



**Universität
Zürich** UZH

European Civil Procedure

UZH Spring Semester 2024

2nd Part

Slides I: Exclusive Competence, Jurisdiction Agreements, Submission

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Exclusive Competence (Art. 22 LugC)

Caution: tripping hazards!

Exclusive jurisdiction in general (Art. 22 LugC)

- "*Exclusive*" in the sense of Art. 22 LugC also always means "**mandatory**"
- Neither a jurisdiction agreement nor submission are possible!
 - Narrow interpretation because of the exclusion of the usual grounds of jurisdiction
- Catalogue according to Art. 22 LugC is **exclusive**
 - No analogous application (Federal Tribunal 4A_283/2018 9.7.2019 cons. 6.2)
- Connection to the **subject matter** of the dispute alone
 - The subject matter must be realised in one of the contracting states
 - Domicile and nationality of the parties are irrelevant
 - Only concerning the main subject matter in dispute

- **Public interest** of the states, to decide the subject matters themselves
- Ensuring **proximity** to the **facts and evidence**
 - However, this is not necessary in individual cases and is also not enough to justify jurisdiction alone (Federal Tribunal 4A_283/2018 9.7.2019 cons. 6.2)
- Regulates the **international** jurisdiction
- To be examined **ex officio** (Art. 25 LugC)
- **Consequences** of a violation: above all, no *lis pendens* and no recognition of the decision

Properties (Art. 22(1) LugC)

- International jurisdiction at the **location**
 - *"rights in rem"* and *"rent and lease"* of *"immovable property"*
 - Essentially autonomous interpretation
(regarding *"rights in rem"*, compare CJEU C-417/15 *Schmidt/Schmidt* n. 27; Federal Tribunal 4A_283/2018 9.7.2019 cons. 6.2)
- Exception: certain short-term utility leases (Para. 2): Right to choose
- Special cases
 - **Time-Sharing** (No. 1 is not applicable in the case of membership)
 - **Airbnb** (at least triangle ratio: Airbnb – Host | Airbnb – Guest | Host – Guest. At least in the latter contractual relationship, No. 1 may be applicable)

- Comparison: local jurisdiction according to the **PILA**
 - *Rights in rem*: exclusive and mandatory place of jurisdiction at the place of location (Art. 97 PILA)
 - Rental disputes concerning immovable property: general contractual jurisdictions (Art. 112 *et seq.* PILA)

Mr. and Mrs. Göbel, resident in Germany, are owners of a vacation home in Cannes (F). In 1978, Mr. Lieber, also resident in Germany, had sued the couple before the Frankfurt am Main Regional Court. This legal dispute ended with an out-of-court settlement according to which ownership of the apartment was to pass to Mr. Lieber. In execution of this settlement, the couple conceded ownership of the apartment to Mr. Lieber. In 1987, it turned out that the settlement was void.

Mr. and Mrs. Göbel demanded compensation from Mr. Lieber before the Regional Court of Frankfurt am Main for the use made of the apartment until 1987. Mr. Lieber contested the jurisdiction of the German courts on the grounds of [Art. 22] no. 1 [LugC].

(CJEU C-292/93 9.6.1994 *Lieber vs. Göbel*)

Mr. Schmidt, resident in Austria, gave away a property in Vienna to his daughter, who lives in Germany, in 2013. A psychiatric report retroactively established Mr. Schmidt's incapacity to act. His trustee (guardian) sued Ms. Schmidt before the Vienna Regional Court for (1) annulment of the 2013 gift contract and (2) deletion of Ms. Schmidt's entry as owner in the land register. Ms. Schmidt claims that the Vienna court lacks local jurisdiction.

