

Swiss Civil Procedural Law

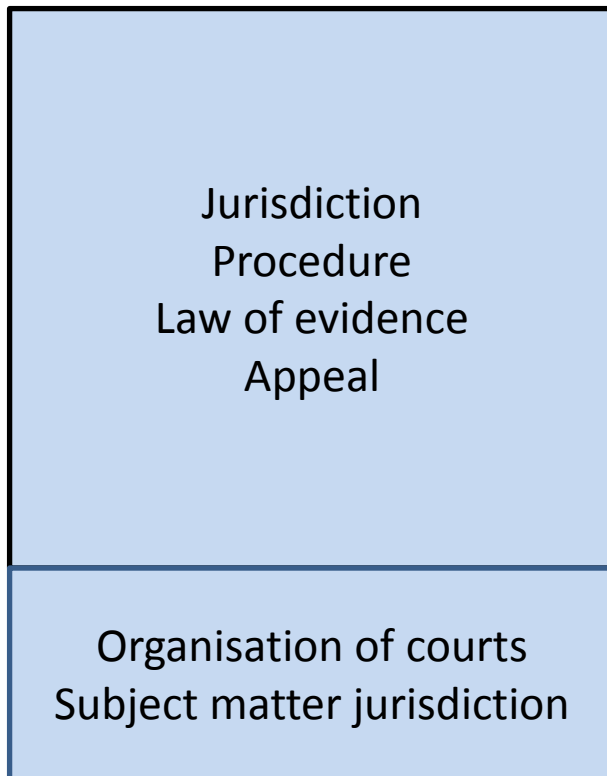
Professor Isaak Meier

Substantive law and procedural law

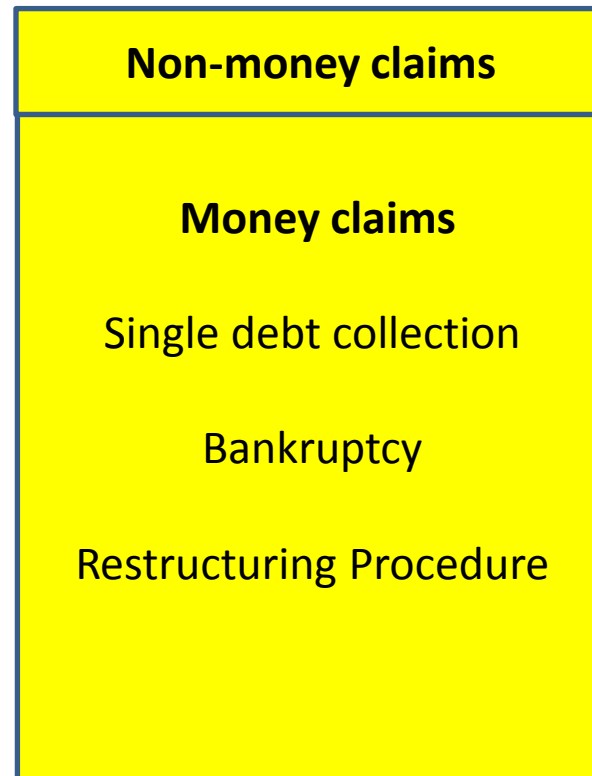
Area la law	Substantive law	Procedural law
Public law	Administrative Law (federal and cantonal law)	Administrative proceedings (federal and cantonal law)
Criminal law	Swiss criminal code (CrimC)	Criminal Procedure Code (CrimPC)
Private law	Swiss civil code (CC), Code of Obligation (CO)	Swiss Civil Procedure Code (CPC).

