Chambers
AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Banking & Finance 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

Switzerland: Law & Practice
Shelby R du Pasquier, Patrick Hünerwadel, Valérie Menoud and Marcel Tranchet
Lenz & Staehelin

SWITZERLAND

Law and Practice

Contributed by:
Shelby R du Pasquier, Patrick Hünerwadel, Valérie Menoud and Marcel Tranchet
Lenz & Staehelin

Contents

1. Loan Market Overview p.5
1.1 The Regulatory Environment and Economic Background p.5
1.2 Impact of the Ukraine War p.5
1.3 The High-Yield Market p.6
1.4 Alternative Credit Providers p.6
1.5 Banking and Finance Techniques p.6
1.6 ESG/Sustainability-Linked Lending p.6

2. Authorisation p.7
2.1 Providing Financing to a Company p.7

3. Structuring and Documentation p.7
3.1 Restrictions on Foreign Lenders Providing Loans p.7
3.2 Restrictions on Foreign Lenders Receiving Security p.8
3.3 Restrictions and Controls on Foreign Currency Exchange p.9
3.4 Restrictions on the Borrower's Use of Proceeds p.9
3.5 Agent and Trust Concepts p.9
3.6 Loan Transfer Mechanisms p.9
3.7 Debt Buy-Back p.10
3.8 Public Acquisition Finance p.10
3.9 Recent Legal and Commercial Developments p.11
3.10 Usury Laws p.11
3.11 Disclosure Requirements p.11

4. Tax p.11
4.1 Withholding Tax p.11
4.2 Other Taxes, Duties, Charges or Tax Considerations p.12
4.3 Foreign Lenders or Non-money Centre Bank Lenders p.12

5. Guarantees and Security p.13
5.1 Assets and Forms of Security p.13
5.2 Floating Charges and/or Similar Security Interests p.14
5.3 Downstream, Upstream and Cross-Stream Guarantees p.15
5.4 Restrictions on the Target p.15
5.5 Other Restrictions p.15
5.6 Release of Typical Forms of Security p.16
5.7 Rules Governing the Priority of Competing Security Interests p.16
5.8 Priming Liens p.16

6. Enforcement p.17
6.1 Enforcement of Collateral by Secured Lenders p.17
6.2 Foreign Law and Jurisdiction p.17
6.3 Foreign Court Judgments p.17
6.4 A Foreign Lender's Ability to Enforce Its Rights p.18

7. Bankruptcy and Insolvency p.18
7.1 Impact of Insolvency Processes p.18
7.2 Waterfall of Payments p.18
7.3 Length of Insolvency Process and Recoveries p.19
7.4 Rescue or Reorganisation Procedures Other Than Insolvency p.19
7.5 Risk Areas for Lenders p.19

8. Project Finance p.19
8.1 Recent Project Finance Activity p.19
8.2 Public-Private Partnership Transactions p.19
8.3 Governing Law p.20
8.4 Foreign Ownership p.20
8.5 Structuring Deals p.20
8.6 Common Financing Sources and Typical Structures p.21
8.7 Natural Resources p.21
8.8 Environmental, Health and Safety Laws p.22

Contributed by: Shelby R du Pasquier, Patrick Hünerwadel, Valérie Menoud and Marcel Tranchet,
Lenz & Staehelin

Lenz & Staehelin has the largest banking and finance team in Switzerland, with approximately 80 specialised lawyers offering leading expertise on transactional and regulatory matters. The firm acts for a strong domestic and international client base, and is involved in a high proportion of the most significant matters in Switzerland. The team advises on the full range of banking and finance matters, including financings, regulatory matters, regulatory proceedings, capital markets, asset management, derivatives, private banking, fintech and ESG-related matters.

Authors

Shelby R du Pasquier heads the banking and finance team at Lenz & Staehelin's Geneva branch and focuses on banking and financing services, investment funds, corporate and M&A, and internal investigations. He is the author of numerous articles and guides, and is admitted as an expert to the SIX Swiss Exchange for Listing Purposes. He is also a board member of several listed and private companies, including the Swiss National Bank, and is the chair of the supervisory board of the Pictet Group.

Patrick Hünerwadel is a partner at Lenz & Staehelin, and active in structured finance, aircraft financing, asset securitisation, and capital markets matters, among others. Patrick has contributed to several publications in the field, and lectures on corporate law and contracts at the University of St Gallen.

Valérie Menoud is a partner specialising in banking and regulatory matters at Lenz & Staehelin. Her practice also covers contract and corporate law, anti-money laundering, compliance issues and corporate investigations. She regularly contributes to industry publications and has been a part-time lecturer at the University of Lausanne (HEC).

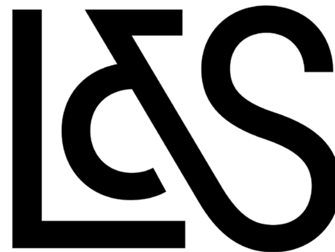
Marcel Tranchet heads the banking and finance team at Lenz & Staehelin in Zurich. His practice includes syndicated financings, acquisition finance, structured finance, project finance, bond offerings and other securities transactions, financial restructurings, derivatives, regulatory matters and fintech matters. Marcel is the author of various articles and guides, and a frequent speaker at conferences.

