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Switzerland: Law & Practice and Trends & Developments

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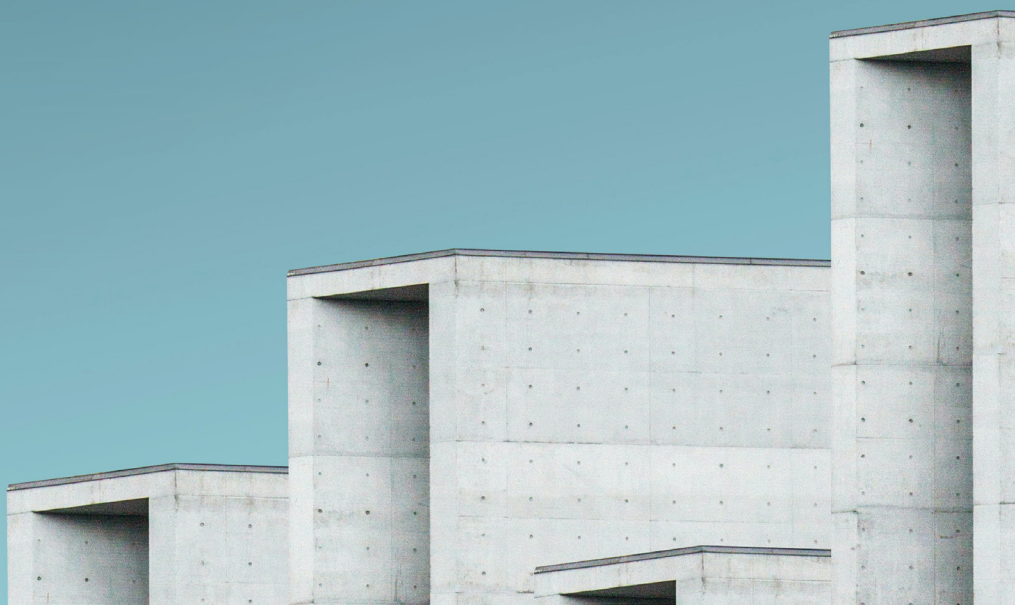

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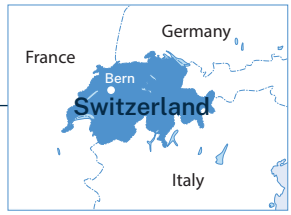

Law and Practice

Contributed by:
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Monfrini Bitton Klein was founded in Geneva by Enrico Monfrini in 1978, focusing on international business law and complex litigation. The asset recovery practice of the firm started in the 1990s with the representation of foreign governments, companies, individuals and liquidators of bankruptcies, and victims of fraud and Ponzi schemes. In 2017, the firm changed its name to Monfrini Bitton Klein and became a litigation-only practice to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime and cross-border litigation, in particular the enforcement of foreign judgments, bankruptcy decisions or arbitral awards, and the obtaining of evidence and interim measures in support of foreign proceedings. Monfrini Bitton Klein is the representative for Switzerland of ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialised correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

Author

Yves Klein is a partner at Monfrini Bitton Klein and is a world-leading asset recovery lawyer. His main activities are litigating and co-ordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts – cross-border litigation. He is also active in white-collar crime and anti-corruption proceedings. Yves has published and presented at international conferences on those topics since the 1990s. He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German. He has been top-ranked in Chambers and Partners' Litigation Support Global Guide in Asset Tracing & Recovery since 2019, when the category was created.

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1. Identifying Assets in the Jurisdiction

1.1 Options to Identify Another Party's Asset Position

Switzerland is generally a difficult jurisdiction in which to obtain information about another party's assets due to its strict privacy rules and culture. Publicly available information is limited and does not include judgments. It should also be mentioned that Article 271 of the Swiss Penal Code (the Swiss "blocking statute"), which protects Swiss sovereignty, severely limits the possibility of obtaining evidence in Switzerland in support of foreign proceedings or by foreign officeholders such as liquidators of a foreign insolvency.

Public Information

Public information is limited to the following two sources:

- the cantonal Registers of Commerce; and
- the cantonal land registers.

Judgments of first instance are generally not public, and only an action based on the Data Protection Act may, in some cases, allow access to a version of the judgment, in which the names of the parties are usually redacted. Judgments of appeal are published with a redaction of the names of the parties (with the exception of a few "famous cases") on the websites of the Federal Court and the cantonal courts (links available on the Federal Court's website).

Cantonal Registers of Commerce

All persons or entities established in Switzerland performing a trading, manufacturing or other business activity must be registered with the cantonal Register of Commerce at their headquarters or place of business. Share corporations, limited liability corporations and co-operative corporations only come into existence when they are registered with the Register of Commerce. Branch offices of Swiss and foreign business organisations must also be registered at their place of business.

The cantonal Register of Commerce contains basic information about these persons or entities, such as the date of creation, the type of activity (corporate objective), the persons empowered to represent them, the amount and type of registered capital of share corporations, and the identities and addresses of their directors and managers. All changes must be registered.

All new entries are published in the Swiss Commercial Gazette and the respective cantonal official gazettes. All the cantonal Registers of Commerce may be searched by the name of the entity through a federal search engine. A list of the cantonal Registers of Commerce is available on the Zefix website. Search by director is not available on the official websites, but is provided through private websites requiring a subscription (such as moneyhouse).

It is possible to order a copy by post or email of the documents provided to the Register of Commerce as documentary evidence to obtain a registration or amend it. It should be noted that it is customary to only file excerpts of general meeting of shareholders' or board of directors' minutes, certified by the president of the board of directors. Consequently, the list of shareholders or directors present or represented is usually not filed with the Register of Commerce.

Cantonal land registers

Although the legislation applicable to land registers in Switzerland is essentially governed by federal law, there is no central land register for the entire country. Instead, the cantons keep their records in their own land registers. A search engine to identify which land register is competent for a certain locality is available here.

Some land registers allow the search of basic information through their website; others require a contact by email or letter. A person with evidence of a legitimate interest, such as a claim or a judgment to enforce, may require the competent land register to indicate whether a certain person owns a property within its territory.

Access to Commercial Accounts

Pursuant to Article 957 of the Swiss Code of Obligations (SCO), any person or company that has to register with the Register of Commerce must hold commercial accounts. The accounting records and the accounting vouchers, together with the annual

report and the audit report, must be retained for ten years following the expiry of the financial year (Article 958f(1), SCO). Corporations that have issued bonds or are listed on a stock market must publish or provide on request their annual accounts and consolidated accounts together with the audit reports (Article 958e(1), SCO). For other undertakings, creditors with a legitimate interest may ask to inspect the annual report and the audit reports (Article 958e(2), SCO).