(CJEU C-417/15 16.11.2016 *Schmidt vs. Schmidt*)

Corporate law (Art. 22(2) LugC)

- Claims for validity of constitution/nullity/dissolution of the company and validity/nullity of decisions of its organs
 - Incl. review of compensation in the event of a *squeeze out* (CJEU C-560/16 7.3.2018 *E.On Czech Holding vs. Dedouch a.o.*)
- *Not:* Exclusion of shareholders; liability actions; actions for information or for special audit; preliminary issues

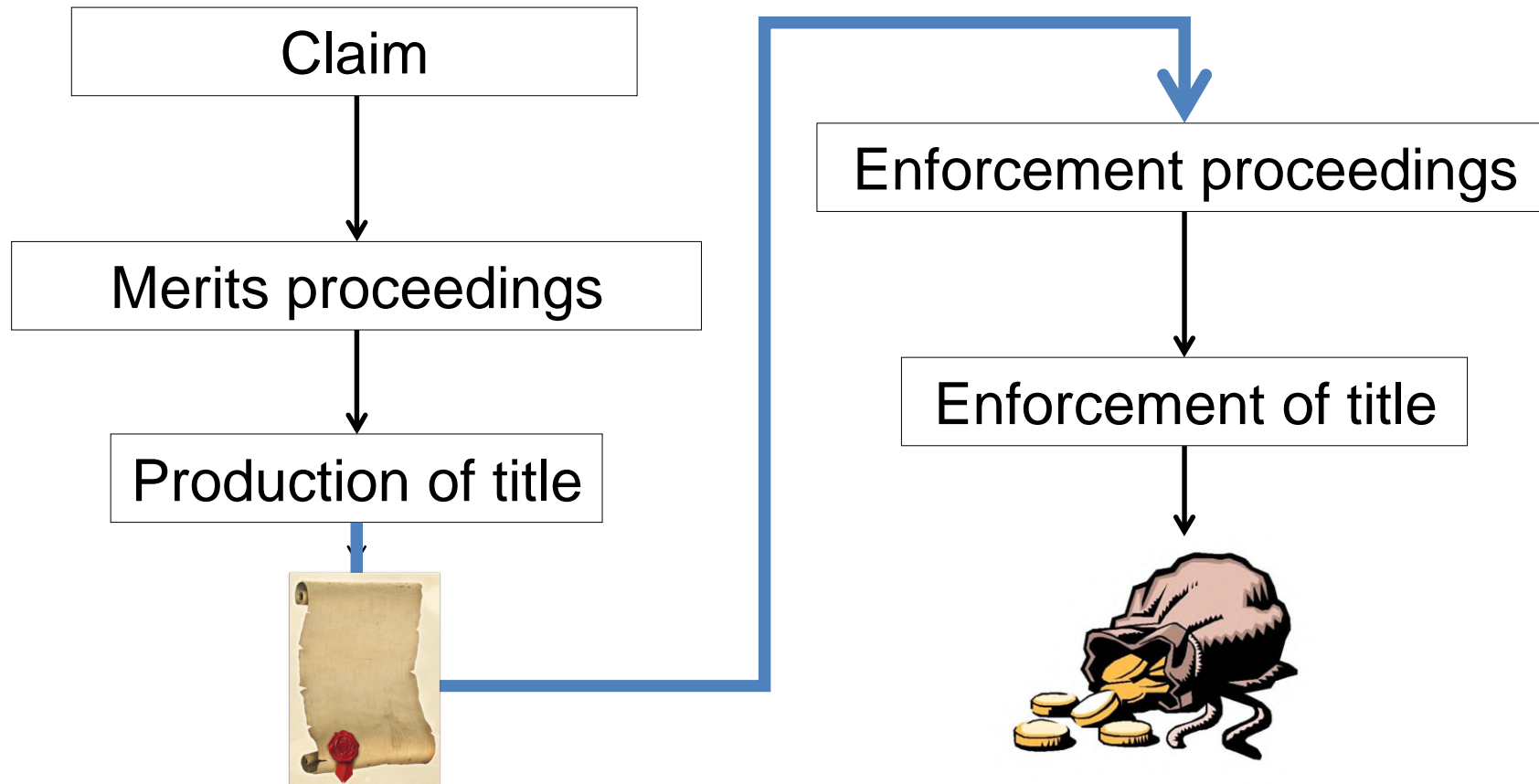
- Jurisdiction in the country of domicile of the company
 - Determination of domicile explicitly according to the *lex fori*, not according to Art. 60 LugC
→ Art. 151 in conjunction with Art. 21(2) PILA (= primarily the designated domicile)
 - Possible conflicts of jurisdiction due to different domicile designations (CH/EU):
 - Domicile theory
 - Foundation or incorporation theory
- The terms "company" and "legal person" are interpreted autonomously
(DFT 142 [2016] III 466 cons. 5)

