjustment does not lead to any substantive change and is therefore insignificant in terms of transitional law (see above N. 10).

160 In the first exception to the personal appearance at the conciliation hearing, the legislator added the *"registered office"* **of the legal person** in Art. 204 para. 3 let. a nZPO. This does not change the content, because the exception already applied to legal entities with a foreign or out-of-canton registered office (see above N. 10).

161 The revision introduced a **fourth exception to the obligation to appear in person**, namely if one of several plaintiffs or defendants is present and authorized to represent the **other plaintiffs or defendants and to conclude a settlement on their behalf** (Art. 204 para. 3 let. d nZPO). The purpose of this regulation is to avoid that in neighborhood and property disputes, all neighbors or co-owners have to appear in person at the conciliation hearing. Since Art. 204 para. 3 lit. d nZPO is not included in the catalog of Art. 407*f* nZPO, this exception only applies to conciliation proceedings that became pending as of January 1, 2025. If possible, it is advisable to wait with the submission of the conciliation request in such cases. There is no indication that Art. 204 para. 3 let. d nZPO was inadvertently not included in the catalog of Art. 407*f* nZPO. Therefore, no legislative oversight can be assumed as to why

the provision is not applicable to proceedings already pending on January 1, 2025.

2. Time limit for filing an action after leave to intervene has been granted (Art. 209 para. 4 new CCP)

162 Art. 209 para. 4 sentence 2 old CCP contained a reservation in favor of further statutory and judicial time limits for filing an action. The Federal Council proposed to delete the reservation regarding **judicial time limits for filing an action** without replacement. In cases in which the court sets a time limit for filing an action, the conciliation proceedings do not apply (Art. 198 let. h CPC). Therefore, the proviso in Art. 209 para. 4 sentence 2 aCPC concerning court action periods was meaningless. The Federal Council therefore proposed that the court action periods in Art. 209 para. 4 aCPC be deleted. Parliament went a step further by also abolishing the reservation regarding **statutory deadlines for action**. This means that the shorter ten-day period for an attachment enforcement action in Art. 279 SchKG does not take precedence over the three-month period for action within the meaning of Art. 209 para. 3 CPC.

163 Art. 209 para. 4 nZPO only applies to **proceedings that become pending as of January 1, 2025** because the standard is missing from the catalog of Art. 407*f* nZPO. This means that the time limit for filing an action following the granting of an application for attachment in the case of proceedings that are **already pending** continues to be governed by Art. 279 SchKG (see Art. 404 para. 1 CPC; supra N. 21 et seq.). If, contrary to the case law of the Federal Supreme Court, the conciliation proceedings are considered to be a separate instance, the new law is applicable (see above N. 22). This is because the Federal Supreme Court considered that the conciliation proceedings are concluded after the statement of claim has been approved. Consequently, the court vacations also apply to the time limit for filing an action because Art. 145 para. 2 let. a CPC is not applicable. As a precaution, the action in proceedings in which the request for conciliation was filed before January 1, 2025, must be filed within the ten-day period provided for in Art. 279 SchKG.

3. Determination of court costs and party compensation in the event of a decision by the conciliation authority (Art. 212 para. 3 nZPO)

164 In the case of a decision by the conciliation authority in a pecuniary dispute involving an amount in dispute of up to CHF 2,000, the conciliation authority shall determine the **court costs** and the **party compensation** in accordance with Art. 212 para. 3 nZPO. The National Council's intention in introducing Art. 212, para. 3 of the new Code of Civil Procedure was to prevent a party from initiating proceedings in order to obtain compensation for the costs incurred by them. The majority view among legal scholars was that the conciliation authority should set the court costs and compensation for the costs incurred by the party (applying Art. 114 of the Code of Civil Procedure) when making a decision. A minority also applies Art. 113 CPC in the decision-making procedure under Art. 212 CPC, which is why the conciliation authority may not set any party compensation. Art. 212 para. 3 nCPC clarified this question in favor of party compensation.

165 Like the other changes to the law of costs, this norm is also not included in Art. 407 et seq. nZPO (see above N. 127 et seq.). If the majority of the doctrine is followed, Art. 212 para. 3 nZPO is merely a codification of the previous legal view. In this case, there are **no transitional issues** (see above N. 10). If the minority view is followed, the conciliation authority may not award any party compensation under the old law. Since Art. 212 para. 3 nZPO is not included in Art. 407*f* nZPO, this standard only applies to conciliation proceedings that become pending as of January 1, 2025 (see Art. 404 para. 1 CPC *a contrario*; supra N. 21 et seq.). Since the other provisions of the law on costs were not integrated into Art. 407 *et seq.* nZPO either, it cannot be assumed that this is a legislative oversight (see above N. 121).