2. Domestic Judgments

2.1 Types of Domestic Judgments

Swiss law identifies different categories of judgments.

Final, Interlocutory and Partial Judgments

The judgment is final when it puts an end to the proceedings, whether by a decision on the merits (on substantive law grounds) or by a decision of dismissal (on procedural grounds). The judgment is interlocutory when the court of appeal could take a contrary decision that would put an end to the proceedings and would allow an appreciable saving of time or costs. The interlocutory judgment settles, without ending the proceedings, either a substantive preliminary question or a procedural question (see pretrial issues). The judgment is partial when the court rules on part of the case on the merits without ending the proceedings.

Judgment on the Merits and Procedural Judgment

A judgment on the merits of the case decides either on the claim (admission or rejection of the action) or on a material preliminary question (admission or rejection of a substantive legal objection). A procedural judgment is the pronouncement by which the judge decides whether they are authorised to enter into the merits of the case and, consequently, to render a judgment on the merits at a later date. The court issues either a decision of dismissal if a pretrial issue is missing, or an admissibility decision if it considers the challenge to the existence of a pretrial issue to be unfounded.

Contradictory Judgment and Judgment by Default

A contradictory judgment is given when both parties have been heard by the judge before the decision is made. A decision by default is given when the defendant does not appear at the trial and the judge decides without hearing them.

Condemnatory, Formative or Declaratory Judgments

The condemnatory judgment corresponds to the condemnatory action that condemns the defendant to performance. The formative judgment corresponds to the formative action that creates, modifies or removes the right that is the subject of the case. The declaratory judgment corresponds to the declaratory action that establishes the existence of the right invoked by the claimant.

The Civil Procedure Code (CPC) deals specifically only with:

- the final judgments (Article 236, CPC);
- the interlocutory judgments (Article 237, CPC);
- the interim measures (Articles 308 (1)(b) and 319 (a), CPC);
- the ex parte interim measures (Article 265, CPC); and
- the “other decisions and orders of instruction” (Article 319 (b), CPC).

Interim measures are to ensure the subsequent compulsory execution of a right, to provisionally settle a legal situation before the court has ruled on the merits of the case, or to take evidence today that could disappear tomorrow. They do not have the force of res judicata.

Ex parte interim measures are issued in cases of urgency; they differ from (ordinary) interim measures only in that they are issued without the opposing party being heard beforehand. If the court grants such measures, it must then promptly hear the opposing party and rule without delay on the application for interim measures (Article 265 (2), CPC). It then issues a decision on interim measures that replaces the ex parte interim measures. It is not possible to appeal against ex parte interim measures.

The other decisions concern purely procedural matters. To this extent, they have the force of res judicata regarding the parties and third parties concerned.

For example:

- a recusal decision (Article 50 (2), CPC);
- a decision on accessory intervention (Article 75 (2), CPC);
- a decision on third-party action (Article 82 (4), CPC);
- a decision admitting or refusing new facts and evidence (Article 229, CPC); and
- a decision admitting or refusing the amendment of the statement of claim (Articles 227 and 230, CPC).

An order of instruction relates to the preparation and conduct of the proceedings. In so far as they are not binding or res judicata, they are subject to change at any time. Examples include:

- the setting of time limits for the submission of pleadings (eg, Article 223 (2), CPC for the statement of defence);
- the extension of limitation periods set by the court (Article 144 (2), CPC);
- the summons to appear (Article 133, CPC); and
- the taking of evidence (Article 231, CPC).

2.2 Enforcement of Domestic Judgments

The enforcement of money judgments and non-money judgments follows different procedures.

Common features between the enforcement of money judgments and non-money judgments are as follows:

- even though Switzerland is a federal state composed of 23 cantons and six half cantons with their own judicial organisation, domestic judgments are enforceable in all of Switzerland without a need for domestication; and
- a domestic judgment does not need to be final to be enforced.

Enforcement of Money Judgments

The enforcement of money judgments (and of money claims in general) is governed by the Debt Enforcement and Bankruptcy Act (DEBA). A claimant holding an enforceable domestic money judgment may choose to start the enforcement proceedings through debt enforcement proceedings or through attachment proceedings.

Debt enforcement proceedings

Debt enforcement proceedings are not judiciarised in nature, and are operated by debt enforcement offices, organised by the Swiss cantons in accordance with the provisions of the DEBA.

Initiation of debt enforcement proceedings

A creditor initiates debt enforcement proceedings by requesting the competent debt enforcement office (usually that of the Swiss domicile or registered headquarters of the debtor) to issue an order to pay against its purported debtor. The request for debt enforcement proceedings is typically a one-page form, indicating:

- the name and address of the creditor and its Swiss legal representative;
- the name and address of the debtor;
- the amount of the claim (in Swiss francs);
- the yearly interest and its starting date; and
- the cause of the claim (eg, contract, tort or judgment).

The debt enforcement office does not verify the merits of the claim, only whether the information above has been provided, and issues the order to pay, which requests the debtor to pay the claim within 20 days on the debt enforcement office's bank account. The order to pay is served on the debtor by the debt enforcement office or by the Swiss postal service.

Objection to the order to pay

Within ten days from having been served with the order to pay, the debtor may file an objection with the debt enforcement office. The objection must be timely, but does not need to be reasoned. If no objection is filed, the creditor is informed and may, at least 20 days from the service of the order to pay but at the latest within one year from such service, request the continuation of the debt enforcement proceedings (see below). If the creditor filed a timely objection to the order to pay, the creditor must initiate proceedings to set aside the objection.

Setting aside of the objection to the order to pay

To set aside the objection to the order to pay, the creditor has three choices, depending on the situation:

- To seek to provisionally set aside the objection on the basis of a written acknowledgement of debt. The action is conducted through summary proceedings. The debtor's defences are that there is no acknowledgement of debt, that the debt is not due or that the debt has been discharged. If the creditor's application is granted, the debtor may seek a declaratory judgment of release of the debt through ordinary proceedings.
- To seek to definitely set aside the objection on the basis of an enforceable judgment, an arbitral award or an official record in the meaning of Article 347 of the CPC or Article 57 of the Lugano Convention (LC). The action is conducted through summary proceedings. The debtor's defence is that the judgment, award or record is not enforceable or that the debt has been discharged.
- To seek to definitely set aside the objection by bringing an action on the merits of their claim. The action may be brought in Switzerland or abroad before a court that is deemed to have jurisdiction under Swiss private international law.

Continuation of the debt enforcement proceedings

If no objection to the order to pay was filed in a timely manner or if it was set aside, the creditor may request the continuation of the debt enforcement proceedings, at the latest one year after the service of the order to pay (the period stops running during the set-aside proceedings).

