



**Universität
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Rechtswissenschaftliches Institut

Introduction to Swiss Civil Procedure

Fall Semester 2019

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Legislation on civil procedure

- Swiss Code of Civil Procedure (Zivilprozessordnung, ZPO) 2008 [entry into force: 2011]
- Swiss Debt Enforcement and Insolvency Act (Schuldbetreibungs- und Konkursgesetz, SchKG) 1889 [eif 1892] / major reform 1994 [eif 1997]
- Federal Patent Court Act (Bundespatentgerichtsgesetz, BPatGG) 2009 [eif 2010]
- [Federal Act on Federal Civil Procedure (Bundesgesetz über den Bundeszivilprozess, BZP)] 1947 [eif 1948]
- Swiss Federal Court Act (Bundesgerichtsgesetz, BGG) 2005 [eif 2007]
- Bundesgesetz über das Internationale Privatrecht (IPRG) 1987 [eif 1989]
- Cantonal legislation on court organisation and subject-matter jurisdiction (eg Court Organisation Act of the Canton of Zurich [GOG])



Legislation on civil procedure

Adjudication

Cantonal courts, Federal
Patent Court: ZPO [/BPatGG]
Federal court (appeals): BGG
[/BZP]
Federal court (1st instance): BZP

Enforcement

Money claims: SchKG
Non-money-claims: ZPO

Arbitration
Domestic: ZPO
International: IPRG

Insolvency: SchKG



Civil courts

Federal Court (Bundesgericht)

2nd instance cantonal court

single-
instance
cantonal
court

Federal
Patent Court

1st instance
cantonal
court

[conciliation
authority]



Swiss judges

- Eligibility: cantonal law (for cantonal judges)
- Professional and lay judges
- Elections
- Influence of political parties



Swiss lawyers

- Federal Act on the Free Movement of Lawyers (Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte, BGFA)
- Cantonal rules on bar admission
- No requirement to be represented by a lawyer in civil proceedings
- Professional representation before courts: lawyers' monopoly
- Federal Court: representation only by lawyers (but litigants in person also admitted)



Subject-matter jurisdiction

- Determined by cantonal law within parameters set by ZPO
- Example: GOG Zurich
 - District court (*Bezirksgericht*) – first instance court
 - single-judge court (*Einzelgericht*)
 - multi-judge court (*Kollegialgericht*)
 - labour court (*Arbeitsgericht*)
 - tenancy court (*Mietgericht*)
 - High court (*Obergericht*)
 - appellate court
 - first instance court
 - subject-matter jurisdiction in matters according to Articles 5-8 ZPO
 - Commercial court
 - Civil chambers as first-instance court



Territorial jurisdiction

- Traditional Swiss approach: defendant's domicile

Article 30(2) Swiss Federal Constitution

Unless otherwise provided by law, any person against whom civil proceedings have been raised has the right to have their case decided by a court within the jurisdiction in which they reside.

- Influence of Lugano Convention
- Today: Many exceptions from domicile principle



Territorial jurisdiction

- Examples
 - Related actions (Articles 14–16 ZPO)
 - Jurisdiction agreement (Article 17 ZPO)
 - Entering an appearance (Article 18 ZPO)
 - Rights in rem (Articles 29 and 30 ZPO)
 - Place of performance (Article 31 ZPO)
 - Protection of weaker parties (consumers, tenants, employees) (Articles 32-35 ZPO)
 - Torts (Article 36 ZPO)



Mandatory conciliation

- Principle: mandatory pre-trial conciliation
- Exceptions (examples)
 - summary procedure
 - family matters
 - single-instance cantonal court / commercial court
 - some matters connected with enforcement proceedings
- About 50% of cases settled at conciliation stage
 - & large percentage of money claims filtered out through enforcement proceedings without prior judgment
- Cantonal rules on organisation of conciliation authority (court, justice of the peace, specialised administrative authority)
- Alternative: mediation (rarely used)