P. Counterclaim (Art. 224 para. 1^{bis} nZPO)

166 Art. 224 para. 1^{bis} lit. a nZPO expressly allows the **counterclaim**, **which would** be **adjudicated in the simplified procedure solely on the basis of the amount in dispute**, to be made in response to a main action that is being assessed in the ordinary procedure (so-called **cross-procedural counterclaim**). The counterclaim is assessed in the ordinary proceedings (Art. 224 para. 1^{bis} lit. a nZPO). The Federal Supreme Court has left this question open so far. The majority of legal scholars have already considered such counterclaims to be admissible, which is why **no transitional law questions** arise

with this view. A minority prohibited such a counterclaim. If the minority view is adopted, the transitional question arises as to whether a counterclaim can be filed after January 1, 2025, in response to a main action that became pending before January 1, 2025, which could be assessed in a simplified procedure due to the amount in dispute. This is to be denied because the lis pendens of the first action that initiated the proceedings is used to determine the applicable procedural law (see above N. 26). For this reason, the previous law is applicable, which, according to the minority, prohibits a corresponding counterclaim (see Art. 404 para. 1 CPC; above N. 21 et seq.). If the counterclaim is raised independently, a later unification of the proceedings under Art. 125 let. c CPC is ruled out. The unification of proceedings is only admissible if both claims could be judged in the same type of proceedings.

167 Art. 224 para. 1^{bis} let. b nZPO basically codifies the case law of the Federal Supreme Court, according to which the filing of a counterclaim for **negative declaratio against a partial claim** that is to be assessed in a simplified procedure *solely on the basis of the amount in dispute* is admissible. It is unclear whether this also applies to the partial claim that is not genuine, contrary to the Federal Supreme Court. In this case, the partial claim and the negative declaratory counterclaim are assessed in the ordinary proceedings (Art. 224 para. 1^{bis} let. b nZPO). Since, in my opinion, only the case law of the Federal Supreme Court was codified for the genuine and the non-genuine partial claim, there are **no transitional issues** (see above N. 10). If the **improper partial claim** is not covered by Article 224 para. 1^{bis} let. b CPC (*quod non*), it can still be brought in proceedings that are already pending as of January 1, 2025. This is because the applicability of the applicable procedural law is determined on the basis of the pending status of the action that initiated the proceedings (see above N. 26). This means that the previous law and the case law issued on it remain applicable in the pending proceedings (see Art. 404 para. 1 CPC; supra N. 21 et seq.).

168 On the **amount in dispute of the counterclaim** under Art. 94 para. 3 nCPC supra N. 122 et seq.

Q. New facts and evidence (Art. 229 para. 1 to para. 2^{bis} new CCP)

169 Parliament has fundamentally revised Art. 229 of the old CPC. Only Art. 229 para. 3 CPC remained untouched. The **legal definition of genuine and spu-**

rious novae, which was moved from Art. 229 para. 1 of the old CPC to Art. 229 para. 2 of the new CPC, remains unchanged. Under the new law, the parties may present new facts and evidence *"without restriction in the first party submission pursuant to Art. 228 para. 1"* if no second exchange of submissions or no instruction hearing has taken place (Art. 229 para. 1 nZPO). In doing so, the legislator corrected the (strict) case law of the Federal Supreme Court, according to which *"at the beginning of the main hearing"* under Art. 229 para. 2 aZPO requires a separate presentation of facts before the first party submissions. If the parties were able to express themselves without restriction in a **second exchange of written submissions** or in **instructions to the court**, the novelty bar applies. This means that the parties continue to have the opportunity to present facts and evidence without restriction **on two occasions**.

After the novation barrier has been crossed, the previous law stipulated that 170
the novae must be submitted *"without delay"* (Art. 229 para. 1 aZPO). Art. 229 nZPO replaces this strict approach, which was also associated with uncertainties, with a differentiated regulation in Art. 229 para. 2 and para. 2^{bis} nZPO. For the **phase prior to the first party submission**, Art. 229 para. 2 nCPC provides that novae must be submitted within a time limit set by the court or, in the absence of such a time limit, *"at the latest by the first party submission"* in the main hearing pursuant to Art. 228 para. 1 CPC. What is disputed in the new law is whether this is an isolated nova submission that precedes the first party submissions. In the subsequent phase **after the first party submissions**, novae will only be considered if they are submitted within the time limit set by the court, or, in the absence of such a time limit, at the latest in the next hearing (Art. 229 para. 2^{bis} nZPO).