The debt enforcement proceedings may continue, depending on the situation, in the following manner:

- seizure of the debtor's assets (Articles 89ff, DEBA); or
- bankruptcy if the debtor is subject to bankruptcy under Article 39 of the DEBA.

If the claim was secured by pledged assets, a special procedure applies (Articles 152ff, DEBA).

Seizure proceedings

If the debtor is subject to seizure proceedings, upon receiving the creditor's request for continuation of the debt enforcement proceedings, the debt enforcement office initiates the proceedings of seizure of the debtor's assets (Article 89, DEBA). The debtor is, under the threat of criminal sanctions, summoned to appear or to be represented before the debt enforcement office (Article 91 (1), DEBA). If the debtor fails to appear or be represented, the debt enforcement office may request the police to force the debtor to attend (Article 91 (2), DEBA). The debtor has an obligation to disclose their assets, including claims against third parties (Article 91 (3), DEBA). The debt enforcement office must be satisfied that the assets disclosed are sufficient to satisfy the claims of the creditors, including interests and expenses (Article 97, DEBA).

Third parties who hold assets for the debtor are obliged to provide information to the same extent as the debtor under threat of criminal prosecution (Article 91 (4), DEBA). Authorities are also obliged to provide information to the same extent as the debtor (Article 91 (5), DEBA).

The debt enforcement office must order interim measures to secure the seized assets, such as securing cash and precious metal (Article 98, DEBA). If a seized asset is a claim against a third party, such party is put on notice that they may only discharge their debt with the debt enforcement office (Article 100, DEBA). If several creditors are enforcing their claims against the debtor at the same time, they participate in the same series if they have filed their request for continuation of enforcement proceedings within 30 days from the execution of the seizure (Article 110, DEBA).

Bankruptcy proceedings

Bankruptcy proceedings are opened by a bankruptcy order issued by the court of the effective domicile or headquarters of the debtor (Articles 159ff, DEBA). Bankruptcy proceedings are not judiciarised in nature, and are mainly operated by bankruptcy offices, organised by the Swiss cantons in accordance with the provisions of the DEBA.

Bankruptcy order

If the debtor is subject to bankruptcy proceedings, upon receiving the creditor's request for continuation of the debt enforcement proceedings, the debt enforcement office serves on the debtor a bankruptcy warning (Article 160, DEBA). The creditor may file a bankruptcy request with the bankruptcy court 20 days after the service of the bankruptcy warning.

The bankruptcy court may, at the request of the creditor, issue interim measures to preserve the debtor's assets from dissipation (Article 170, DEBA). Such measures may include an inventory of all the debtor's assets (Article 162, DEBA). The rules of seizure (Articles 90–92, DEBA) apply (see above). The debtor must ensure that the recorded assets are preserved or replaced by equivalent assets (Article 164, DEBA).

The court sets a bankruptcy hearing without delay. The court decides on the bankruptcy without delay, even if the parties have chosen not to appear (Article 171, DEBA). From the moment of the bankruptcy, all assets and claims of the debtor belong to the bankruptcy estate (Article 197, DEBA).

Assets and claims of the bankruptcy estate

The bankruptcy office starts preparing an inventory of the bankruptcy estate's assets and claims (Article 221, DEBA). The debtor is, under the threat of criminal sanctions, obliged to disclose their assets, including claims against third parties (Article 222, DEBA).

Third parties who hold assets for the debtor are obliged to provide information to the same extent as the debtor under threat of criminal prosecution (Article 222 (4), DEBA). Authorities are also obliged to provide information to the same extent as the debtor (Article 222 (5), DEBA). At the request of a creditor, the bankruptcy office must record potential claims against third parties in the inventory, without assessing the merits of such claims.

Ordinary bankruptcy procedure

If the rules for ordinary bankruptcy procedure apply, the bankruptcy estate is administered as follows (Articles 221ff, DEBA):

- the bankruptcy office publishes a notice of bankruptcy in the local official gazette instructing all creditors and debtors to file their claims and debts within one month and inviting creditors to a first creditors' meeting;
- the first creditors' meeting may appoint a private bankruptcy administration acting instead of the bankruptcy office, as well as a creditors' committee, which has certain supervisory (and limited decisive) competencies;
- the bankruptcy administration decides which claims to admit; such decisions may be challenged by the debtor, the creditor concerned or other creditors;
- creditors who file late claims may participate in the bankruptcy proceedings but are excluded from the interim distributions of assets that precede the filing of their claims;
- a second creditors' meeting is convened to pass resolutions as to all important matters, including the commencement or continuation of claims against third parties and the method of realisation of the assets belonging to the bankruptcy estate (the actual realisation, however, is reserved to the bankruptcy administrator);
- following distribution of the proceeds, the bankruptcy administration submits its final report to the bankruptcy court; and
- if the court finds that the bankruptcy proceedings have been completely carried out, it declares them closed.

Summary bankruptcy procedure

A summary liquidation procedure (Article 231, DEBA) may be ordered if the proceeds of the debtor's assets are unlikely to cover the costs of ordinary proceedings or in non-complex circumstances. In those cases, the bankruptcy office requests the court of first instance to order a summary liquidation procedure. The court authorises the summary procedure unless a creditor requests an ordinary liquidation procedure and provides security for the costs of the liquidation.

In the summary liquidation procedure, the bankruptcy estate is administered as follows:

- the bankruptcy office publishes a notice of bankruptcy in the local official gazette instructing all creditors and debtors to file their claims and debts within one month;
- in general there is no call for a creditors' meeting;
- upon the expiry of the deadline to produce claims, the bankruptcy office sells the debtors' assets; in principle, without conducting an auction;
- the inventory of assets and the schedule of claims are, in principle, filed together; and
- the assets are distributed to the creditors at the end of the liquidation.

Classes of claims in the bankruptcy

In both ordinary and summary liquidation procedures, secured claims are satisfied directly out of the proceeds from the realisation of the collateral. Should the proceeds not be sufficient to satisfy the claim of a secured creditor, such creditor shall rank as an unsecured and non-privileged creditor for the outstanding amount of their claim.

Unsecured claims are ranked within three classes of claims (Article 219, DEBA), which are essentially composed as follows:

- The first class consists of claims of employees:
  (a) derived from the employment relationship that arose during the six months prior to the opening of bankruptcy proceedings and that do not exceed the maximum insurable annual salary as defined by the Federal Ordinance on Accident Insurance (which is currently CHF148,200);
  (b) in relation to the restitution of deposited security; and
  (c) derived from social compensation plans that arose during the six months prior to the opening of the bankruptcy proceedings – the first class also includes claims of the assured derived from the Federal Ordinance on Accident Insurance and from facultative pension schemes, as well as claims of pension funds against employers.
- The second class includes claims of various contributions to social insurances.
- All other claims are comprised in the third class.