X Inc. (statutory domicile in Zug) trades in commodities. Most of the business is conducted from Berlin, where the meetings of the board of directors also take place. A minority shareholder resident in London feels that her protected interests have been violated by a resolution of the board of directors, which is hostile towards her. She wants to assert the nullity of a board resolution and at the same time hold the board members accountable.

Where can she do this?

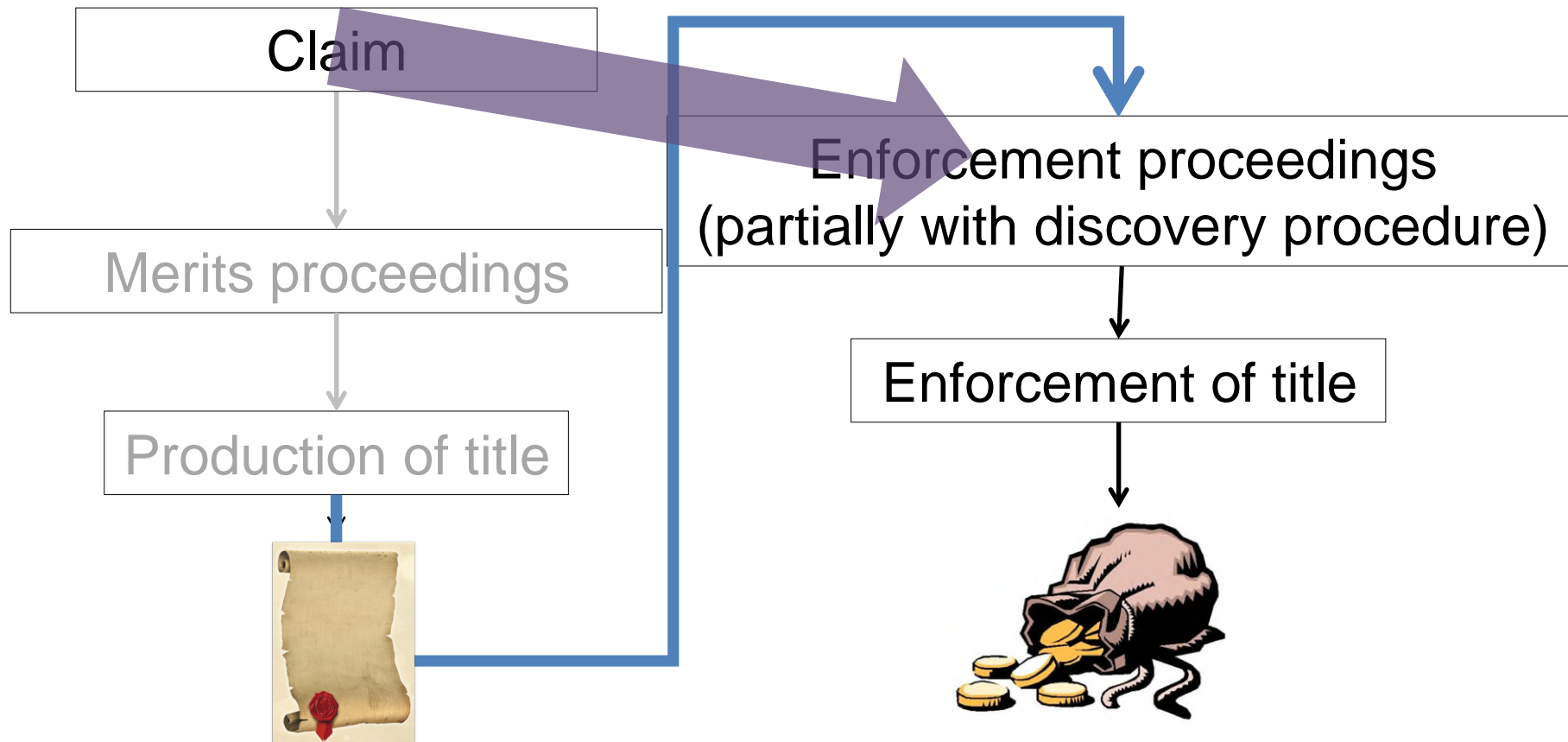
Enforcement proceedings (Art. 22(5) LugC)

