

EXPERT OPINIONS AS ADMISSIBLE EVIDENCE IN SWISS CIVIL PROCEEDINGS



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IS SWITZERLAND A NEW LAND OF OPPORTUNITY FOR INTERNATIONAL EXPERTS?

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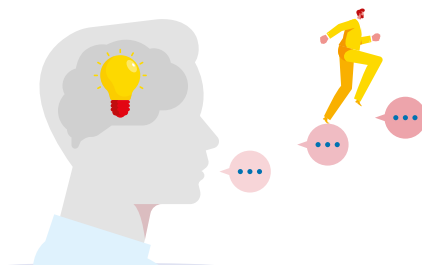
Introduction

Until recently, the prevalence of expert reports in Swiss civil proceedings was somehow more limited than in many other jurisdictions.

Indeed, party expert reports (or private expert reports) were essentially deemed to be mere party allegations rather than admissible evidence, and the central place was left to court-appointed experts.

As part of the most significant review of the Swiss Code of Civil Procedure since its entry into force in 2011, which aims to improve its practical efficiency, notably for foreign litigants, encompasses the possibility for cantons of creating international commercial courts which may use English as the language of the proceedings, as well as improving rules on hearings by video conference and on advance court costs, the role of private expert reports as evidence have been fundamentally changed.

This article will review the role of private expert reports until the entry into force of the new provisions and discuss those, together with the opportunities they present for litigants and experts.



The Evidentiary Power Of Private Expert Opinions Until 2025

Contrary to several cantonal codes prior to its entry into force in 2011, the Swiss Code of Civil Procedure did not contain any provisions on private expert reports.

Only reports of court-appointed experts were considered as evidence. In assessing the probative weight of the court-appointed expert report, the judge could not depart from its conclusions of without compelling reasons.

As to private expert reports, in a ruling of 2015, the Federal Court, found that they could not be considered as evidence, but as mere factual allegations by the parties.

This ruling was criticized by many scholars and practitioners.

This did not mean, however, that private expert reports were useless.

Firstly, as pointed out by the Federal Court, the production of such a report by a party entailed an obligation for the opposing party to refute those allegations in details, failing which the court would rule in favour of the party producing the expert report, not so much on the basis of its evidentiary power as on the ground that the opposing party had not sufficiently fulfilled its duty of contestation of the factual allegations it contained.

In addition, it was admitted that if the expert report was corroborated by substantiated circumstantial evidence, it could assist in convincing the court that the facts were proven.

Lastly, in some instances, for example in construction defects cases, experts could be examined as material witnesses by the court.

In reply to the criticisms of the Federal Court ruling, the Swiss Government proposed, in its dispatch to Parliament of 2020, to amend the Swiss Code of Civil Procedure on the issue of private expert reports.



The Admissibility Of Private Expert Opinions As Evidence Since 2025

In the context of the revision Swiss Code of Civil Procedure that entered into force on 1 January 2025, private expert reports are now listed as one of the types of documents that constitute admissible evidence.

The Swiss Code of Civil Procedure, however, does not provide other specific rules in regard of private expert reports.

Contrary to court-appointed expert reports, judges will remain free in the assessment of the evidentiary value of private expert reports.

Typically, judges will assess the weight of private expert reports on the basis of all relevant circumstances, notably the competence and reputation of the experts, their independence from the parties, the instructions given to them, and the process they followed in drafting their report.

It is likely therefore that the experts will be examined by the court in order to assess those criteria.

It will be interesting to see where Swiss courts and legal practitioners will draw their inspiration from: former cantonal case law and practice, rules applying to international arbitration, practice of neighbouring or more distant countries. It will probably take years for those rules to set.

Confronted with contradictory expert reports produced by the parties, Swiss courts will probably appoint judicial experts. There are indeed several advantages for court appointed experts over private experts, as they have a duty of independence, are under oath, receive their instructions from the court after a full consultation with the parties.

New Opportunities

One of the type of proceedings where the admissibility of private expert reports is probably having the most significant effect are summary proceedings, as under the rules of Swiss Code of Civil Procedure, only documentary evidence are admissible.

This is very relevant for the asset recovery practice, as summary proceedings apply to many of the most relevant proceedings, such as recognition of foreign judgments and arbitral awards, interim injunctions and attachment proceedings. In the latter cases, the use of private expert reports in ex-parte applications is a game changer.

In any event, the use of private expert reports in Swiss civil proceedings will certainly be multiplied over the coming years.

Conclusion

The admissibility of private expert reports in Swiss civil proceedings is presenting litigants and experts with new opportunities.

In the cantons adopting English as the language of the proceedings before commercial courts, international experts will have the opportunity of being examined in their working language. In all other courts, however, German, French or Italian will continue to prevail.

For Swiss practitioners, the coming months and years will be fascinating, as they will define the rules applying private expert reports and answer many pending questions.

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