Art. 229 nCPC is not included in Art. 407*f* nCPC. Accordingly, in **proceed-** 171
ings that were pending before January 1, 2025, the (stricter) rules of Art. 229 aCPC must be observed (see Art. 404 para. 1 CPC; supra N. 21 et seq.). This transitional legal regulation makes sense. On the one hand, the parties must be aware of the right to file a new plea when proceedings are initiated for procedural reasons. On the other hand, it is also crucial for the court's case management that the applicable right to file a new plea is established. A split into a phase in which Art. 229 aZPO applies and a phase in which Art. 229 nZPO applies is impractical and would lead to difficulties (e.g. discovery of the novelty at the beginning of December 2024 and setting of a time limit by the

court in terms of Art. 229 para. 2^{bis} nZPO). Accordingly, novae in these proceedings must continue to be submitted *"without delay"* (Art. 229 para. 1 aZPO; supra N. 170). In addition, the Federal Supreme Court's case law under the old law also applies in these proceedings, according to which the facts and evidence are to be presented in a separate statement of facts before the first submissions by the parties (supra N. 169).

R. Content of the decision (Art. 238 let. g nZPO)

172 Art. 238 let. g nZPO stipulates that the court shall state the essential factual and legal grounds for the decision in the decision, if applicable. In contrast, Art. 238 let. g aZPO only spoke of the grounds for the decision. The new wording does not entail any substantive change, which is why **no transitional issues** arise (see above N. 10).

S. Default in the simplified procedure

173 The consequences of **default at the main hearing** of the simplified procedure were expressly regulated with the revision of 17 March 2023 (cf. Art. 245 nZPO). The law still does not regulate the consequences of failure to provide a **written statement** within the meaning of Art. 245 para. 2 sentence 1 CPC. The new law distinguishes between the following scenarios regarding default at the main hearing.

1. Default at the hearing in the case of an action without written statement of grounds (Art. 245 para. 1 sentences 2 and 3 nZPO)

174 If the claim in the simplified procedure does **not include a statement of reasons**, the court serves the claim on the defendant and at the same time summons the parties to the hearing (Art. 245 para. 1 sentence 1 CPC). **Until now**, the **Federal Supreme Court** has provided that if the defendant is in default, **Art. 234 para. 1 CPC is to be applied by analogy**. Accordingly, the court considers the claim and the submissions of the claimant and, if necessary, officially takes evidence in terms of Art. 153 and 247 para. 2 CPC (see Art. 234 para. 1 CPC). In this decision, the Federal Supreme Court left open the question of how to proceed in the event of default by the claimant.

175 The **new law** is less strict because if a party is in default at the hearing, the court immediately summons them to a **single further hearing** and informs

the parties of the consequences of any further default (Art. 245 para. 1 sentence 2 nZPO). The new provision therefore applies to both plaintiffs and defendants. The second hearing must take place within thirty days of the first hearing (Art. 245 para. 1 sentence 3 new CPC). If one of the parties fails to appear at the second hearing, Art. 234 para. 1 CPC applies. If both parties default, the proceedings are to be dismissed as without object (Art. 219 in conjunction with Art. 234 para. 2 CPC). Art. 245 para. 2 sentence 2 nCPC now explicitly refers to the application of Art. 234 CPC mutatis mutandis.

176 If the **simplified procedure was already pending** on January 1, 2025, the previous law applies in principle (Art. 404 para. 1 CPC; supra N. 21 et seq.). According to the case law of the Federal Supreme Court, this also applies if only the conciliation proceedings are pending before January 1, 2025 (see supra N. 22). The stricter Federal Supreme Court case law was issued under the previous law (see above N. 174). In connection with Art. 222 CrimPC, the Federal Supreme Court changed its case law even before the partial revision of the CrimPC of June 17, 2022, came into force because it came to a better understanding of Art. 222 CrimPC thanks to the legislator (see above N. 107 for details). The solution enshrined in Art. 245 para. 1 of the new CPC would have arisen under the previous law from an analogous application of Art. 223 para. 1 CPC. Only the period of thirty days does not arise from an analogous application of Art. 223 para. 1 CPC. Since the legislature expressed a better understanding of the previous law, it can, in my opinion, be reasonably argued that the Federal Supreme Court's case law is no longer applicable to proceedings that are already pending, both *before January 1, 2025* and *after January 1, 2025*.