Theory (and LugC)



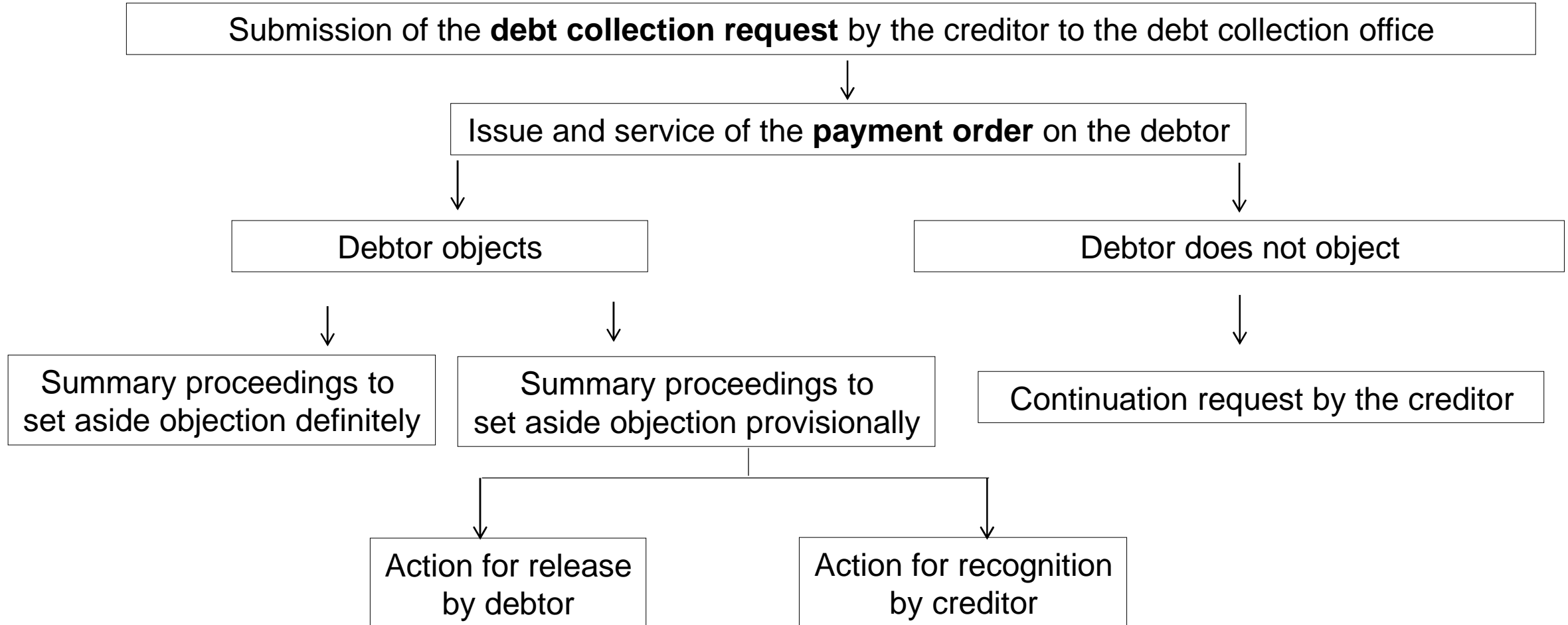
Swiss practice

(with DEBA – Debt Enforcement and Bankruptcy Act 1889)