Civil Procedural Law

Adjudication

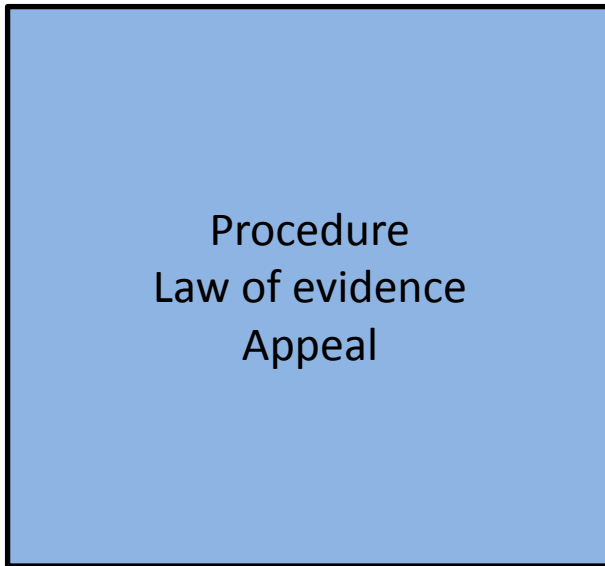


Enforcement



Civil procedural Code: CPC 2008

Adjudication



Enforcement



Organisation of courts

Cantonal law = GOG ZH

- Debt Enforcement and Bankruptcy Code (Insolvency Code)
- Federal Statute on the Federal Supreme Court
- Federal Statute on Private International Law
- Lugano Convention
- Constitution and European Human Rights Convention (HRC)

Swiss Constitution

Art. 29 of the Constitution - General procedural guarantees

¹ Every person has the right to equal and fair treatment in judicial and administrative proceedings and to have their case decided within a reasonable time.

² Each party to a case has the right to be heard.

³ Any person who does not have sufficient means has the right to free legal advice and assistance unless their case appears to have no prospect of success. If it is necessary in order to safeguard their rights, they also have the right to free legal representation in court.

Human Rights Convention (HRC)

Article 6 – Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ...

Limited importance of constitutional rights in Switzerland

Art. 189 of the Constitution – Jurisdiction of the Federal Supreme Court

¹ to ³...

⁴ Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. ...

Federal Supreme Court

High Court

Commercial Court

District Court

Conciliation Authorities

Justice of the peace

Bezirksgericht Zürich





Obergericht mit Handelsgericht
des Kantons Zürich

Kantons-und Obergericht des Kantons Glarus



Schweizerisches Bundesgericht



Bezirksgericht Zürich, Wengistrasse 28/30



Bezirksgericht Zürich, Badenerstrasse 90



Swiss judges

- Laypersons and jurists
- Single judges or bench of judges
- Elected only for a fixed period of time
- Elected by the people or parliament
- Political influence

Swiss lawyers

- **Federal Act on the Freedom of Movement for Lawyers:** Admission requirements for lawyers, ethical rules and the lawyer's monopoly etc.
- Swiss and cantonal bar associations; ethical rules.
- Admitted in every canton and at the Federal Supreme Court
- A party can defend him/herself (there is no obligation to be legally represented in court)

Number of lawyers and judges in Switzerland in comparison with other European countries (number per 100'000 inhabitants)
CEPEJ = European Commission for the Efficiency of Justice

	Lawyers	Judges
Switzerland	128,8*	14,5 (7,3***)
Germany	190,4*	24,3
UK (England and Wales)	299 **	3,6 (13,9***)
Greece	369,5*	18,0