2. Default of appearance at the hearing in the case of an action with written statement of grounds (Art. 245 para. 2, second sentence, nZPO)

177 In the case of a **well-founded action**, Art. 234 CPC applies by analogy in the event of default at the hearing (Art. 245 para. 2 sentence 2 nCPC). Accordingly, no second hearing is to be scheduled, but a default judgment is to be handed down. This was already the case under the previous law. Therefore, in the event of default at the hearing in the case of an action with written grounds, **no transitional questions** arise (see above N. 10).

T. Summary proceedings

1. Scope of application (Art. 249, 250, 251, 251*a* and 305 nZPO)

178 The **enumerations** in the catalogs of Art. 249, 250, 251, 251a and 305 nZPO for the application of the summary procedure are **now exhaustive** because the legislator deleted the word *"in particular"*. The previous non-exhaustive list was intended to create scope for further disputes that, by their very nature, necessarily belong in summary proceedings. It is questionable whether, in the case of those cases that were forgotten, the exhaustive list will be relaxed by analogous application (e.g. for the rights of board members to information and inspection under Art. 715a CO). For summary proceedings that were already pending on January 1, 2025, the **non-exhaustive lists** continue to apply (see Art. 404 para. 1 CPC; supra N. 21 et seq.).

179 Art. 249 let. a no. 5 nZPO now provides for summary proceedings in the event of **deficiencies in the organization of an association**. In my opinion, the similarity of Art. 69*c* CC to company law means that summary proceedings are already applicable under the current law. Accordingly, **no transitional issues** arise (see above N. 10). Otherwise, the procedural type of the previous law would apply to corporate organizational defect proceedings pending on 1 January 2025 (Art. 404 para. 1 CPC; above N. 21 et seq.).

180 In Art. 250 let. c no. 6 new CCP, the legislature codified the Federal Supreme Court's case law according to which every measure aimed at **remedying organisational deficiencies** in the case of the **AG, GmbH and cooperative** is subject to summary proceedings. This rendered Art. 250 let. c no. 11 old CCP redundant and it could be repealed. As the case law of the Federal Supreme Court and thus the previous legal situation was codified, there are **no transitional issues** (see above N. 10).

181 Art. 250 let. c no. 16 nCCP provides for summary proceedings for the **deletion of a company** in the cases of Art. 938*a* para. 2 CO. Due to the revision of the law on the commercial register of March 17, 2017, which came into force on January 1, 2021, Art. 250 let. c no. 16 nZPO should refer to Art. 934 para. 3 CO. The summary procedure was already applied under the previous law. Consequently, in the absence of any substantive change, there are **no transitional issues** (see above N. 10).

Since the catalogs are now formulated in a conclusive manner, it is argued that the practice of some cantons in French-speaking Switzerland regarding the **security for party compensation within the meaning of Art. 99 CPC** can no longer be decided in summary proceedings. However, proceedings (in French-speaking Switzerland) that are already pending on January 1, 2025 may still be continued as summary proceedings (see Art. 404 para. 1 CPC; supra N. 21 et seq.). The security for the party compensation is a precautionary measure. For this reason, the summary procedure based on Art. 248 lit. d CPC is applicable, which is why, in my opinion, **no transitional legal question** arises (see above N. 10). 182

2. Precautionary measures against the media (Art. 266 lit. a nZPO)

Provisional measures can now also be ordered in the case of **existing rather than merely impending violations of rights** (Art. 266 let. a CPC). This corrects a legislative oversight that occurred when Art. 28*c* para. 3 of the former Civil Code was transposed into the CPC. Since the previous law was a legislative oversight and since case law and doctrine already apply as provided for in the new regulation, there is no substantive change. Therefore, there are **no transitional legal issues** (see above N. 10). 183

According to Art. 266 let. a nZPO, only a *"serious disadvantage"* is now required. Previously, a *"particularly serious disadvantage"* was required (Art. 266 let. a aCPC). This restricts the media privilege. For proceedings that were already pending on January 1, 2025, the requirement of a *"particularly serious disadvantage"* continues to apply (see Art. 404 para. 1 CPC; above N. 21 et seq.). If the time frame allows, the application for interim measures can only be filed from January 1, 2025. However, the impact of this change in practice is likely to be minimal. 184

