

DEFENDING SWISS ASSETS FROM EX PARTE APPLICATIONS

The protective brief can provide a vital shield for a litigant's assets, but what are the most practical measures to follow to avoid potential risk during disputes?



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Switzerland is not only a leading financial centre, with an estimated \$2.3trn (£1.9trn) of offshore wealth under management, but also a key trading platform for energy and other commodities and the host to free ports sheltering artworks and cultural goods worth billions. Over and above those, the country is home to many high-net-worth individuals, their family, properties, advisers and custodian banks.

It is therefore not surprising that Swiss courts are often approached for attempts at asset recovery, in particular in cross-border disputes.

Since 2011, Swiss law provides prospective defendants to ex parte applications with a tailor-made defensive tool: the protective brief, enshrined in Art. 270 of the Swiss Code on Civil Procedure.

The Swiss protective brief

The protective brief is the judicial equivalent of a shield or defensive mine for litigants fearing a request for ex parte measures against their assets (e.g. prohibitory orders or attachments) in Switzerland, be it a bank account, a claim against a Swiss-resident counterpart or another form of property subject to civil seizure. It allows a party to set out in writing his or her position in anticipation of the possible filing of an ex parte application by his or her prospective opponent.

As a civil law jurisdiction, Switzerland does not require 'full and frank disclosure' from applicants, with the result that litigants are at the mercy of a selective display of facts and evidence by their opponents. The protective brief allows balancing the court's perspective in advance, to avoid that ex parte decisions are rendered purely on a one-sided presentation of the dispute.

Protective briefs remain in force six months after filing and can be amended, renewed or extended for further periods of six months each.

Courts will neither review the brief nor serve it on the named opponent unless and until the latter applies for the feared ex parte injunction. This avoids unnecessarily sharing information and evidence with the opponent

where proceedings are eventually not initiated.

Without a nationwide register, protective briefs must be filed wherever the relevant asset(s) are in Switzerland, before the court(s) having jurisdiction locally.

Tips and limits

As a practical measure, it is advisable to file one brief per potentially targeted asset, to avoid unnecessarily disclosing all of them to a prospective applicant who may know of and target only one or a few of the existing assets and need not be informed of the existence of others.

While useful also against the enforcement of foreign decisions or awards, protective briefs are, however, inoperative against decisions from courts in member states to the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Lugano Convention, indeed, provides for immediate enforcement subject to possible appeal, and as an international treaty, takes precedence over domestic law. Accordingly, and subject to Brexit, a protective brief may not prevent enforcing an English worldwide freezing order in Switzerland.

Conclusion

Whether advising claimants or defendants in proceedings on the merits, foreign and Swiss counsel whose clients have assets potentially at risk in Switzerland will consider the protective brief as an essential component of a robust asset protection strategy.



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