*without legal advisors

***part-time judges

**including legal advisors

Ordinary Proceedings

Issuing a claim:
Settlement conference
led by a justice of the peace



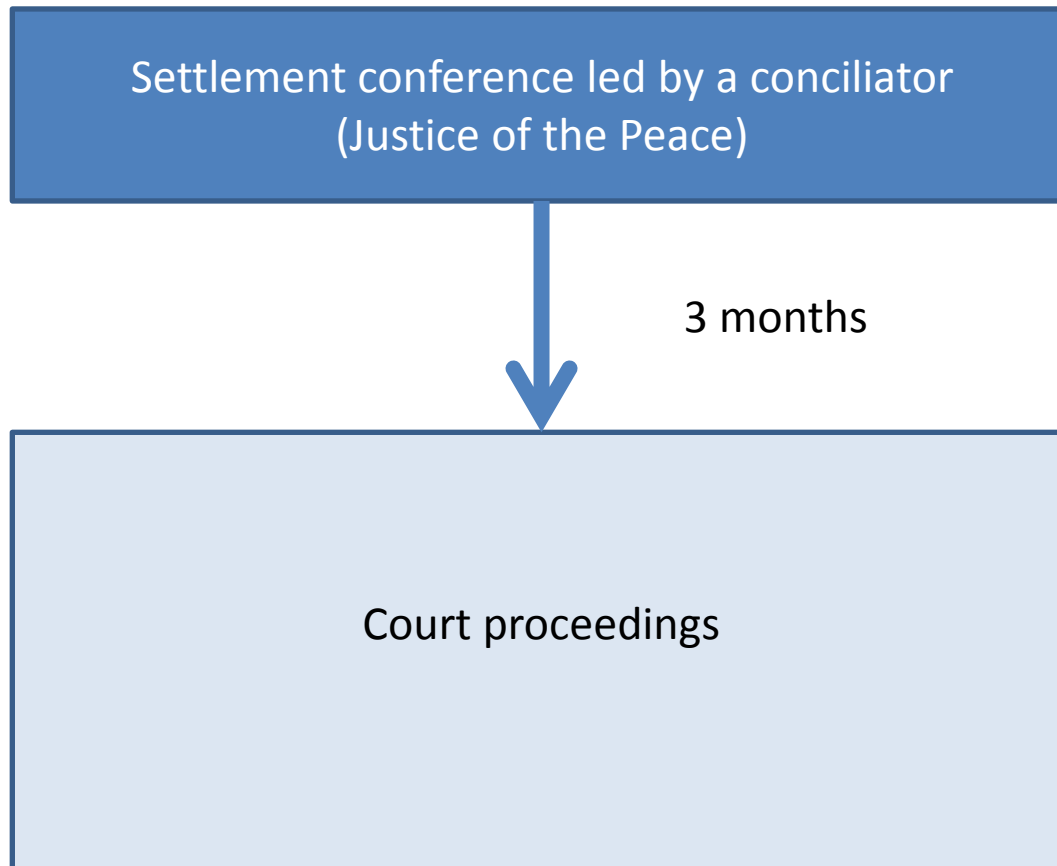
Filing the claim:
Exchange of statements with
detailed statements of facts and list of evidence

Preparatory hearing: settlement conference etc.

Second exchange of statements

Main hearing
Exchange of pleadings
Taking evidence

Pre-trial settlement conference



Settlement conferences as part of the preparatory hearing

- Led by the judge who later decides the case
- Negotiation about a proposal based on an *assessment* of the chances to win the case
- The court has enough time for each case

60% settlements!

Adjudication

Conciliation

Conciliation proceedings

First step of the adjudication proceedings

mandatory conciliation hearing led by a justice of the peace

Adjudication proceedings

Exchange of pleadings and preparation of main hearing

Statements of claim and defence,

Preparing the settlement conference

Preparatory hearing

The parties have to complete their statements of facts and evidence.

Settlement conference led by the trial judge.

Main hearing

Exchange of arguments, taking evidence and closing statements.

