

DEBT RECOVERY IN SWITZERLAND

Grendelmeier Jenny & Partner

Prior to initiating legal action

As in any other system, the best way to begin the debt collection process is to contact the debtor by phone or by sending a demand letter, or a reminder. If the debtor has not paid his or her debt in time. A letter written by a lawyer can be most effective.

However, if the debtor remains silent or denies outright owing anything, one must determine whether the debt is:

- based on a contract;
- based on a written acknowledgment of debt; or,
- or is supported by a court judgment.

Also, it is important to determine whether the debt might soon become barred by prescription. If prescription is imminent, you may request an enforcement proceeding in writing (or orally) at the debt enforcement office within the area of the debtor's domicile. The office will serve the summons to pay. Even without continuing the process, doing so interrupts the prescription period, and it will run again for its full length.

It is possible to check the collectibility of a debt by making an inquiry at the enforcement office within the area of the debtor's domicile. Provided the creditor can justify his or her interest in such information, the inquiry will be answered with a list of any enforcement proceedings involving the debtor.

Debt enforcement based upon a court judgment

If your claim is based on an enforceable court judgment,¹ the objection that any debtor may file within ten days after receipt of the summons will be set aside before a low court in a summary proceeding, unless the debtor can prove through documentation that since judgment was rendered, the debt has been discharged or deferred, or can successfully invoke the statute of limitations.²

Debt enforcement base upon a recognition of debt

If, on the other hand, the claim is based on a recognition of debt contained in a notarized deed or, which is more often the case, in a signed private document, the creditor may request that the objection filed by the debtor be removed provisionally.

For this purpose, a recognition of debt is not only a formal IOU. It can exist in various forms, such as a signed order for goods, a rental contract, or any sort of document

¹Likewise settlements and recognitions made in court or decisions by a federal or cantonal authority.

²Judgments of foreign courts are recognized according to §§ 25-27 of the Swiss CPIL are declared enforceable upon application by the interested party. Foreign arbitral awards are governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

DEBT RECOVERY IN SWITZERLAND

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signed by the debtor in which he or she undertakes to pay a certain, at least determinable, amount of money. In the case of rental agreements, delivery orders, or other bilateral contracts, the creditor must satisfy the court that he or she has fulfilled his or her part of the obligation and is consequently entitled to ask for the other party's performance.

The court will set aside the objection unless the debtor immediately shows *prima facie* that he or she has a defense which controverts the recognition of debt.

If the court sets aside the objection provisionally, the debtor can, in an ordinary court proceeding, bring an action requesting that the claim be declared unfounded. If no action is brought or if it is dismissed, the objection is set aside permanently, and any provisional seizure becomes definite.

Legal proceedings

Should the request to set aside the objection be provisionally dismissed, or should the creditor have no written recognition of debt,³ the debt collection process starts with the commencement of ordinary proceedings before the Justice of the Peace, in which each party lays down its opinion in a brief statement. When no settlement can be reached, the plaintiff (i.e., the creditor) usually asks the Justice to issue a certificate which allows him or her to continue the action before an ordinary court. It is important to note that the commencement of proceedings before the Justice of the Peace will also interrupt the prescription period and cause it to start again.

Small claims will usually be heard before the court in an oral proceeding where each party has two opportunities to present the case. If higher sums are at issue⁴, the first exchange of opinions or presentations⁵ is filed in writing. The court may decide to continue the trial with a court hearing or may order the parties to make their second presentation in writing as well.

It is not uncommon for the court to invite the parties to a reconciliatory meeting or pretrial hearing between the first and the second set of presentations in order to help the parties settle their dispute under the auspices of a judge.⁶

³No bilateral contract with a determinable amount to pay.

⁴The value requiring proceedings in writing varies from one canton to another.

⁵Statement of claim and answering statement.

⁶Such judge will not be excluded from rendering a judgment if the reconciliatory proceedings do not lead to a settlement.

DEBT RECOVERY IN SWITZERLAND Grendelmeier Jenny & Partner

Evidence proceedings

Unlike the procedure in Anglo-Saxon areas, in Switzerland, evidence proceedings (discovery) will only start after the first hearing in court or after both parties have exchanged written statements. Based on the allegations of fact, the court will decide what has to be corroborated by evidence and which party is burdened with the proof.⁷ Upon conclusion of the evidence proceedings, the court will render its judgment.

When the judgment becomes final, the creditor may collect the debt with the help of the enforcement office as previously outlined.

Proceedings regarding the seizure of assets

If the aforementioned enforcement proceedings

- have not been stayed by an objection or;
- an objection has been set aside by a judgment,

the creditor may request continuation of the proceedings no earlier than 20 days after the summons to pay has been served.

The application for continuation is filed with the enforcement office and will be served immediately to the debtor. Under threat of sanctions, the debtor has to be present at the seizure and has to disclose all of his or her assets, including those not in his or her possession. The debtor is prohibited by law from disposing of seized assets without the consent of the enforcement officer. At the same time, income may be seized to the extent that it is non-exempt.

The request to liquidate seized assets, claims, and other rights may be filed no earlier than one month and no later than one year after seizure.⁸

Each member within a group of creditors is entitled to request the liquidation of assets, which will normally take place in a public auction. However, assets may be disposed of by private sales if all parties concerned so agree.⁹

Each creditor will receive a certificate of shortfall for the unsatisfied portion of his or her claim. The certificate is equivalent to a recognition of debt and entitles the creditor to a

⁷The court or one appointed member of the court will lead the party through the proceedings, cause summons to be issued or witnesses to be heard. It is also the court or the delegate judge who will hear witnesses.