Claims in a lower ranking class will only receive dividend payments once all claims in a higher ranking class have been satisfied in full. Claims within a class are treated on a pari passu basis. The costs incurred during the bankruptcy proceedings are debts of the estate and have to be paid with priority, ie, before any other creditor is paid. Upon the expiry of the deadline of the call to creditors, the bankruptcy administration (the bankruptcy office in the case of a summary liquidation procedure) reviews the claims filed and makes decisions in their respect after consulting with the debtor's representative (Articles 244 and 245, DEBA). The schedule of claims – ie, the decisions of the administration of the bankruptcy on the claims in the bankruptcy – is filed with the bankruptcy office and a notice is published in the official gazette (Articles 247–249, DEBA).

Creditors may challenge the decision regarding their own claim (existence, privilege, class and quantum) or the claims of other creditors by filing within 20 days an action of challenge of the schedule of claims before the court of first instance (Article 250, DEBA). The proceedings are conducted in a summary procedure. Creditors who file late claims may participate in the bankruptcy proceedings but are excluded from the interim distributions of assets that precede the filing of their claims (Article 251, DEBA).

The bankruptcy administration liquidates the debtors' assets and brings claims against third parties that may be liable to the debtor (Articles 256ff, DEBA). The bankruptcy administration distributes the proceeds (dividends) of the liquidation of the debtors' assets in accordance with the ranking of the class and in proportion to the claim of each creditor (Articles 261ff, DEBA). In an ordinary liquidation procedure, interim distribution may take place, while in a summary liquidation procedure, the distribution takes place at the end of the bankruptcy procedure. The dividends corresponding to claims of creditors against the bankruptcy that have not been finally adjudicated are set aside until they are, and, as the case may be, are distributed to such creditors or among the other creditors.

Assignment of claims to the creditors

If the bankruptcy administration renounces to bring an action in regard of a contentious claim, and no creditor objects, each creditor may request to be assigned the rights of action of the bankruptcy estate (Article 260, DEBA). All creditors who have been assigned a claim must act jointly and severally, at their own costs and risks, on behalf of the bankruptcy estate. After deduction of the costs they incurred, assigned creditors receive a share of the recoveries they obtained, in accordance with the ranking of the class and in proportion to their claim. The excess, if any, is remitted to the bankruptcy administration and distributed to the other creditors.

Attachment proceedings

A creditor may request a court to order the attachment of assets located in Switzerland to secure a due claim if any of the following grounds of attachment are met (Article 271 (1), DEBA):

- the debtor has no fixed domicile;
- the debtor, with the intention of evading their obligations, conceals their assets, flees or makes preparation for their flight;
- the debtor is passing through Switzerland or belongs to the category of persons who visit fairs and markets, for claims that, by their nature, must be fulfilled immediately;
- the debtor does not live in Switzerland, and none of the other grounds for an attachment order can be invoked, provided the claim has a sufficient connection with Switzerland or is based on an acknowledgement of debt pursuant to Article 82 of the DEBA;
- the creditor holds a provisional or definitive loss certificate against the debtor; or
- the creditor holds a title for the definitive setting aside of an objection to a payment order against the debtor.

In the first two grounds, an attachment may also be requested for a claim that is not yet due.

The title for the definitive setting aside of an objection to a payment order may be:

- an enforceable domestic judgment or arbitral award;
- an enforceable foreign judgment issued in a state party to the LC (see **3.4 Process of Enforcing Foreign Judgments**);
- a final foreign judgment in another state (see **3.4 Process of Enforcing Foreign Judgments**);
- a foreign arbitral award; and
- an official record in the meaning of Article 347 of the CPC or Article 57 of the LC.

The creditor needs to show probable cause that the claim exists (and is due, as the case may be), that there is ground for an attachment in the meaning of Article 271 of the DEBA and that an asset of the creditor within the jurisdiction of the court exists. If the debtor is in Switzerland, the competent court to file the attachment request is that of the debt enforcement proceedings (usually the domicile or registered headquarters of the debtor). If the debtor is not in Switzerland, the court where at least one asset is located has jurisdiction (once the condition is met, the court also has competence to attach assets in Switzerland outside its jurisdiction). The court issues the attachment order ex parte, on the basis of a written brief.

The creditor is liable to the debtor and to third parties for any damage caused by an unjustified attachment (Article 273 (1), DEBA). The court may order them to provide security, sua sponte, or at the request of the debtor or an interested third party (Article 273 (2), DEBA). If the application for an attachment order is denied, the debtor is not informed.

The attachment order is enforced by the competent debt enforcement office(s). The debt enforcement office at the location of the assets is competent to enforce the attachment. It does so by sending the attachment order by fax or registered letter to the person holding the attached assets, requesting them to immediately confirm the execution of the attachment and to indicate the attached assets and their estimated value. Due to banking secrecy, however, banks may delay the reporting of the attached assets until the end of the objection term or the end of the objection proceedings.

Upon receiving the reports of the persons holding the assets, the debt enforcement office issues an attachment deed that it serves on the creditor (at the address of their Swiss counsel) and on the debtor (at the address of their Swiss counsel, if they have accepted to receive a debt enforcement notice, or at their address in Switzerland or abroad, through mutual assistance proceedings).

Any person whose rights are affected by an attachment may, within ten days from receipt of the attachment deed (persons residing abroad may be granted an extension), file a motivated objection to the attachment order with the same court that issued the attachment order (Article 278, DEBA). The court rules on the objection through summary proceedings (evidence is

documentary) on the basis of plausibility of the attachment conditions. The attachment is maintained during the appeal proceedings.

If the creditor has not already instituted debt enforcement proceedings or brought a court action prior to attachment, they must do so within ten days of service of the attachment deed (Article 279, DEBA). If the debtor objects to the order to pay, the creditor must, within ten days of being served with the objection, file a request to set aside the objection (see "Setting aside of the objection to the order to pay" in this section). If the debtor did not object to the order to pay, or once the objection to the order to pay was set aside, the creditor must, within 20 days, request the continuation of the debt enforcement proceedings (see "Continuation of the debt enforcement proceedings" in this section). These periods do not run while objection proceedings are pending.

Enforcement of Non-Money Judgments

The enforcement of non-money judgments in Switzerland is governed by Articles 335ff of the CPC.

A Swiss non-money judgment may be enforced if it is final and binding, and the court has not suspended its enforcement, or it is not yet final and binding, but its early enforcement has been authorised by the court that issued it (Article 336, CPC). The enforceability of a Swiss judgment is issued by the court that issued it.

