

Swiss legal German and German legal German

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The difference between Swiss and German legal German goes deeper than the vocabulary of everyday Helvetisms. Both countries use German words for legal concepts, yet these words are embedded in different legal systems, so that the same word may designate different institutions, while different words may designate similar ones. For a financial centre that serves German clients and works with German banks, lawyers and tax advisers, these differences are a constant source of misunderstanding.¹ The author, who practises as a German Rechtsanwalt and is admitted in Zurich, encounters these differences in almost every cross-border mandate.

Company law offers a first example. The Swiss *Aktiengesellschaft* and the German *Aktiengesellschaft* share their name, their basic principle of limited liability and their division of capital into shares. Their governance, however, differs fundamentally. The Swiss company is managed by a *Verwaltungsrat*, a single board that combines the functions of supervision and strategic direction and may delegate management to executives.² The German company has a two-tier structure with a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*), whose members may not belong to both bodies at the same time. A German client who hears that a Swiss bank's *Verwaltungsrat* has decided a matter may therefore misjudge the role of that body, all the more since the Swiss Banking Act requires banks to separate supervision from management within the single board.³ The meeting of shareholders, called *Generalversammlung* in Switzerland and *Hauptversammlung* in Germany, is a further example of different terms for comparable institutions.

The law of debt enforcement and bankruptcy contains a vocabulary that has no equivalent in Germany. Swiss creditors enforce monetary claims through the procedure of *Betreibung* under the Federal Debt Enforcement and Bankruptcy Act of 1889, which allows a creditor to initiate enforcement through the *Betreibungsamt* without a prior judgment.⁴ The

debtor receives a *Zahlungsbefehl*, an order to pay, against which he may lodge a *Rechtsvorschlag*, an objection that stops the procedure without any reasons being required. The creditor must then obtain the removal of the objection through *Rechtsöffnung*, which is definitive when based on an enforceable judgment and provisional when based on a signed acknowledgement of debt. Since none of these terms corresponds exactly to a German concept, the translation of *Rechtsöffnung* as "setting aside of the objection" conveys the function only roughly. The old word *Gant* for a public auction of seized property survives in Swiss usage, especially in the context of real estate, while German lawyers speak of *Zwangsversteigerung*.⁵

Private client work is equally affected. The Swiss executor of a will is called *Willensvollstrecker*, whereas German law speaks of the *Testamentsvollstrecker*. The powers of the two differ in important respects.⁶ The compulsory share, *Pflichtteil*, exists in both systems, although Swiss law conceives it as a share in the estate itself, whereas German law grants a monetary claim against the heirs. The reform of Swiss inheritance law that entered into force on 1 January 2023 reduced the compulsory shares of descendants and abolished that of parents, which increased the freedom of testators and has implications for estate planning across the border.⁷ In real estate finance, the Swiss *Schuldbrief*, a mortgage instrument that may be issued as a paper or a register instrument, plays the role that the *Grundschild* plays in Germany. Owners of flats hold *Stockwerkeigentum* in Switzerland and *Wohnungseigentum* in Germany.⁸

The vocabulary of financial regulation and anti-money laundering shows the same pattern. Swiss law speaks of *Geldwäscherei*, German law of *Geldwäsche*. The Swiss Anti-Money Laundering Act and the reporting office MROS use the former term, which a German reader might take for a typographical error.⁹ The person on whose behalf assets are held is the *wirtschaftlich berechtigte Person* in Switzerland, the identification of which the Swiss banks document on a standard form traditionally known as Form A under the Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence (CDB). German law uses the term *wirtschaftlich Berechtigter* and a transparency register with its own rules.¹⁰ The Financial Institutions Act replaced the old *Effektenhändler* with the *Wertpapierhaus*, while German law speaks of *Wertpapierinstitute*. The similarity of these terms encourages a false sense of familiarity that the precise practitioner must resist.

For financial service providers in Basel, these terminological differences have practical consequences. Client documentation, account opening forms and investment advice must be comprehensible to the client, which

under the Financial Services Act includes the obligation to provide key information documents in a language the client understands.¹¹ A German client who signs a Swiss contract in German may believe that he understands its terms because he understands its words, while the legal institutions behind them differ from those he knows. The careful adviser therefore explains the Swiss concepts in terms that the German client can relate to his own legal experience, and records in the file that he has done so. The terminology database of the Federal Chancellery and the trilingual glossary in the annex of this book offer starting points for such explanations.¹²

1 Notes

1. On the differences between Swiss and German legal terminology, see the literature on legal translation within German, e.g. Peter Sandrini (ed.), *Übersetzen von Rechtstexten*, Tübingen 1999; the terminology database TERMDAT of the Swiss Federal Chancellery. To be verified. ↩
2. Swiss Code of Obligations (OR), Art. 707 ff. (Verwaltungsrat) and Art. 716a (non-transferable and inalienable duties of the board), as revised by the company law reform in force since 1 January 2023. ↩
3. German Stock Corporation Act (AktG), §§ 76 ff. (Vorstand) and §§ 95 ff. (Aufsichtsrat), § 105 (incompatibility); Swiss Banking Ordinance (BankV), Art. 11 (separation of the board of directors from executive management in banks). To be verified. ↩
4. Federal Debt Enforcement and Bankruptcy Act (SchKG) of 11 April 1889 (SR 281.1), Art. 38 ff. (Betreibung), Art. 69 (Zahlungsbefehl), Art. 74 ff. (Rechtsvorschlag), Art. 80–84 (Rechtsöffnung). ↩
5. On the term Gant (public auction in debt enforcement) in Swiss usage, see *Schweizerisches Idiotikon*, s.v. "Gant"; Bickel/Landolt, *Schweizerhochdeutsch*, 2012. To be verified. ↩
6. Swiss Civil Code (ZGB), Art. 517–518 (Willensvollstrecker); German Civil Code (BGB), §§ 2197 ff. (Testamentsvollstrecker). To be verified. ↩
7. Revision of the Swiss law of succession of 18 December 2020, in force since 1 January 2023 (ZGB, Art. 470 f.); German Civil Code, §§ 2303 ff. (Pflichtteilsanspruch as a monetary claim). ↩
8. Swiss Civil Code, Art. 842 ff. (Schuldbrief; register mortgage note introduced by the revision in force since 1 January 2012) and Art. 712a

- ff. (Stockwerkeigentum); German Civil Code, §§ 1191 ff. (Grundschild); German Wohnungseigentumsgesetz (WEG). To be verified. ↩
9. Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, GwG/AMLA) of 10 October 1997 (SR 955.0); Money Laundering Reporting Office Switzerland (MROS); German Geldwäschegesetz (GwG) of 23 June 2017 and § 261 StGB (Geldwäsche). ↩
 10. Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence (CDB 20), Art. 27 ff. and Form A; German Geldwäschegesetz, § 3 (wirtschaftlich Berechtigter) and §§ 18 ff. (Transparenzregister). See also Part E, Chapter III. To be verified. ↩
 11. Financial Services Act (FinSA/FIDLEG) of 15 June 2018 (SR 950.1), Art. 8 (information obligations), Art. 58 ff. (key information document); Financial Services Ordinance (FinSO/FIDLEV), provisions on the languages of the key information document and prospectus. To be verified. ↩
 12. Swiss Federal Chancellery, terminology database TERMDAT (www.termdat.bk.admin.ch); see also the trilingual glossary in the annex of this book. To be verified. ↩

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