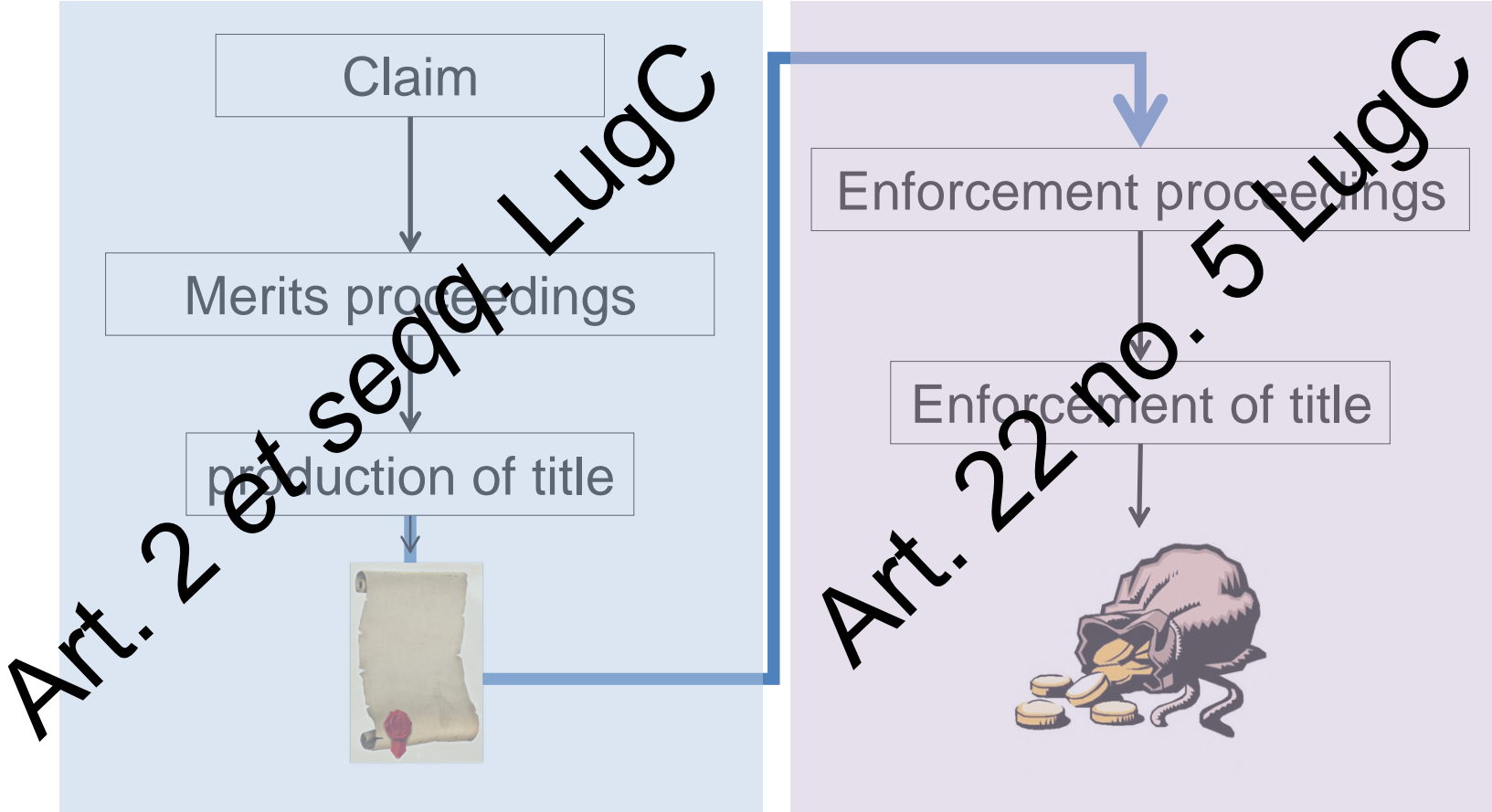


DEBA-proceedings: Initiation procedure

(simplified)



Competence (Scope)