The applicant seeking the enforcement of a Swiss judgment must file a request for enforcement with the competent Swiss court, which may be (Article 339, CPC):

- at the domicile or registered office of the succumbing party;
- at the place where the measures are to be taken; or
- at the place where the decision to be enforced was made.

Upon request, the enforcement court may order protective measures, if necessary ex parte (Article 340, CPC). Summary proceedings apply (Article 339, CPC).

If the decision provides for an obligation to act, refrain from acting or tolerate something, the enforcement court may, under Article 343 of the CPC:

- issue a threat of criminal penalty under Article 292 of the Swiss Penal Code;
- impose a disciplinary fine of up to CHF5,000;
- impose a disciplinary fine of up to CHF1,000 for each day of non-compliance;
- order a compulsory measure such as taking away a movable item or vacating immovable property; or
- order performance by a third party.

In the event of non-performance, the prevailing party may demand (Article 345, CPC):

- damages if the succumbing party does not follow the orders of the court; or
- conversion of the performance due into the payment of money.

A judicial review of the performance due is reserved in every case, and the obligee may, at any time, file a claim for a declaratory judgment that the obligation does not or no longer, exists, or that it has been suspended (Article 352, CPC).

2.3 Costs and Time Taken to Enforce Domestic Judgments

Money Judgments

The administrative and court fees involved in the enforcement of domestic judgments are governed by a federal ordinance (the Ordinance on the fees charged in application of the DEBA). In total, the enforcement of a Swiss judgment rarely exceeds CHF2,500 in administrative and court fees in the first instance and CHF3,500 in the second instance. Federal Court fees are typically of up to CHF20,000 but could theoretically go up to 1% of the matter value.

In the case of judicial proceedings, adverse party costs are governed by cantonal tariffs (Article 95, CPC), which are proportional to the matter value but vary from one canton to the other. The Federal Court has its own tariff. As proceedings are governed by summary proceedings, adverse party costs rarely exceed CHF2,000 per instance, with the exception

of those in the Federal Court, which are typically up to CHF20,000.

The length of the proceedings varies from one canton to another. Debt enforcement offices typically carry out their measures within days. When judicial objections are filed, a decision of the first instance, in summary proceedings, is typically issued within three to six months. Cantonal appeal courts and the Federal Court typically issue their decision within three to six months.

Non-Money Judgments

In total, the costs and court fees regarding the enforcement of a Swiss non-money judgment rarely exceed CHF10,000 in total, with the exception of appeals to the Federal Court, which are typically up to CHF20,000. The length of the proceedings varies from one canton to another, but they are typically concluded within a year.

2.4 Post-Judgment Procedures for Determining Defendants' Assets

It is only when the stages of seizure (see **2.2 Enforcement of Domestic Judgments** under "Seizure proceedings") or bankruptcy (see **2.2 Enforcement of Domestic Judgments** under "Bankruptcy proceedings") are reached in the enforcement of money claims that the debtor is, under the threat of criminal sanctions, compelled to disclose their assets.

2.5 Challenging Enforcement of Domestic Judgments

From a procedural perspective, a typical defence against the enforcement of a Swiss default judgment is to challenge that it was properly served. On the merits, a typical defence is that the obligation does not exist or no longer exists, or that it has been suspended.

2.6 Unenforceable Domestic Judgments

Declaratory judgments, by their very nature, are unenforceable. Judgments that are final and binding but of which enforcement has been suspended by a court are not enforceable.

2.7 Register of Domestic Judgments

There is no central or decentralised register of Swiss judgments.

3. Foreign Judgments

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

Switzerland is a party to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 between members of the European Union and members of the European Free Trade Association other than Liechtenstein (Switzerland, Norway and Iceland). It should be noted that as a consequence of Brexit, the United Kingdom is, since 2021, no longer covered by the LC. United Kingdom judgments issued until the end of the transition period, namely 31 December 2020, may continue to be enforced under the LC.

Switzerland is also a party to bilateral conventions on the recognition and enforcement of judgments with Austria, Belgium, the Czech Republic, Germany, Italy, Liechtenstein, Slovakia, Spain and Sweden. The typical issues concern whether the action was properly served, whether the court was competent on the basis of Swiss private international law or an international treaty, whether the judgment is enforceable and whether it breached Swiss public policy.

3.2 Variations in Approach to Enforcement of Foreign Judgments

As for Swiss judgments, the proceedings of enforcement of foreign judgments differ if they are money or non-money judgments. The other main difference in the approach to the enforcement of foreign judgments is whether they were issued in the context of the LC or whether they are governed by the general clauses of the Private International Law Act (PILA).

3.3 Categories of Foreign Judgments Not Enforced

The following foreign judgments are not enforced in Switzerland:

- declaratory judgments;
- judgments of enforcement;

- judgments issued by foreign courts that were not competent under the PILA or an international treaty (the LC);
- judgments that are not in force (the LC) or are not final (the PILA);
- ex parte judgments;
- judgments by default, if a party establishes that they did not receive proper notice under either the law of their domicile or that of their habitual residence, unless that party proceeded on the merits without reservation;
- judgments by which recognition would be manifestly incompatible with Swiss public policy or if a party establishes that the decision was rendered in violation of the fundamental principles of Swiss procedural law, including the fact that the party concerned was denied the right to be heard; and
- if a dispute between the same parties and with respect to the same subject matter as initiated in Switzerland first or that was already decided there, or that such dispute was previously decided in a third state, provided the latter decision fulfils the requirements for recognition in Switzerland.

3.4 Process of Enforcing Foreign Judgments

The process of enforcing foreign judgments differs, depending on whether the judgment is enforced under the LC or the general PILA rules, and on whether it is a money or non-money judgment.

Enforcing Foreign Judgments Under the LC

Under the LC, a declaration of enforceability of a money judgment under Article 41 of the LC may be issued at three stages:

- if the creditor requests an attachment, ex parte, by the court issuing the attachment order, in a separate judgment (see **2.2 Enforcement of Domestic Judgments** under "Attachment proceedings");
- if the creditor requests an order to pay to be issued against the debtor, by the court setting aside the debtor's objection to the order to pay (see **2.2 Enforcement of Domestic Judgments** under "Setting aside of the objection to the order to pay"); and
- upon a request for an independent recognition, ex parte, if the creditor shows legitimate interest for such a declaratory judgment.

Under the LC, a declaration of enforceability of a non-money judgment under Article 41 of the LC may be issued at two stages:

- by the court enforcing the foreign decision (see **2.2 Enforcement of Domestic Judgments** under "Enforcement of Non-money Judgments"), in an ex parte judgment parallel to the enforcement proceedings; and
- upon a request for an independent recognition, ex parte, if the creditor shows legitimate interest for such a declaratory judgment.

