

The abusive call in Swiss case law

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The doctrine of the abusive call (*rechtsmissbräuchlicher Abruf*) is the Swiss counterpart of the fraud exception in English and American law. Its elements have been settled for decades. First, the abuse must be manifest. The applicant must show, by immediately available evidence, that the beneficiary has no right to the payment in the underlying relationship or that it calls the guarantee for a purpose other than the one it secures. Second, the abuse must be recognizable to the guarantor. A bank cannot be expected to investigate the underlying dispute and must pay unless the abuse is evident from its own point of view. Third, a mere dispute over performance, defects or set-off does not suffice, because the very purpose of the guarantee is to shift the burden of litigation to the applicant. The Federal Supreme Court described the requirement of manifest abuse as early as 1974 in BGE 100 II 145, cited above, as requiring immediate provability.¹ Later decisions confirmed that a disproportion between the beneficiary's claims and the amount of the guarantee may be relevant in exceptional cases.²

Two recent decisions of the Commercial Court of the Canton of Zurich show how restrictively the courts apply this standard. In a decision of 23 March 2020, a contractor asked the court to prohibit a bank from paying under a performance guarantee payable on first demand. It invoked disputes over defects and the financial strain caused by the COVID-19 pandemic. The court dismissed the request. It held that a prohibition of payment requires circumstances which, from the bank's point of view, are absolutely clear and leave no doubt at all. Neither the dispute over defects nor the pandemic qualified.³ In a decision of 20 June 2024, the same court refused to prohibit payment under a performance guarantee of CHF 20 million. It recalled that provisional prohibitions are issued "only with great restraint" because they contradict the principle of "first pay, then litigate". The applicant had itself terminated the underlying contract, which was precisely the risk that the guarantee secured.⁴ A third decision of 18

December 2025 confirmed this line and stated the test in two parts: the call must be manifestly abusive, and the abuse must be recognizable to the guarantor.⁵

1 Procedure: provisional measures and attachment

An applicant that wants to stop payment under a guarantee governed by Swiss law, or issued by a Swiss bank, must act within days. The usual route is an application for a provisional measure under Articles 261 ff. of the Civil Procedure Code (CPC), often combined with a request for an ex parte order under Article 265 CPC. The applicant must make credible (*glaubhaft machen*) a claim in substance and a risk of harm that is not easily reparable. It must also show the temporal urgency of the matter. In guarantee cases the claim in substance is the manifest abuse of the call. The applicant usually names both the beneficiary and the guarantor bank as respondents. Because the courts apply the abuse test strictly, most applications fail, as the Zurich decisions show.⁶

An alternative is the attachment (*Arrest*) under Articles 271 ff. of the Debt Enforcement and Bankruptcy Act (DEBA). An applicant that has a claim against a foreign beneficiary may seek to attach the beneficiary's claim against the Swiss guarantor bank, which is an asset located in Switzerland. The creditor must have a claim that is due and not secured by a pledge. Where the debtor does not live in Switzerland, the attachment requires that the claim have a sufficient connection with Switzerland or rest on an acknowledgment of debt, unless the creditor holds a final enforceable title (Art. 271 para. 1 nos. 4 and 6 DEBA). Whether the applicant may use this route to block the proceeds of the guarantee it has itself procured is doubtful, because the attachment would undermine the independence of the guarantee, and the answer depends on the circumstances.⁷ For a Lugano trader that has given an advance payment guarantee to a foreign buyer, the practical advice is to negotiate the guarantee carefully from the start. The trader should insist on a URDG 758 guarantee with a supporting statement, a reduction clause linked to deliveries, a clear expiry date and Swiss law and jurisdiction. It should also keep a contemporaneous record of performance that can serve as immediate evidence if an abusive call is made.

Common misconception. Many traders believe that a guarantee "on first demand" can be stopped if the beneficiary has no real claim. Swiss courts will prohibit payment only if the call is manifestly abusive and the abuse is evident to the guarantor bank from immediately available evidence. A dispute about performance, defects, termination or financial hardship does

not meet this standard. The rule is "first pay, then litigate", and the protection of the trader lies in the drafting of the guarantee before it is issued.

2 Notes

1. Commercial Court of the Canton of Zurich, decision HE200121 of 23 March 2020, https://entscheidsuche.ch/docs/ZH_Obergericht/ZH_HG_001_HE200121_2020-03-23.pdf, citing BGE 100 II 151 on the requirement of immediate provability, BGE 138 III 241 E. 3.2, BGE 122 III 273 E. 3a and BGE 131 III 511 E. 4.2. ↩
2. Commercial Court of Zurich, HE200121 (above), citing Federal Supreme Court, judgment 4A_111/2014 of 31 October 2014, E. 3.3. ↩
3. Commercial Court of Zurich, HE200121 (above) ("aus Sicht der Bank absolut klare Verhältnisse vorliegen, die keinerlei Zweifel darüber offen lassen"). Court fee CHF 10,000. ↩
4. Commercial Court of the Canton of Zurich, decision HE240087 of 20 June 2024, https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HE240087-O1.pdf ("nur mit grosser Zurückhaltung"; "zuerst zahlen, dann prozessieren"). ↩
5. Commercial Court of the Canton of Zurich, decision HE250128 of 18 December 2025, https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HE250128-O1.pdf ("Ein Verbot kommt grundsätzlich nur in Frage, wenn glaubhaft gemacht ist, dass die Abrufung der Garantie offensichtlich rechtsmissbräuchlich ist und wenn der Rechtsmissbrauch auch für den Garanten erkennbar ist"), referring to ZR 114 (2015) No. 44, ZR 112 (2013) No. 68 and ZR 111 (2012) No. 69. ↩
6. Swiss Civil Procedure Code of 19 December 2008 (CPC), SR 272, Arts. 261, 262 and 265, as applied in Commercial Court of Zurich, HE200121 (above). ↩

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7. Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (DEBA), SR 281.1, Art. 271 para. 1 (in particular nos. 4 and 6), German and French text at [droit-bilingue.ch, https://www.droit-bilingue.ch/de-fr/2/28/281.1-271-306.html](https://www.droit-bilingue.ch/de-fr/2/28/281.1-271-306.html). ↩

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