3. Appeals in summary proceedings

a. Appeal (Art. 314 nZPO)

Art. 314 para. 2 nZPO now provides for a **thirty-day period** for the appeal and the response to the appeal in summary proceedings for **family law disputes**. In addition, the **cross-appeal** is now also admissible in summary proceedings (Art. 314 para. 2 nZPO *in fine*). In the other summary proceedings, the cross-appeal is inadmissible, as before (Art. 314 para. 1 nCPC *in fine*). If 185 the **first-instance decision is issued from January 1, 2025,** the **new law** applies to the time limit for appeal and the admissibility of the cross-appeal (Art. 405 para. 1 CPC; above N. 28 f.).

b. Appeal (Art. 321 para. 2 new CPC)

186 Under the previous law, a thirty-day time limit for appeal applies to *"other first instance decisions"* within the meaning of Art. 319 let. b CPC, because the ten-day time limit for appeal under Art. 321 para. 2 old CPC applies only to summary decisions and procedural orders. The ten-day appeal period now also applies to *"other first-instance decisions"* (Art. 321 para. 2 nZPO). The legislator made this change because it is unclear what is meant by an *"other first-instance decision"*. Art. 321 para. 2 nCPC applies to those **decisions that are issued as of January 1, 2025** (Art. 405 para. 1 CPC; supra N. 28 et seq.).

U. Family law proceedings

187 Various amendments to family procedural law are contained in Art. 407 *et seq.* of the new CCP and have already been explained in Part III (Art. 198 let. b^{bis} of the new CCP [see above, N. 67]; Art. 298 para. 1^{bis} nZPO [see above, N. 42]; Art. 315 para. 2 lit. c and d nZPO [see above, N. 86]; Art. 317 para. 1^{bis} nZPO [see above, N. 81]). Conversely, the other amendments to family procedural law are not yet applicable to pending proceedings (see Art. 404 para. 1 CPC; supra N. 21 et seq.).

188 On **appeals in summary proceedings in family law**, see above N. 185.

1. Simplified procedure for ancillary divorce proceedings (Art. 288 para. 2 and 291 para. 3 nZPO)

189 If the spouses cannot agree on all the ancillary consequences of divorce or the grounds for divorce, or if the court does not approve the settlement of ancillary consequences, the proceedings will continue on an adversarial basis (so-called **ancillary divorce proceedings**; Art. 288 para. 2 CPC and 291 para. 3 nCPC). The adversarial procedure was already applicable under the previous law to divorce suits, although Art. 291 para. 3 aZPO did not explicitly refer to the adversarial procedure. Until now, the annex procedure was conducted as an ordinary procedure. The **simplified procedure** is now planned for the annex procedure (Art. 288 para. 2 and 291 para. 3 nZPO). This change means that **purely oral proceedings** will be increasingly possible.

Annex proceedings under divorce law that are already pending on January 1, 2025 will continue to be conducted in the ordinary proceedings (Art. 404 para. 1 CPC; above N. 21 et seq.). The relevant point in time is the pendency of the action, which occurs when the joint petition for divorce or the divorce action is filed (see also Art. 274 CPC). From the point of view of transitional law, it is therefore irrelevant at what point in time the proceedings are continued on an adversarial basis. 190

The same also applies to proceedings for **action for marriage annulment and legal separation**, because these are based on the provisions for divorce actions (Art. 294 para. 1 CPC). The same also applies to the dissolution and annulment of registered partnerships (Art. 307 CPC). 191

2. Independent actions for the maintenance of minor and adult children and other child-related matters (Art. 295 nZPO)

The scope of application of Art. 295 aZPO was controversial because this provision merely stipulated that the simplified procedure applies to independent actions. In an unpublished decision, the Federal Supreme Court ruled in favor of the simplified procedure for an action for maintenance of an adult, without providing detailed reasons. In contrast, in an officially published decision, the Federal Supreme Court applied the ordinary procedure to a claim by an adult person for payment of **relatives' support contributions** or to the claim of the **subrogated community** in their place, and not the simplified procedure based on Art. 295 aZPO. According to the prevailing legal opinion, this Federal Supreme Court decision does not mean, however, that Art. 295 aCPC is not applicable to maintenance claims of adult children. In contrast, a minority draws the conclusion from this decision that maintenance claims of adult children are subject to the ordinary procedure, unless the simplified procedure applies due to the amount in dispute (see Art. 243 para. 1 CPC). Cantonal case law is divided. 192