The party applying for the declaration of enforceability must provide a certified copy of the judgment (Article 53, LC) and a declaration of enforceability in accordance with the Annex V form to the LC. A certified translation of the documents may be requested by the enforcement judge (Article 55, LC) but it is usually not requested if the decision is in a Swiss national language (German, French or Italian) or in English.

The LC declaration of enforceability is issued ex parte, except when in the context of the setting aside of an objection to an order to pay. The declaration of enforceability is served on the succumbing party, who has 30 days to appeal. The grounds for refusal under Articles 34 and 35 of the LC are thus only examined by the cantonal court of appeal and then the Federal Court.

Enforcing Foreign Judgments Under the Private International Law Act

Under the PILA, the proceedings are less expedited than under the LC.

Under the PILA, a declaration of enforceability of a money judgment may be issued at two stages:

- if the creditor requests an order to pay to be issued against the debtor, by the court setting aside the debtor's objection to the order to pay (see **2.2 Enforcement of Domestic Judgments** under "Setting aside of the objection to the order to pay"); and
- upon a request for an independent recognition, if the creditor shows legitimate interest for such a declaratory judgment.

It should be noted that when a creditor applies for an attachment order, the court incidentally assesses ex parte whether there is probable cause that the foreign judgment can be recognised under the PILA, but does not issue a decision in that regard.

Under the PILA, a declaration of enforceability of a non-money judgment may be issued at two stages:

- by the court enforcing the foreign decision (see **2.2 Enforcement of Domestic Judgments** under "Enforcement of Non-money Judgments") in the context of the enforcement proceedings; and
- upon a request for an independent recognition, if the creditor shows legitimate interest for such a declaratory judgment.

The party applying for the declaration of enforceability must provide a complete and authenticated copy of the foreign judgment, and a confirmation that the judgment is final and binding. In the case of a judgment rendered by default, the applicant must provide an authenticated document showing that the defaulting party was duly put on notice.

Jurisdiction Under the Private International Law Act

In addition to proving that the foreign judgment is final and binding, the other main condition to establish is that the foreign court had jurisdiction under the PILA.

Such a condition is met if:

- jurisdiction derives from a provision of the PILA or, in the absence of such a provision, if the defendant was domiciled in the state in which the decision was rendered;
- in matters involving an economic interest, the parties submitted to the jurisdiction of the authority that rendered the decision by means of an agreement valid under the PILA;
- in matters involving an economic interest, the defendant proceeded on the merits without reservation; or
- in the case of a counterclaim, the authority that rendered the decision had jurisdiction to hear the main claim and if there was a factual connection between the claim and counterclaim.

In commercial matters, the main PILA provisions on jurisdiction are as follows:

- Foreign decisions on rights in rem on immovable property are recognised in Switzerland if they were rendered in the state in which the property is located or if they are recognised in such state (Article 108, PILA).
- Foreign decisions on rights in rem in movable property are recognised in Switzerland (i) if they were rendered in the state of domicile of the defendant, or (ii) if they were rendered in the state in which the property is located, provided the defendant had their habitual residence there (Article 108, PILA).
- Foreign decisions regarding intermediated securities are recognised in Switzerland (i) if they were rendered in the state of the defendant's domicile or habitual residence, or (ii) if they were rendered in the state of the defendant's establishment and they concern claims related to the operations of this establishment (Article 108d, PILA).
- Foreign decisions relating to the infringement of intellectual property rights are recognised in Switzerland (i) if the decision was rendered in the state of the defendant's domicile, or (ii) if the decision was rendered at the place where the act or the result occurred and the defendant was not domiciled in Switzerland (Article 111, PILA).
- Foreign decisions pertaining to the existence, validity or registration of intellectual property rights shall be recognised only if they were rendered in a state for the territory of which the protection of the intellectual property is sought or if such decisions are recognised there (Article 111, PILA).
- Foreign decisions relating to a claim under the law of obligations are recognised in Switzerland (i) if they were rendered in the state of the defendant's domicile, or (ii) if they were rendered in the state of the defendant's habitual residence, in so far as the claims relate to an activity carried out in such state. They are also recognised:
  (a) if the decision relates to a contractual obligation and was rendered in the state of performance of the characteristic obligation, and the defendant was not domiciled in Switzerland;
  (b) if the decision relates to a claim under a contract concluded with a consumer and was rendered at the consumer's domicile or habitual

residence, and the requirements provided in Article 120 (1) of the PILA are met;
(c) if the decision relates to a claim under an employment contract and was rendered at the place of the establishment or at the place of work, and the employee was not domiciled in Switzerland;
(d) if the decision relates to a claim arising out of the operation of an establishment and was rendered at the location of that establishment;
(e) if the decision relates to unjust enrichment and was rendered at the place where the act or result occurred, and the defendant was not domiciled in Switzerland; or
(f) if the decision relates to an obligation in tort and was rendered at the place where the act or the result occurred, and the defendant was not domiciled in Switzerland (Article 149, PILA).

- Foreign decisions on matters concerning trust law are recognised in Switzerland:
  (a) if they were rendered by a court that was validly designated pursuant to Article 149b(1) of the PILA;
  (b) if they were rendered in the state in which the defendant was domiciled, was habitually resident or had their establishment;
  (c) if they were rendered in the state in which the trust had its seat;
  (d) if they were rendered in the state whose law applies to the trust; or
  (e) if they are recognised in the state in which the trust has its seat, provided the defendant was not domiciled in Switzerland (Article 149e, PILA).
- Foreign decisions relating to claims concerning company law are recognised in Switzerland (i) if they were rendered or are recognised in the state of the seat of the company, provided the defendant was not domiciled in Switzerland, or (ii) if they were rendered in the state of the defendant's domicile or habitual residence. Foreign decisions relating to claims concerning public issues of equity or debt securities based on prospectuses, circulars or similar publications are recognised in Switzerland if they were rendered in the state in which the equity or debt securities were issued, provided the defendant was not domiciled in Switzerland (Article 165, PILA).
- A foreign bankruptcy decree shall be recognised in Switzerland if the decision was issued (i) in the debtor's state of domicile, or (ii) in the state of the centre of the debtor's main interests, provided the debtor was not domiciled in Switzerland when the foreign proceedings were opened (Article 166, PILA).

The proceedings of enforcement of foreign judgments are adversary and are conducted through summary proceedings.

3.5 Costs and Time Taken to Enforce Foreign Judgments

While not procedurally more complex than domestic judgments, the enforcement of foreign judgments tends to be more contested, thus leading to costlier and more protracted litigation. The fees and adverse party costs and time mentioned under **2.3 Costs and Time Taken to Enforce Domestic Judgments** should therefore be doubled.