DEBA proceedings: issuance of a payment order

- Judicial proceedings according to the LugC? Disputed
 - Under old LugC: DFT 130 (2004) III 285 cons. 5.1: "*highly doubtful*"
 - No decision under revised LugC
 - Art. 62 LugC defines "Court" functionally (CJEU C-467/16 20.12.2017 *Schlömp*, n. 57)
 - Art. 32 LugC mentions "decree, order, decision or writ of execution" as a form of a decision, but does not necessarily mean the Swiss payment order
- No exclusion pursuant to Art. 1(2)(b) LugC
- Consequences of possible applicability:
 - If there is no enforceable title ("untitled" payment order) → issuance of the payment order exclusively in a LugC-place of jurisdiction for discovery proceedings
 - Uncontested payment orders are enforcement orders under Art. 32 *et seqq.* LugC!
 - If there is an enforceable title ("titled" payment order) → Art. 22(5) LugC

DEBA proceedings: legal opening procedure

Is the **legal opening procedure** a merits procedure or an enforcement procedure?

- **Provisional opening procedure:**
 - DFT 136 (2010) III 566: enforcement procedure
 - But otherwise inconsistent case law
 - Prevailing doctrine: merits procedure
- **Definitive opening procedure:** enforcement procedure

DEBA proceedings: actions for release / for recognition

- Merits procedures → not Art. 22(5) LugC
- However, DFT 130 (2004) III 285 cons. 5.3: The Federal Supreme Court allows the action for release against the French creditor at the Geneva domicile and debt collection location of the debtor, where the provisional opening has already taken place
 - Protection of the *de facto* defending claimant in the action for release
 - Disregard for Art. 2 *et seqq.* LugC?
(Possible justification by the special nature of the release proceedings which are closely connected to the opening proceedings: double proceedings judicial opening - revocation action as a unit of jurisdiction)

Further DEBA proceedings

Reminder: Bankruptcies, compositions and similar proceedings are excluded from the material scope of the Lugano Convention (Art. 1(2)(b) LugC)

Art. 22(5) LugC *not* applicable, because it is a merits procedure (selection):

- Arrest prosecution action (Art. 279 DEBA)
- Negative declaratory action (Art. 85a DEBA)
- Paulian (claw back) actions (Art. 285 DEBA)?
 - Specific execution: merits procedure → Art. 2 *et seqq.* LugC
(CJEU C-722/17 10.7.2019 *Reitbauer a.o./Casamassima* n. 56 *et seqq.*)
 - General execution: → applicability of LugC depends upon the circumstances
(CJEU C-213/10 19.4.2012 *F-Tex SIA* n. 30 *et seqq.*)

Further DEBA proceedings

Art. 22(5) LugC applicable, because enforcement procedure (selection):

- Granting of a subsequent objection to the payment order (Art. 77 DEBA)
- Cancellation or discontinuation of the debt enforcement proceedings (Art. 85 DEBA)
- Opposition to third-party claims (Art. 107/108 DEBA)?
(Federal Tribunal 5A_53/2020 13.7.2021)
- Attachment order (Art. 272 DEBA) and objection to attachment (Art. 278 DEBA), if titled attachment
- Privileged garnishment by another creditor (Art. 111(3) DEBA)
- Special case of debtor's instruction under matrimonial law
(Federal Tribunal 138 [2012] III 11)

Jurisdiction Agreements (Art. 23 LugC)

The bedrock of any contract

Jurisdiction agreement

- Belongs in every (international) contract!
- Sources:
 - Art. 23 LugC; Art. 25 Brussels Ia Regulation
 - Art. 5 PILA
 - Hague Convention of 30 June 2005 on Choice of Court Agreements (in force for EU [incl. Denmark], Mexico, Montenegro, Moldova, Singapore, Ukraine, UK)
 - Limited scope of application!
 - Only exclusive jurisdiction clauses (but with a presumption of exclusivity)
 - Focus on contracts (but exclusion of consumer and employment contracts and tenancy of immovable property)
 - But applicable independent of the seat/residence of the parties
 - Switzerland is currently ratifying
 - Priority of LugC (Article 26)

Restrictions (Art. 23(5) LugC)