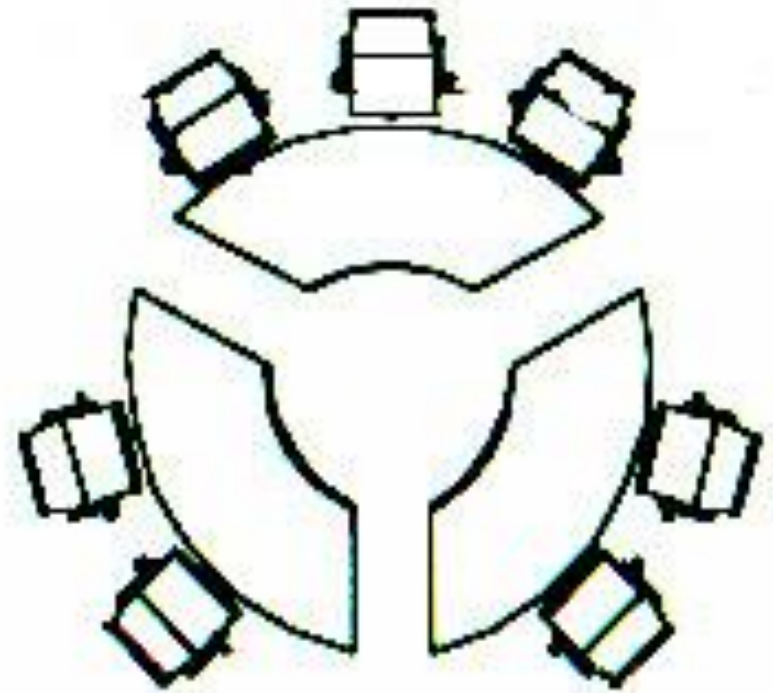
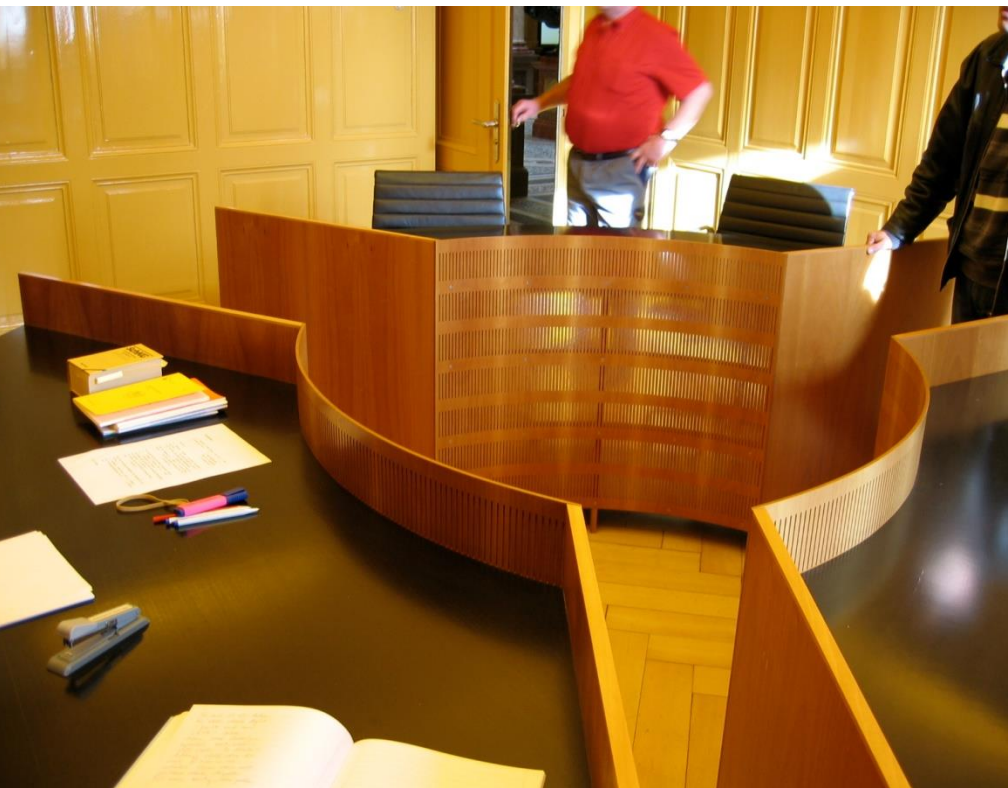
The court again encourages the parties to settle the case.