The ambiguities of the previous law will be eliminated with the revision of 17 March 2023. Art. 295 nZPO expressly covers **independent actions by children who have come of age**. This means that the principles of mandatory investigation and ex officio prosecution within the meaning of Art. 296 are also applicable in these cases. 193

194 For proceedings already pending on January 1, 2025, Art. 295 aCPC and the associated uncertainties apply (see Art. 404 para. 1 CPC; see above N. 21 et seq.). If the judgment of the court of first instance was handed down after January 1, 2025, the new law applies to the **appeal proceedings** (Art. 405 para. 1 CPC; supra N. 28 et seq.). Art. 295 CPC also leads to the application of the unrestricted principle of investigation within the meaning of Art. 296 para. 1 CPC. This in turn would lead to the court of appeal taking into account new facts and evidence up to the deliberation (Art. 317 para. 1^{bis} nCPC; above N. 81). In my opinion, however, the previous law should also be applied in appeal proceedings and Art. 317 para. 1^{bis} nZPO should only be applied if the unrestricted principle of investigation was applicable in the previous law in first-instance proceedings. Otherwise, the new regulation provided for in the previous law can be undermined by delaying proceedings and lodging an appeal.

3. Automatic inclusion and party status of parents in the maintenance and paternity suit (Art. 304 para. 2 sentences 2 and 3 nCPC)

195 According to Art. 304 para. 2 CPC, in the event of a maintenance suit, the court also decides on **parental custody** and **other child-related matters** (so-called **competence attraction**). The Federal Court considered that in this situation, the *"formal inclusion"* of the parent concerned in the proceedings was necessary. The Federal Court did not specify the exact form of this inclusion, and it remains unclear to this day. At least to a certain extent, this is also an *"academic question"*.

196 Art. 304 para. 2 nZPO now stipulates that parents have **party status** if the parent-child relationship has been established. As in divorce proceedings, the court can distribute the party roles. According to the message, in the case of disputes concerning maintenance only, **only one parent** and the **child** (usually represented by the other parent) are parties to the proceedings. However, legal scholars are correct in stating that the other child-related matters are the subject of the dispute from the outset and without party applications, based on the principle of official maxim in the sense of 296 para. 3 CPC, which is why both parents are to be granted party status from the outset.

197 For proceedings already pending on January 1, 2025, Art. 304 para. 2 aCPC applies (Art. 404 para. 1 CPC; see above N. 21 et seq.). Since the Federal Supreme Court already requires a *"formal inclusion"* of the parent concerned under the current law, little will change in practice. If the **first-instance**

judgment was handed down after January 1, 2025, the new law applies to the appeal proceedings (Art. 405 para. 1 CPC; supra N. 28 f.). Accordingly, the parents are to be involved in the proceedings as parties in accordance with Art. 304 para. 2 nCPC. Some kind of participation was already necessary under the previous law. Therefore, in my opinion, the question of how to deal with intentional procedural delays that lead to the application of the new law in appeal proceedings does not arise, or at most only in theory.

The Federal Supreme Court declared a judgment **null and void** without *"formal inclusion"* of the parent concerned in the proceedings. 198
The question of how to deal with decisions that have been made without *"formal inclusion"* also arises after the entry into force of Art. 304 para. 2 nZPO. However, this is not a transitional issue, because the problem already arose under the previous law. The nullity means that these judgments have no legal effect whatsoever and therefore cannot be enforced. Since the judgment is null and void, the proceedings have not been concluded. In my opinion, the previous law therefore applies with regard to the resumption of proceedings for the purpose of issuing a valid judgment (see also above N. 23).

V. Cross-appeal (Art. 313 para. 2 let. b nZPO)

The revision of 17 March 2023 repeals Art. 313 para. 2 let. b aZPO, according 199
to which the **cross-appeal** lapses if the appeal is dismissed as **manifestly unfounded**. An appeal that is manifestly unfounded is not served on the other party in any case (Art. 312 para. 1 CPC *in fine*). Therefore, the other party is not given the opportunity to file a cross-appeal in its response (see Art. 313 para. 1 CPC). Art. 313 para. 2 let. b aCPC was a legislative oversight and is therefore redundant. In the absence of substantive changes, there are **no transitional issues** regarding the cross-appeal (see above N. 10, on the right to cross-appeal in family law summary proceedings, see above N. 185).