- Art. 22 LugC!
- Consumer disputes
 - Art. 17 LugC: only after the dispute has arisen or in favour of the consumer or in favour of the common (domiciliary) State.
 - Consumer: natural person who purchases for private purposes (so-called purpose theory)
 - Only certain contracts: Purchase on instalment credit; credit transactions to finance a purchase of movable property; gearing of the transaction to the consumer's country of residence
 - Art. 114(2) PILA: consumer may not in advance waive jurisdiction at his own residence
 - Consumption = Acquisition of goods of "ordinary consumption" of private households → narrower!
 - Applicable if the defendant does not have seat/branch/residence in a LugC state (Art. 4, 15(2) LugC)

- Employment disputes
 - Art. 21 LugC: only after the dispute has arisen or in favour of the employee
 - Art. 115 PILA: no restriction!
- Insurance disputes
 - Art. 13 LugC: In principle, only after the dispute has arisen or in favour of the policyholder, insured person or beneficiary (special cases reserved)
 - Art. 112 *et seqq.* PILA: in principle no restriction (as far as no "usual" insurance contracts covered by Art. 120 PILA, such as household contents and private liability insurance policies)

Art. 23 LugC

- Spatial-personal scope
 - At least one party (but no matter which!) must have its seat/domicile in a Contracting State
 - Agreement of a court of a Contracting State
 - No reference to another Contracting State is required, but the facts of the case must be international
(CJEU C-281/02 1.3.2005 *Owusu/Jackson* n. 28; DFT 143 [2017] III 558 cons. 3.3)
 - Art. 23 is also applicable if parties are both seated in one Member State and choose the courts of another Member State
(CJEU C-566/22, 8.2.2024 *Inkreal s.r.o. v. Dúha reality s.r.o.*)

Art. 23 LugC

- Specific or determinable legal relationship required
(Federal Tribunal 4A_433/2019 10.4.2020 cons. 4.2.4)
- Determination of a specific jurisdiction required (designation of a state is sufficient)
- In case of doubt jurisdiction is exclusive

- Formal requirements:
 - Written form on both sides as a principle (electronic transmission sufficient)
 - Text, but no signature required
 - Verbal with written confirmation
 - Form according to an established practice between the parties or according to trade usage (rare!)
 - Jurisdiction clauses in by-laws bind all shareholders
(CJEU C-214/89 10.3.1992 *Powell Duffryn v. Petereit*)
 - "Click-wrapping" of terms and conditions is sufficient with the possibility of permanent recording
(CJEU C-322/14 21.5.2015 *El Majdoub v. CarsOnTheWeb*)
 - Adherence to form is an indication of consensus (rebuttable presumption)

- Eligibility (*ratione materiae* and *ratione personae*), form
→ LugC
- Interpretation, formation, lack of intention etc.: insofar as not autonomously regulated
→ *lex causae*
 - Law chosen by the parties for the choice of court agreement (rare)
 - Subsidiarily the *lex causae* of the main contract
- Independence of a jurisdiction clause from the main contract ("*separability*")
 - Made explicit in Art. 25(5) Brussels Ia Regulation

(a) In 2010, X Inc., Austria, intended to conclude work contracts with Y Ltd., Germany, for the construction of a new warehouse. In the email with the drafts of the contracts, X AG refers to its General Terms and Conditions (GTC), which could be requested under a certain fax number. In the GTC there is a jurisdiction clause with the following wording:

"All disputes arising out of or in connection with this contractual relationship (including disputes concerning the validity and termination of this contract and the validity of the jurisdiction clause) shall be decided exclusively by the courts having jurisdiction for the city of Zurich; [...]"

Y Ltd. signs the contracts and sends them back by email. Later, X Inc. points out that the GTC are now available on the website.

In response to an action brought by X Inc. before the Commercial Court of Zurich, Y Ltd. raises a plea of lack of jurisdiction.

(DFT 139 [2013] III 345)

(b) What if the GTC can be accessed via a hyperlink in the contract?

(CJEU C-358/21 24.11. 2022 *Tilman SA v. Unilever Supply Chain Company AG*)

There is a brokerage agreement between B Ltd., domiciled in Pfäffikon, Canton Schwyz, Switzerland, and A, domiciled in Monaco, in connection with the sale of a property in Herrliberg, District of Meilen, Canton Zurich, Switzerland. In it, the parties agreed, inter alia, the following:

"The place of jurisdiction for any disputes arising from this agreement shall be the Commercial Court of Zurich. Swiss law shall apply."