Decision on the merits

The court decides the dispute on the merits.

The settlement conferences influences the court's decision.







English Civil Procedure

Duty to disclose evidence

Issuing a claim:
Sorting out non defended cases
(Default judgment)

Case management:
Track-Allocation (transfer)
Disclosure (inspection)
Exchange of witness statements
Exchange of expert reports
Pre-trial checklists
Pre-trial review
Trial-bundle

Trial
Taking evidence
Submissions
(Judgement, reserved judgment)

Simplified Proceedings

Art. 243 Scope of application

¹ Simplified proceedings apply in financial disputes with a value in dispute not exceeding 30,000 francs.

² They apply regardless of the amount in dispute to: for example:

- disputes concerning the tenancy and lease of residential and business property or the lease of agricultural property
- disputes concerning the right of access to personal data provided by the Federal Act on Data Protection;
- disputes concerning insurance supplementary to the social health insurance

Simplified proceedings

- Oral proceedings,
- Supporting to parties not represented by lawyers:

Art. 247 Establishment of facts

¹ By asking the appropriate questions, the court shall cause the parties to complete inadequate submissions and to designate the evidence.

² In the following cases, the court shall establish the facts ex officio:

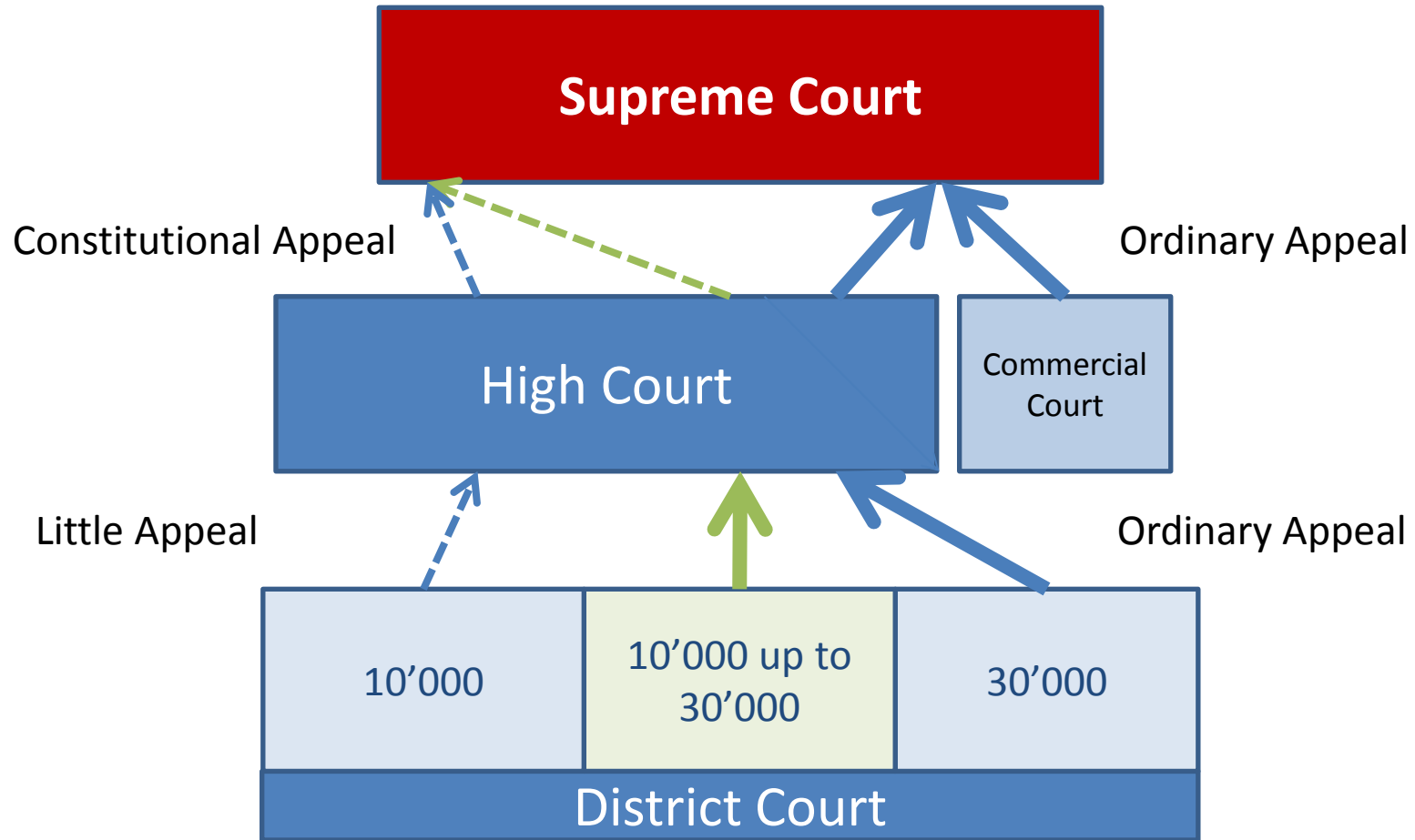
- Disputes concerning the tenancy and lease;
- in other employment law disputes.