W. Revision

1. Discovery of new facts and evidence (Art. 328 para. 1 let. a nZPO)

Art. 328 para. 1 lit. a nZPO states that a **ground for revision** only exists if the 200
subsequently discovered significant facts or evidence could not have been provided *"despite due attention"* in the earlier proceedings. The message and the parliamentary deliberations are silent on this amendment. The adminis-

tration assumes that this is in line with previous practice. Honegger-Müntener/Rufibach/Schumann assume that this will weaken the standard of care expected by the Federal Supreme Court. The Federal Supreme Court has so far set relatively high standards. It requires that it should not have been possible for the appellant in the revision, despite all due care in collecting the material for the proceedings, to have submitted the facts or evidence asserted retrospectively in good time.

201 The new law applies to the revision of judgments that were handed down under the previous law (Art. 405 para. 2 CPC; supra N. 28). If the request for revision has already been submitted, i.e. the revision proceedings are pending, the previous law applies. Accordingly, Art. 328 para. 1 (a) aZPO applies to applications for revision that were submitted before January 1, 2025. Assuming that no substantive changes were made, no transitional issues arise (see above N. 10).

2. Invalidity of the acknowledgment of claim, withdrawal from the action or court settlement (Art. 328 para. 1 let. c new CCP)

202 The revision of 17 March 2023 added that the invalidity of the acknowledgment of the claim, the withdrawal from the action or the court settlement may arise *"due to formal or material defects"* (Art. 328 para. 1 let. c nZPO). In the absence of a material change, there are **no transitional issues** (see above N. 10).

3. Ground for challenge (Art. 328 para. 1 let. d nCCP)

203 For the appeal on the discovery of the ground for challenge under Art. 328 para. 1 let. d nCCP, see above N. 105.

4. Postponement of enforceability in the appeal proceedings (Art. 331 para. 2 nCCP)

204 Art. 331 para. 2 of the new Code of Civil Procedure, like other provisions, now speaks of a postponement of the *"enforceability"* and no longer of the *"enforcement"*. This is an **editorial change** with no substantive significance and thus no significance in terms of transitional law (see above N. 10).

X. Amendments to the BGG

1. Language of legal documents (Art. 42 para. 1bis nBGG)

On this, see above N. 144 f. 205

2. Requirements of the BGG for the opening of cantonal decisions (Art. 112 para. 2 first sentence nBGG)

On this, see above N. 79 f. and N. 84. 206

3. Revision in Federal Supreme Court Proceedings (Art. 123 para. 2 let. a nBGG)

Art. 123 para. 2 let. a nBGG now contains the addition *"despite due care"*, as 207
does Art. 328 para. 1 let. a nZPO. Honegger-Müntener/Rufibach/Schumann assume that – as with Art. 328 para. 1 let. a nZPO – the standard of care required by the Federal Court is relaxed (on Art. 328 para. 1 let. a nZPO supra N. 200 f.). No reasons are given in the materials. Please refer to the comments on Art. 328 para. 1 let. a nZPO (see above N. 200).

In the case of an appeal to the Federal Supreme Court, the new law applies if 208
the **proceedings were initiated after** it came into force (see Art. 132 para. 1 BGG; see above N. 80 for the analogous application of Art. 132 BGG). Art. 123 para. 2 let. a nBGG therefore applies to all appeal proceedings in which the application for appeal was filed after January 1, 2025. For **already pending appeal proceedings**, the previous law applies, i.e. Art. 123 para. 2 let. a aBGG.

Y. Arbitration

1. English as the language of proceedings in state summary proceedings

See above N. 142 f. 209

2. Removal of an arbitrator by agreement (Art. 370 para. 1 nZPO)

Art. 370 para. 1 of the new ZPO provides that any member of the arbitral tri- 210
bunal may be **dismissed** by written agreement of the parties. The new law refers to the form required for the arbitration agreement for the form of the agreement (Art. 370 para. 1 of the new ZPO). Accordingly, proof in text form is

sufficient (see Art. 358 para. 1 CPC). In doing so, the legislator adopted the previous view in legal doctrine regarding the form of revocation. In the absence of a change in the law, **no transitional issues** arise (see above N. 10).