Mandatory conciliation – possible outcomes

- dismissal for groundlessness (plaintiff's default)
- settlement, acceptance, withdrawal
 - same effect as binding judgment
- authorisation to proceed (*Klagebewilligung*)
 - case may be brought before court within 3 months (no automatic initiation of court proceedings!)
- decision (*Entscheid*)
 - up to 2000 CHF
 - claimant's request; discretion of conciliation authority
- proposed judgment (*Urteilsvorschlag*)
 - up to 5000 CHF (gender equality/tenancy: no upper limit)



Proceedings before the trial court

- Ordinary procedure (*ordentliches Verfahren*)
 - claims over CHF 30'000 / claims without monetary value
 - often dominated by written elements
 - emphasis on formalities, strict party responsibility, *de facto* (but not *de iure*) necessity of representation by lawyer
- Simplified procedure (*vereinfachtes Verfahren*)
 - claims up to CHF 30'000 (some types of claims regardless of value)
 - less formal, more orality, more judicial involvement
- Summary procedure (*summarisches Verfahren*)
- Special procedures in family law matters



Proceedings before the trial court

- Structure of ordinary proceedings
 - exchange of written statements
 - (statement of claim, statement of defence)
 - if ordered by court: replication [*Replik*], rejoinder [*Duplik*]
 - at court's discretion: instruction hearing (*Instruktionsverhandlung*)
 - main hearing (waiver by parties possible)



Proceedings before the trial court

- New factual allegations and evidence
 - two unrestricted opportunities
 - two written statements for each party or
 - one written statement for each party and instruction hearing where new allegations and evidence can be brought forward (*i.e. instruction hearing not restricted to e.g. settlement discussions*) or
 - one written statement for each party and “beginning” of oral hearing (*i.e. parties’ statements under Article 228 ZPO*)



Proceedings before the trial court

- New factual allegations and evidence (continued)
 - admissibility of late allegations
 - newly-arising facts [and evidence?]: admissible if introduced without delay
 - pre-existing facts and evidence: admissible if they could not have been introduced earlier despite reasonable diligence & introduced without delay
 - latest possibility for all new facts and evidence: beginning of the deliberation of the judgment
 - where facts are established *ex officio*, new allegations and evidence are allowed until the beginning of the deliberation of the judgment without restriction



Proceedings before the trial court

- Relationship between the judge and the parties
 - Formal aspects of proceedings (service of documents, scheduling hearings etc.): responsibility of court
 - Substantive case management?
 - principle of party presentation
 - duty to ask questions and give instructions (scope disputed; courts often reluctant, in particular towards parties represented by lawyers)
 - taking evidence ex officio (powers broad in theory, but rarely used in practice)



Proceedings before the trial court

- Evidence
 - types of evidence enumerated in ZPO (witness testimony, documents, inspection, court-appointed experts, written statements, party interrogation)
 - no party-appointed experts (such expertise only qualifies as party's assertion, not as evidence)
 - free evaluation of evidence
 - “anticipated evaluation” of evidence?
 - evidence that is irrelevant, inadmissible or (objectively) unfit for purpose
 - very problematic: assessment of credibility before taking of evidence



Proceedings before the trial court

- Evidence (continued)
 - duty to cooperate and right to refuse
 - unjustified refusal by party taken into account when appraising evidence
 - unjustified refusal by third party: compulsion
 - illegally obtained evidence



Effects of judgments and settlements

- both judgments and settlements become *res judicata* (exact meaning for settlements unclear)
- settlement leads to termination of the proceedings *ipso iure* (i.e. without a judgment)
- *res judicata*
 - between the parties (*inter partes*)
 - limited to the object of the dispute (*Streitgegenstand*), no collateral estoppel/issue preclusion
- third-party intervention (Nebenintervention) and third-party notice (Streitverkündung): binding effect of reasons that are detrimental to the party in whose favour the third party intervened or who issued the notice (Articles 77 and 80 ZPO)