Summary Proceedings

Art. 248 Principle

- Summary proceedings may be brought:
 - a. ... ;
 - b. for legal protection in clear cases;**
 - c. ... ;
 - d. for interim measures;**
 - e. for non-contentious matters.**

Appeal



Conciliation Authorities

Law of evidence

- Limited catalogue of evidence, but “document” as general notion for all kinds of evidences.
- Formal limitations for evidence
- Party testimony as subsidiary evidence.

- General duty of third parties and the involved parties to disclose evidence etc.
- Preventive taking of evidence (art. 158 CPC).

General duty of third parties and the involved parties.

¹ Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty:

- to make a truthful deposition as a party or a witness;
- to produce the physical records, with the exception of documents forming correspondence between a party or a third party and a lawyer who is entitled to act as a professional representative,
- ...

Burden of proof (art. 8 CC).

Art. 8 CC

Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.

Special rules: Burden of proof of the defendant for not acting with negligence in tort cases based on a contract (CO 97).

Procedural Costs and legal aid

Procedural Costs;

- Court costs: court fees; cost for taking evidence
- Party costs: costs of a lawyer, necessary expenses.

The losing party has to pay all the costs: Court costs, the opponent's lawyer, her/his own lawyer.

Costs

Losing party pays all the costs = lawyer's fees and court costs.

	1000	100 000	1 Mio.
District Court	1000 – 1750	31 165 – 61 715	94 790 – 188 340
Inclusive cantonal appeal	1416 – 2334	47 181 – 84 999	146 474 – 260 956
Inclusive federal appeal	2816 – 15 334	<u>54 681 – 109 999</u>	165 474 – 324 956

Legal aid = only with an income below subsistence level

Case Management

Active judge:

- *Organizing an effective procedure*
- *Supporting the parties*

Art. 56 CPC:

If a party's submissions are unclear, contradictory or manifestly incomplete, the court shall give the party the opportunity to clarify or complete the submission by asking appropriate questions.

Other important institutions and principles of procedural law

- Res iudicata = Only the judgment itself is binding, not the reasons
- Forum
- Joinder of claims
- ...