B Ltd. sues A before the Zurich District Court. A raises a plea of lack of jurisdiction.

(DFT 143 [2017] III 558)

The Swiss company S and the Czech company T have agreed the following in their contract:

"Disputes that cannot be resolved [amicably] shall be referred to competent general jurisdiction for adjudication."

(Zurich Commercial Court HG160067 9.1.2019)

Company S with its registered office in the Canton of Vaud and Company V in the United Arab Emirates have concluded the following jurisdiction clause:

"This Agreement shall be governed by and construed in accordance with Swiss Law and the parties hereby submit to the exclusive jurisdiction of the Swiss Courts."

S brings an action before the Zurich Commercial Court. V does not submit.

Does the Zurich Commercial Court have jurisdiction?

(Assessment according to LugC and PILA)

(Zurich Commercial Court HG170162, 12.11.2018, ZR 118/2019 p. 68; see also Cour d'appel civile, Vaud, 9.4.2018, JdT 2018 III p. 123)

The Latvian company U maintains a bank account with the Zurich bank B. Its general terms and conditions contain the following clause:

"All legal relations between the account holder and the Bank shall be governed by and construed in accordance with Swiss law. The domicile of the Bank in Zurich shall be the place of performance, the place of debt enforcement for account holders permanently resident or with registered office outside Switzerland and the place of jurisdiction for all proceedings. Notwithstanding the foregoing, the Bank reserves the right to refer any claim against the account holder to any court having jurisdiction in the location of the account holder's permanent place of residence or registered office, any other court of competent jurisdiction, or permitted place of debt enforcement."

U brings an action in tort against B at its domicile for allegedly fraudulent actions by the customer relationship manager. Bank B raises a plea of lack of jurisdiction.

In 2006, the European Commission fined six European chemical companies for price fixing, including for hydrogen peroxide. Several affected customers assigned their claims for damages to Cartel Damage Claims (CDC) Hydrogen Peroxide SA (Belgium).

CDC sued the six companies before the Dortmund Regional Court. Some of the defendants claimed lack of jurisdiction citing, among other things, jurisdiction agreements in their supply contracts.

(CJEU C-352/13 21.5.2015 *CDC*)

Art. 5 PILA

- Very narrow remaining scope of application → only if
 - Out of subject-matter scope of the LugC
 - No residence/seat of a party in a Lugano State
 - Derogation of a Swiss jurisdiction in favour of a third state
- Internationality required
 - Foreign (domicile) of at least one party
 - Foreign place of performance
 - Other relevant foreign connection (?)
- Reservation of abuse of law (para. 2): broader than Art. 2(2) Swiss Civil Code?
- Reservation of para. 3
 - *Forum-non-conveniens* idea → out of place!

Submission (Art. 24 LugC)

In practice quicker than you think

Legal provisions

- **Art. 24 LugC**

- According to the wording, irrespective of party domiciles (unlike Art. 23 LugC, but disputed; case law unclear)
- Internationality required
- Art. 22 LugC takes precedence!

- **Art. 6 PILA**

- Art. 24 LugC takes precedence → only rarely applicable
- Only in property disputes
- Not in cases of Art. 97 PILA (actions concerning rights *in rem* in real property)
- Reservation of Art. 5(3) PILA applies analogously

Art. 24 LugC

- **Term of Submission:** Defendant "enters an appearance" (autonomous interpretation)
- **No submission:** Mere failure to act; participation in conciliation hearing; application for stay; assertion of lack of jurisdiction (with helpful argumentation on the merits); legal proposal or objection against a European order for payment
- **Submission:** contestation of subject-matter jurisdiction, invocation of litispendency, *res iudicata* or limitation period suffice
- **Point in time:** Plea of lack of jurisdiction at the latest together with an act which can otherwise be qualified as a submission → at the latest with the statement of defense

(DFT 133 [2007] III 295; Federal Tribunal 4A_448/2018 21.5 2019 "*Swatch II*" cons. 6.1 [unpubl. cons. of DFT 145 [2019] III 303])