⁸Where real estate is involved the time runs from six months to two years.

⁹There are also other situations where a private sale is conducted in lieu of a public auction.

DEBT RECOVERY IN SWITZERLAND Grendelmeier Jenny & Partner

request for continuation without initiating enforcement proceedings. The claim evidenced in the certificate will only become barred by statute after 20 years.

Bankruptcy proceedings

An application for the continuation of proceedings will lead to bankruptcy proceedings if the debtor is subject to bankruptcy.

A debtor is subject to bankruptcy¹⁰ if he or she is registered in the commercial register as:

- a board member of a company, foundation association, or corporation;
- the owner of a business, or a member of a partnership;
- a company, foundation association, or corporation, etc.

The notice served by the enforcement officer to the debtor contains a warning that the creditor may file for bankruptcy after 20 days.

In general, such a request will be granted by the court, unless the debtor proves that his or her debt, including interest and costs, has been covered, or the creditor has granted a deferral.

The bankruptcy proceeding itself is highly complex and can hardly be dealt with in a few paragraphs.

Please note, however, that there are three different ways to run a bankruptcy proceeding:

- i) If the debtor's estate will not cover the costs of a summary proceeding, the bankruptcy court, at the request of the bankruptcy office, will order the suspension of the proceeding;
- ii) The bankruptcy court will, however, allow a summary proceeding if the proceeds of the debtor's assets are unlikely to cover the costs of an ordinary proceeding, or if the situation concerning the debtor seems to be clear and simple;
- iii) In all other cases, the debtor's estate will be wound up in an ordinary bankruptcy proceeding.

¹⁰Any debtor may file for bankruptcy himself.

DEBT RECOVERY IN SWITZERLAND

Grendelmeier Jenny & Partner

When a bankruptcy proceeding commences, all collection and enforcement activity is halted,¹¹ and interest ceases to accrue.

For the uncovered portion of his or her claim, each creditor receives a certificate of shortfall which, if the debtor has acknowledged the claim, constitutes a recognition of debt. The certificate entitles the creditor to obtain a freezing order.

New debt collection proceedings may only be initiated on the basis of the certificate if the debtor has come into possession of new assets.¹²

Attachment/Freezing orders

The creditor may apply for an attachment if:

- the debtor has no fixed domicile,
- is shown to be concealing his or her assets, or
- the claim is sufficiently connected to Switzerland, or is based on an enforceable court judgment, or on a recognition of debt, *and* if the debtor does not live in Switzerland or there are no other grounds for an attachment.

Finally, a creditor can apply for an attachment if he or she holds a provisional or definite certificate of shortfall against the debtor.

The creditor is liable to the debtor in the third place for damages suffered as a result of an unjustified attachment. Consequently, the court is empowered to ask for securities prior to issuing an attachment order.

Any person whose rights are affected by an attachment order can file an objection within ten days.

If no debt collection enforcement proceedings (as described earlier) are underway, the creditor must initiate them within ten days after receipt of the freezing (attachment) order document.

The attachment will be revoked, or will become ineffective if the creditor does not respect the deadlines for the validation of the attachment order, withdraws claims, abandons enforcement proceedings, or loses his or her action in court.

¹¹They can be resumed no earlier than 10 days after the second creditors' meeting in an ordinary proceeding or 20 days after the claim schedule has been laid open.

¹²A certificate of shortfall will be issued at the end of an *ordinary* or a *summary* bankruptcy proceeding. However, in the case of a suspension, no certificates will be awarded.

DEBT RECOVERY IN SWITZERLAND

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Glossary

Because it is not always easy to find adequate terms in English to describe the legal concepts involved, the following short glossary based on German and French may be helpful.

German

Arrest
Betreibungsamt
Betreibungsbeamter
Definitive Rechtsöffnung
Einstellung des Konkursverfahrens
Fortsetzungsbegehren
Gewöhnliches Konkursverfahren
Konkursverfahren
Pfandausfallschein
Pfändung
Provisorische Rechtsöffnung
Rechtsöffnungsverfahren
Rechtsvorschlag
Summarisches Konkursverfahren
Verwertung
Zahlungsbefehl

French

Acte de défaut de biens
Commandement de payer
Demande de mainlevée
Fonctionnaire des poursuites
Liquidation ordinaire
Mainlevée définitive
Mainlevée provisoire
Office de poursuite
Opposition
Procédure de faillite
Procédure de liquidation sommaire
Procédure de mainlevée
Réalisation
Réquisition de saisie
Saisie
Séquestre
Suspension de la liquidation

English

Attachment
Enforcement office
Enforcement officer
Objection set aside definitely
Suspension of bankruptcy proceeding
Request for continuation of enforcement proceedings
Ordinary bankruptcy proceedings.
Bankruptcy proceedings
Certificate of shortfall
Seizure
Objection set aside provisionally
Proceeding to set aside the objection
Objection
Summary bankruptcy proceedings.
Realization
Summons to pay

English

Certificate of shortfall
Summons to pay
Request to set aside the objection
Enforcement officer
Ordinary bankruptcy proceeding
Objection set aside definitely
Objection set aside provisionally
Enforcement office
Objection
Bankruptcy proceedings
Summary bankruptcy proceeding
Proceeding to set aside the objection
Realization
Request for continuation of enforcement proceedings
Seizure
Attachment
Suspension of bankruptcy proceedings