ADR :

Forms of dispute resolution as alternatives to a judgment

ADR solution is based on the consent of the parties and not on the examination of facts and law

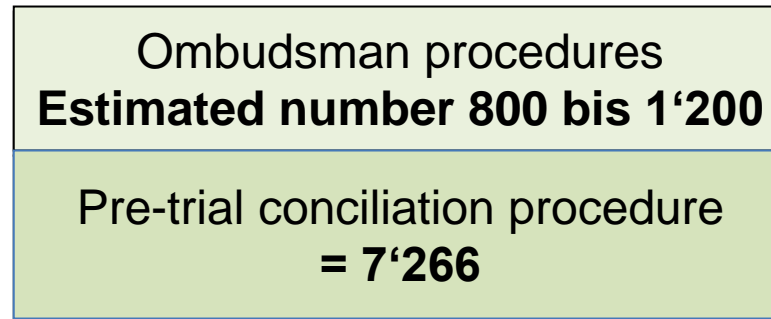
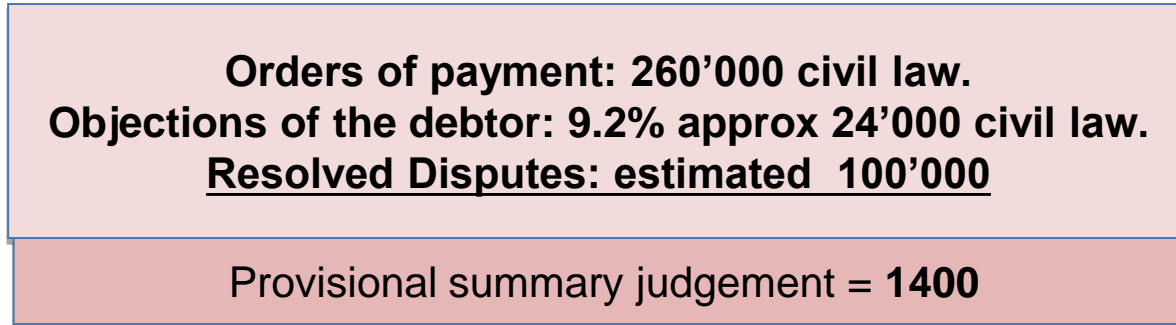
ADR Forms

- **Mediation**
- **Ombudsmen – dispute resolution in consumer cases**
- **Conciliation as a part of the formal procedure**

Many others:

- **Provisional judgment which becomes final, if the defendant does not object etc.**

Figure: Success rates of the ADR instruments in civil matters in the Canton of Zurich in 2013



Ombudsman agencies for consumer disputes

The most important ones are the ombudsmen in the **banking, insurance, telecommunication and travel industries.**

- **Private institutions** installed by the industries.
- The ombudsman is employed by an independent foundation.
- Easy access: fast and cheap.

After submitting a claim the ombudsman negotiates a solution with the supplier.

Mediation

- Introduced in the last 20 years
- Mediation is understood in the sense of a comprehensive and sophisticated dispute resolution procedure
- Regulated mainly in the new CPC (Art. 213 ff.)

Statistics

Survey 2008 amongst the about 1000 members of the SDM:

Importance:

3'513 mediations

Divorce cases: mediation in approx. 10 % of the cases.

Main fields:

Family mediation 40% (child custody, ...)

Employment mediation; commercial mediation ...

Mediation “scene” in Switzerland

- Mainly self-regulated; some rules in CPC.
- Various societies, groups and other institutions
- Wide range of education and training
- Mediators
 - Lawyers
 - Psychologists
 - Public and semi-public institutions.

Mediation

CPC 213 ff.:

- Mediation instead of conciliation
- **Ratification of the agreement by the justice of the peace or by the court**
- Guarantee of confidentiality
- Statute of limitations?

Arbitration

- In most civil cases the parties can choose a private judge/court instead of a state court.
- A judgement of a private court has the same effect as a judgment of a state court.

Legal sources of arbitration

- International arbitration: Code of Private International Law.
- National arbitration: CPC 353 ff.
- International enforcement of arbitration awards: New York Convention of 1958.
- Private rules of ICC and Cantonal Chambers of Commerce.

Some principles of an arbitration procedure

- The parties or the judges can choose the proceedings;
- Minimal standard (ZPO 373): *“The arbitral tribunal must guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings.”*
- Independency of the judges has to be guaranteed.