3. Lis pendens (Art. 372 para. 2 new CPC)

211 Art. 372 para. 2 of the Swiss Code of Civil Procedure was deleted. This provision stipulated that if an action concerning the same subject matter and between the same parties was brought before a state court and an arbitral tribunal, the **court last seized** shall stay its proceedings until the court first seized has decided on its jurisdiction. Art. 372 para. 2 of the old Swiss Code of Civil Procedure (old CPC) thus contained a chronological priority rule that provided for an equal interplay between the state court and the arbitral tribunal. This rule was in conflict with Art. 61 let. b CPC, according to which the state court does not decline its jurisdiction in the case of an *"obviously invalid"* or *"unenforceable arbitration agreement"* (limited jurisdiction). The final decision on the jurisdiction of the arbitral tribunal lies with the arbitral tribunal. Under the new law, an arbitral tribunal is therefore no longer required to **suspend the proceedings** until a state court has ruled on whether the arbitration agreement is *"manifestly invalid"* or *"unenforceable"*.

212 For **arbitration proceedings that are already pending** on January 1, 2025, the **previous law** applies (see Art. 407 para. 2 CPC). Accordingly, the state court and the arbitral tribunal must apply Art. 372 para. 2 aCPC. Whether arbitration proceedings are pending is determined in accordance with Art. 372 para. 1 CPC. However, the **parties to the proceedings** may **agree that** the **new law is applicable** (see Art. 407 para. 2 sentence 2 CPC). In my opinion, an agreement only binds the arbitral tribunal, because such an agreement does not bind the state court. This follows from the wording, which only speaks of *"arbitration proceedings"*. Furthermore, Art. 407 para. 4 CPC, for example, does not provide for the possibility of agreeing on the new law for state proceedings under Art. 356 CPC. This also indicates that it is not possible to choose in favor of the new law in state proceedings.

4. Enforcement of provisional measures ordered by the arbitral tribunal (Art. 374 para. 2 nCPC)

213 If the affected party does not voluntarily submit to a **measure ordered by the arbitral tribunal**, the **state court** shall, at the request of the arbitral tri-

bunal or a party, make the necessary orders (Art. 374 para. 2 nZPO). The previous law provided that the consent of the arbitral tribunal must be obtained if a party requests such measures (Art. 374 para. 2 aZPO).

Art. 407 para. 4 CPC provides that the previous law applies to proceedings 214
before the state courts that have jurisdiction under Art. 356 CPC, provided that these are already pending. In the case of Art. 374 CPC, the general rules on local and subject-matter jurisdiction apply and not Art. 356 CPC. Thus, it is not an auxiliary procedure within the meaning of Article 407 para. 4 CPC. Accordingly, the **previous law** applies based on Article 404 para. 1 CPC (see above N. 21 et seq.). However, the application of Article 407 para. 4 CPC would lead to the same result.

5. Revision on discovery of new facts and evidence (Art. 396 para. 1 (a) nZPO)

Art. 396 para. 1 (a) nZPO contains – like Art. 328 para. 1 (a) nZPO and Art. 123 215
para. 2 (a) nBGG – the addition *“despite due care”* (see above N. 200 and N. 207). According to one legal scholar, this codifies the practice of the Federal Supreme Court. However, as with Art. 328 para. 1 let. a nZPO, this is not codified in the new Code. Under transitional law, the same applies as stated in N. 201.

Z. Enforcement (Art. 400 para. 2^{bis} and para. 3 and Art. 401*a* nCPC)

Art. 400 et seq. CPC contain enforcement provisions. Under Art. 400 para. 216
2^{bis} nCPC, the Federal Council is obliged to provide the public with **information on legal costs** and the **possibilities of free legal aid** and **litigation funding**. Art. 400 para. 3 nZPO now provides that the Federal Council may also transfer the provision of forms and information to the **Federal Office of Justice**. The new mandates to the Federal Council do not constitute *“proceedings”* within the meaning of Art. 407*f* nZPO (see above N. 16 et seq.). Furthermore, the new provisions are missing from Art. 407*f* nZPO. Accordingly, the Federal Council and the Federal Office of Justice must fulfill the corresponding obligations from January 1, 2025. This means that the relevant information should be available (online) from that date.

217 Art. 401*a* nZPO obliges the Confederation and the cantons to ensure that sufficient **statistical data and business figures** are available on the application of this law, in particular the number, type, subject matter, duration and costs of proceedings. This norm also does not concern *"proceedings"* and is missing from Art. 407*f* nZPO. The obligation to collect the relevant data will therefore only come into force on January 1, 2025.

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