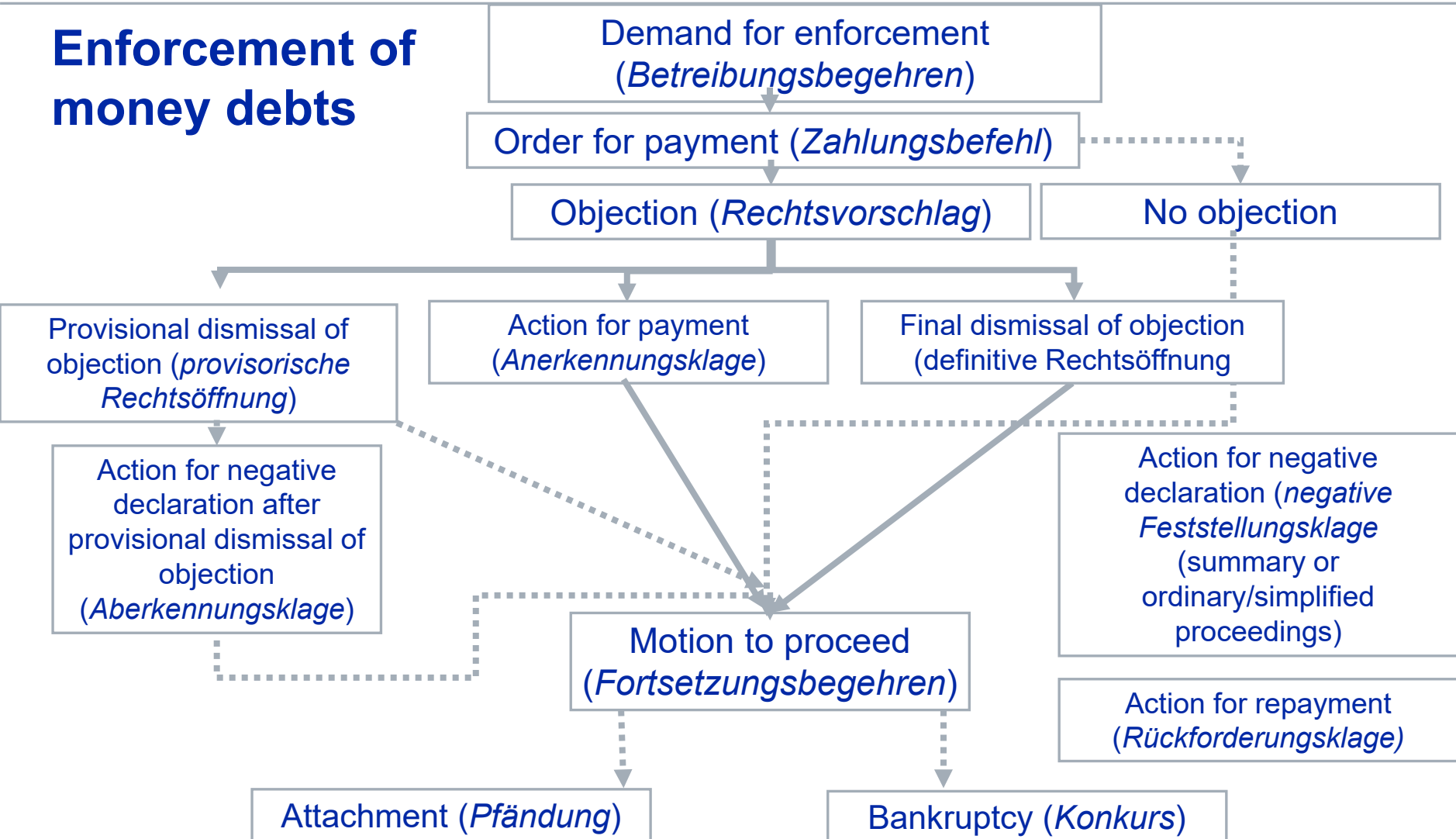


Appeals against judgments

- Appeal (*Berufung*) and objection (*Beschwerde*) to higher cantonal court
 - depending on type of judgment and value of the dispute
 - appeal: full review
 - objection: full review on points of law; facts: only “obviously incorrect” establishment
- Civil appeal (*Beschwerde in Zivilsachen*) and subsidiary constitutional complaint (*subsidiäre Verfassungsbeschwerde*) to the Federal Court