3.6 Challenging Enforcement of Foreign Judgments

The defences against the enforcement of a foreign judgment are more numerous than for domestic judgments, especially if they are governed by the PILA rather than the LC.

Challenging the Enforcement of a Judgment Under the LC

The defences are limited to Articles 34 and 35 of the LC.

Under Article 34 of the LC, a judgment cannot be recognised:

- if recognition is manifestly contrary to public policy in the state in which recognition is sought;
- where it was given in default of appearance, if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable it to arrange a defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible to do so;

- if it is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought; or
- if it is irreconcilable with an earlier judgment given in another state bound by the LC or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the state addressed.

Article 35 of the LC provides that a judgment will not be recognised if it conflicts with Section 3, 4 or 6 of Title II of the LC, or under Article 64 (3), 67 (4) or 68 of the LC. The Swiss court may in no circumstance review the substance of the foreign judgment (Article 36, LC).

Challenging the Enforcement of a Judgment Under the PILA

The main defences against the enforcement of a judgment under the PILA are as follows:

- the foreign decision is not final and binding – ie, an ordinary appeal can still be brought against it (Article 25 (b), PILA);
- the enforcement of the foreign decision would breach substantive Swiss public policy (Article 27 (1), PILA);
- the defendant did not receive proper notice under the law of its domicile or that of its habitual residence, unless the defendant proceeded on the merits without reservation (Article 27 (2)(a), PILA);
- the foreign decision was issued in breach of fundamental principles of Swiss procedural law, including the fact that the party concerned was denied the right to be heard (Article 27 (2)(b), PILA); and
- a dispute between the same parties and with respect to the same subject matter has been initiated in Switzerland first or has already been decided there, or that such dispute has previously been decided in a third state, provided the latter decision fulfils the requirements for recognition in Switzerland (Article 27 (2)(c), PILA).

4. Arbitral Awards

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

The main issue regarding the enforcement of domestic arbitral awards is challenge to the validity of the arbitration clause. The main issues regarding the enforcement of foreign arbitral awards are the conditions of Article V of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention").

4.2 Variations in Approach to Enforcement of Arbitral Awards

The enforcement of arbitral awards differs between Swiss arbitral awards, which are considered as Swiss judgments (Article 387, CPC), and foreign arbitral awards, which are enforced in accordance with the New York Convention, irrespective of reciprocity (Articles 194 and 195, PILA). Regarding Swiss arbitral awards, if the parties to the arbitration are all domiciled in Switzerland (national award), Articles 353ff of the CPC apply. If one or more parties was domiciled outside Switzerland (international awards), Articles 176ff of the PILA apply. The enforcement proceedings also differ, depending on whether the award contains money claims or non-money claims.

4.3 Categories of Arbitral Awards Not Enforced

Declaratory arbitral awards, whether domestic or foreign, are not enforceable. Interim measures issued by foreign arbitral tribunals are not directly enforceable (Article 183 (2), PILA).

4.4 Process of Enforcing Arbitral Awards

Enforcement of Domestic Arbitral Awards

Once notice of a domestic award has been given to the parties, it has the effect of a final and binding judgment (Article 387, CPC). The enforcement procedure for domestic arbitral awards is the same as that for domestic judgments (see **2.2 Enforcement of Domestic Judgments**), except where both parties are domiciled abroad and have excluded the possibility to challenge the award before the Federal Court, in which case the New York Convention applies.

Enforcement of Foreign Arbitral Awards

The enforcement of foreign arbitral awards is essentially the same as that for foreign judgments under the PILA.

The documents required to enforce a foreign arbitral award are specified in Article IV of the New York Convention, namely:

- the authenticated original award or a certified copy; and
- the original arbitration agreement referred to or a certified copy.

In addition, a translation must be provided if the documents are not in a Swiss national language (German, French or Italian) or in English.

4.5 Costs and Time Taken to Enforce Arbitral Awards

While not procedurally more complex than domestic judgments, the enforcement of foreign arbitral awards tends to be more contested, thus leading to costlier and more protracted litigation. The fees and adverse party costs and time mentioned under **2.3 Costs and Time Taken to Enforce Domestic Judgments** should therefore be doubled. The costs and time taken in the enforcement of domestic arbitral awards are essentially the same as those for domestic judgments, save for the possibility of challenging the arbitration clause.

4.6 Challenging Enforcement of Arbitral Awards

Challenging Enforcement of a Domestic Arbitral Award

The grounds for challenging a domestic arbitral award are essentially as follows:

- lack of a valid arbitration clause;
- lack of proper notice of the arbitration proceedings; and
- a stay order by the Federal Court pending appeal.

Challenging Enforcement of a Foreign Arbitral Award

The grounds for challenging a foreign arbitral award are strictly limited by Article V of the New York Convention, namely:

- incapacity of the parties to the arbitration agreement;
- lack of due process;
- extra potestatem, ultra petita or extra petita;
- violation of the arbitral procedure;
- the award has not yet become binding on the parties, or has been set aside or suspended;
- lack of arbitrability of the subject matter under Swiss law; and
- breach of Swiss public policy.

Trends and Developments

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Monfrini Bitton Klein

Monfrini Bitton Klein was founded in Geneva by Enrico Monfrini in 1978 focusing on international business law and complex litigation. The asset recovery practice of the firm started in the 1990s with the representation of foreign governments, companies, individuals and liquidators of bankruptcies, and victims of fraud and Ponzi schemes. In 2017, the firm changed its name to Monfrini Bitton Klein and became a litigation-only practice to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime and cross-border litigation, in particular the enforcement of foreign judgments, bankruptcy decisions or arbitral awards, and the obtaining of evidence and interim measures in support of foreign proceedings. Monfrini Bitton Klein is the representative for Switzerland of ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialised correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

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Yves Klein is a partner at Monfrini Bitton Klein and a world-leading asset recovery lawyer. His main activities are litigating and co-ordinating transnational asset recovery proceedings before civil, criminal and bankruptcy courts – cross-border litigation. He is also active in white-collar crime and anti-corruption proceedings. Yves has published, and presented at international conferences, on those topics since the 1990s. He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German. He has been top-ranked in Chambers and Partners' Litigation Support Global Guide in Asset Tracing & Recovery since 2019, when the category was created.

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Expert Opinions as Admissible Evidence in Swiss Civil Proceedings: a Game Changer for the Enforcement of Judgments and Arbitral Awards

In Switzerland, the enforcement of judgment and arbitral awards, which usually begins with an ex parte request for attachment of assets, is mostly conducted through summary proceedings.