Enforcement of money debts





Insolvency

- Bankruptcy proceedings as debt enforcement (for merchants/businesses; no requirement of insolvency)
- Bankruptcy proceedings without prior enforcement
 - at a creditor's demand
 - at the debtor's demand
- Composition proceedings (*Nachlassverfahren*)
- Distribution of assets
- After insolvency: “no new property” exception (but no discharge of residual debt [yet])



Arbitration

- Domestic arbitration: Articles 353 ff. ZPO (possibility to opt into IPRG regime)
- International arbitration: Articles 176 ff. IPRG (where at least one party is domiciled outside Switzerland; possibility to opt into ZPO regime)
- Swiss Rules of International Arbitration
(<https://www.swissarbitration.org/>)
- Reform plans (government draft presented in late 2018,
<https://www.admin.ch/opc/de/federal-gazette/2018/7213.pdf>,
<https://www.admin.ch/opc/de/federal-gazette/2018/7163.pdf>)



Decision on jurisdiction of arbitral tribunal

- “*Kompetenz-Kompetenz*” (authority of arbitral tribunal to rule on its own jurisdiction; subject to scrutiny by Federal Court in setting-aside proceedings)
- International arbitration: priority of proceedings before arbitral tribunal; domestic arbitration: priority of proceedings brought first in time
- Only *prima facie* control of arbitration agreement by state court seised of a matter in which the parties have concluded an arbitration agreement (Article 61 ZPO, Article 7 IPRG)



Application to set aside an arbitral award

- Application to set aside arbitral award: addressed directly to Federal Court
- Possibility to agree on cantonal court in domestic arbitration (Article 390 ZPO)
- Waiver possible if none of the parties is domiciled in Switzerland (Article 192 IPRG)



International Litigation

- Some important international instruments
 - Lugano Convention
 - Hague Service Convention
 - Hague Evidence Convention
 - New York Convention on the Recognition and Enforcement of Arbitral Awards



International Litigation

- National law on cross-border litigation: (primarily) IPRG
 - jurisdiction in cross-border cases
 - lis pendens in cross-border cases
 - recognition and enforcement of foreign judgments



International Litigation

- Recognition and enforcement of foreign judgments under the IPRG (Articles 25 ff. IPRG)
 - indirect jurisdiction of the foreign court (specific rules, no full “mirror principle”)
 - as a rule, no recognition or enforcement of foreign judgments given against a defendant who is domiciled in Switzerland and did not voluntarily submit to the jurisdiction of the foreign court
 - finality



International Litigation

- Recognition and enforcement of foreign judgments under the IPRG (Articles 25 ff. IPRG)
 - grounds for refusal (Article 27 IPRG)
 - public policy exception
 - lack of proper service
 - violation of basic principles of Swiss procedural law
 - disregard of proceedings pending earlier in Switzerland or conflict with Swiss judgment or conflict with earlier third-state judgment
 - no reciprocity requirement
 - “separate” exequatur proceedings or submission of foreign judgments in “normal” enforcement proceedings



Cross-border insolvency

- Recognition of foreign insolvency decrees (Articles 166 ff. IPRG)
 - decree enforceable in state of origin
 - no ground for refusal according to Article 27 IPRG
 - debtor's domicile or (for debtors not domiciled in CH) centre of main interests in state of origin
 - reciprocity requirement abolished by reform of 2018 (in force from 2019)



Cross-border insolvency

- Effects of recognition
 - secondary insolvency proceedings in Switzerland (waiver possible in certain cases)
 - if foreign scheme of distribution is recognised: proceeds handed over to main insolvency administrator after satisfying certain Swiss claimants
 - if there is a waiver of secondary insolvency proceedings: some powers of foreign administrators to act in Switzerland with respect to assets located in Switzerland