In summary proceedings, only documentary evidence is admissible, which makes proof of certain complex facts more difficult.

This difficulty is compounded by the inadmissibility of affidavits as evidence, as they are deemed, at best, to be factual allegations by the parties who produce them.

Furthermore, until the end of 2024, party expert reports (or private expert reports) were not considered as evidence and were also essentially deemed to be mere party allegations. Only reports of court-appointed experts were deemed to be admissible evidence. However, summary proceedings do not allow the judicial appointment of experts.

This change at the end of 2024 formed part of the most significant review of the Swiss Civil Procedure Code (CPC) since its entry into force in 2011, which aims to improve its practical efficiency, notably for foreign litigants. It also 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. As a result, the role of private expert reports as evidence has been fundamentally changed.

This article will review the role of private expert reports until the entry into force of the new provisions (A) and discuss those new rules (B), together with the opportunities they present for litigants, in particular in proceedings of enforcement of judgments and arbitral awards (C).

A. The evidentiary power of private expert opinions until the end of 2024

Unlike several cantonal codes prior to the CPC's entry into force in 2011, the CPC did not contain any provisions on private expert reports.

Article 168 (1) of the CPClists the following types of admissible evidence:

(a) testimony;
(b) physical records;
(c) inspections;
(d) expert opinion;
(e) written statements;
(f) the examination of, and evidence given by, the parties.

Until the end of 2024, only reports of court-appointed experts under Article 183ff of the CPC were considered as evidence. In assessing the probative weight of a court-appointed expert report, the judge cannot depart from its conclusions without compelling reasons.

As to private expert reports, however, in ruling ATF 141 III 433 of 11 September 2015, the Federal Court found that such reports could not be considered as evidence but rather as mere factual allegations by the parties, a position which was criticised by many scholars and practitioners but which did not vary.

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 its allegations in detail, 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.

However, even the Federal Court admitted that the situation created by its 2015 ruling on private expert reports was unsatisfactory.

Therefore, the Swiss Government proposed, in its dispatch to Parliament of 2020, to amend the CPC on the issue of private expert reports.

B. The admissibility of private expert opinions as evidence since 2025

In the context of the revision of the CPC that entered into force on 1 January 2025, private expert reports are now listed as one of the types of physical records (Art. 177 CPC) that constitute admissible evidence within the meaning of Article 168 (1)(d) of the CPC: "Physical records are documents that are suitable to prove legally significant facts, such as papers, drawings, plans, photos, films, audio recordings, electronic files and the like, as well as private expert opinions obtained by the parties."

The CPC, however, does not provide other specific rules in regard of private expert reports.

Unlike court-appointed expert reports within the meaning of Article 180ff of the CPC, judges will remain free in their 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 processes they followed in drafting their reports.

Confronted with contradictory private expert reports produced by the parties, Swiss courts will usually 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 and receive their instructions from the court after a full consultation with the parties.

C. Impact on summary proceedings, in particular on the enforcement of judgments and arbitral awards

One of the types of proceedings where the admissibility of private expert reports is probably having the most significant effect is summary proceedings (Art. 248ff CPC), as under Article 254 of the CPC, only physical records are admissible evidence in such proceedings.

Since summary proceedings apply to the recognition of foreign judgments and arbitral awards, interim injunctions and attachment proceedings, the inclusion of private expert reports as physical records under Article 177 of the CPC is a game changer.

Indeed, the enforcement process usually begins with the filing of an ex parte attachment application by the creditor.

Under Article 271 (1) of the Debt Enforcement and Bankruptcy Act (DEBA), a creditor may request a court to order the attachment of assets located in Switzerland to secure a due claim if any of the following grounds of attachment are met:

- the debtor has no fixed domicile;
- the debtor, with the intention of evading their obligations, conceals their assets, flees or makes preparation for their flight;
- the debtor is passing through Switzerland or belongs to the category of persons who visit fairs and markets, for claims that, by their nature, must be fulfilled immediately;
- the debtor does not live in Switzerland, and none of the other grounds for an attachment order can be invoked, provided the claim has a sufficient connection with Switzerland or is based on an acknowledgement of debt pursuant to Article 82 of the DEBA;
- the creditor holds a provisional or definitive loss certificate against the debtor; or
- the creditor holds a title for the definitive setting aside of an objection to a payment order against the debtor.

In the first two grounds above, an attachment may also be requested for a claim that is not yet due.

The title for the definitive setting aside of an objection to a payment order may be:

- an enforceable domestic judgment or arbitral award;
- an enforceable foreign judgment issued in a state party to the Lugano Convention;
- a final foreign judgment in another state;
- a foreign arbitral award; or
- an official record within the meaning of Article 347 of the CPC or Article 57 of the Lugano Convention.

The creditor needs to show probable cause that the claim exists (and is due, as the case may be), that there is ground for an attachment within the meaning of Article 271 of the DEBA and that an asset of the debtor within the jurisdiction of the court exists.

In certain circumstances, in a doctrine known as *Durchgriff* (transparency), assets formally in the name of a third party may be attached for the obligations of a debtor with which the third party forms an economic identity. This doctrine presupposes, first of all, that the persons are identical in accordance with economic reality or, in any case, that one legal entity has economic control over the other; secondly, the duality must be invoked abusively, ie, in order to obtain an unjustified advantage.

Both the proceedings of ex parte application for attachment and the proceedings of objection to the attachment are conducted through summary proceedings. This means that only physical records as defined under Article 177 of the CPC are admissible. Since 2025, those physical records include private expert reports.

Therefore, since 2025, creditors can produce in support of an attachment request a forensic report that will, for example, establish beneficial ownership of certain assets when applying the *Durchgriff* doctrine.

Interestingly, since the appointment of experts by the court and examination of witnesses, including party-appointed experts, is not possible under summary proceedings, the court needs to forge its opinion on the weight to be given to expert reports on the basis of their content. This opinion thus needs to include an assessment of all relevant circumstances, notably the competence and reputation of the experts, their independence from the parties, the instructions given to them, and the processes they followed in drafting their reports.

It is only at a much later stage in the dispute that the defendant can initiate ordinary proceedings to attempt to challenge the existence of the claim, or the enforceability of the foreign judgment or arbitral award, and be granted the availability of the full range of evidentiary proceedings.

Conclusion

The admissibility of private expert reports in Swiss civil proceedings presents litigants with new opportunities, especially to creditors enforcing judgments or arbitral awards.

In setting the principles on how to assess the weight of private expert reports, Swiss courts will draw their inspiration from former cantonal case law and practice, the rules applying to international arbitration, and the practice of neighbouring or more distant countries.

For Swiss practitioners, the coming months and years will be fascinating as the rules applying to private expert reports become more clearly defined.

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