Contributed by: Shelby R du Pasquier, Patrick Hünerwadel, Valérie Menoud and Marcel Tranchet,
Lenz & Staehelin

Lenz & Staehelin

Route de Chêne 30
CH-1211 Geneva 6
Switzerland

Tel: +41 58 450 70 00
Fax: +41 58 450 70 01
Email: geneva@lenzstaehelin.com
Web: www.lenzstaehelin.com



1. Loan Market Overview

1.1 The Regulatory Environment and Economic Background

The lending market in Switzerland is well developed, with experienced participants (lenders, borrowers and advisers). The Swiss lending market has been stable for many years now, including during the 2008 financial crisis, the COVID-19 pandemic and the war in Ukraine. The Swiss market is largely in the hands of Swiss banks, but non-Swiss banks and alternative lenders (such as specialised debt funds) play an important role as well.

Tax incentives – as well as the negative interest rates introduced by the Swiss National Bank in 2015 and subsequently by most banks – have had the effect of fostering investments and supporting loan market activities. However, over the past year, the Swiss National Bank has decided to raise interest rates several times to counter inflation. Nonetheless, the impact of rising interest rates on the Swiss loan market has been moderate overall compared to other countries.

The Swiss Financial Market Supervisory Authority (FINMA) is keen to ensure that lending is sustainable and that the solvency of banks is not put at risk as a result of over-lending. FINMA monitors banks to ensure that they have sufficient capital to withstand changes in risk-drivers. The continuing pressure on profitability may result in banks taking on increased risks in lending or in interest rate risk management, according to FINMA.

1.2 Impact of the Ukraine War

Following Russia's invasion of Ukraine, global economic growth has slowed down and central banks across the world have tightened monetary policy. In particular, the increased volatility in financial markets, the rise of energy prices and the high inflationary pressure led the Swiss National Bank to increase interest rates for the first time since 2015.

That being said, there are currently no signs of major impacts on the Swiss loan market, compared to other financial centres. However, uncertainty over the future direction of inflation, interest rates and economic growth present risks and challenges to both lenders and borrowers.

Of note, Switzerland has adopted sanctions that are, in principle, aligned with those adopted by the EU in response to Russia's ongoing military aggression against Ukraine.

1.3 The High-Yield Market

High-yield debt securities have been an increasingly popular means of external debt financing during the past few years.

Large transactions, especially leveraged transactions, are frequently structured both with loans and high-yield debt. For Swiss withholding tax reasons, the notes' issuer is often a non-Swiss entity.

1.4 Alternative Credit Providers

Alternative credit providers (eg, specialised debt funds, pension funds and insurance companies) have been increasingly active in the Swiss market, especially in international leveraged transactions. The "Swiss non-bank rules" (see **4.1 Withholding Tax**) are an element to be considered when structuring such transactions.

As regards debt securities transactions in Switzerland, these are generally co-ordinated by banks (Swiss or non-Swiss) with a broader investor base than in the bank loan market.

1.5 Banking and Finance Techniques

As mentioned in **1.4 Alternative Credit Providers**, alternative credit providers have been increasingly active in the Swiss market during the past few years.

The use of crowdfunding to finance projects has shown relatively stable growth over the past few years in Switzerland. Under current Swiss rules, crowdfunding is not subject to specific regulatory requirements. Similarly, crowdfunding platforms are not subject to licensing requirements for the time being.

Platform operators have to be careful, however, to comply with the traditional banking rules and structure their activities in a way that does not trigger a licensing requirement under banking laws. This could, for instance, be the case where the operator accepted deposits from the public. Platform operators' activities are also generally subject to anti-money laundering regulations.

1.6 ESG/Sustainability-Linked Lending

As is the case in other leading financial centres, ESG and sustainability-linked lending is a major topic in Switzerland and is a feature of many transactions, especially syndicated loan transactions and, albeit to a lesser degree, large bilateral loan transactions.

No uniform approach has yet developed but market practice is starting to crystallise more and more, especially in terms of:

- the relevant triggers (key performance indicators are the most common triggers);
- reporting; and
- the implications (eg, margin increase/decrease).

To date, these efforts largely rely on voluntary standards, such as the Loan Market Association recommendations for the bank debt market or the International Capital Market Association principles for the debt capital market.

This development ties in with greater regulatory efforts to better assess how issuers take ESG aspects into account. In this context, it is worth noting that the Swiss stock exchange (SIX Swiss Exchange) has launched ESG indices – based on data from the Swiss sustainability-rating agency Inrate – for its equity and bond markets.

Furthermore, a 2022 revision of Swiss corporate law introduced new provisions on ESG reporting into Swiss law. These provisions notably require large Swiss companies and regulated financial

institutions to publish a non-financial report annually, for the first time for the financial year 2023, to be published in 2024. This report will focus on information related to the company's business development, performance, position, and impact on environmental, social, employee, human rights and anti-corruption matters.

2. Authorisation

2.1 Providing Financing to a Company

Lending activities are generally unregulated in Switzerland, provided the lender does not accept deposits from the public or refinances itself via a number of banks. A Swiss-based entity that combines lending activities with deposit-taking from the public or refinancing from a number of banks will generally qualify as a bank, which triggers licensing requirements under Swiss banking laws.

The Swiss regime for the cross-border provision of financial services, including lending to Swiss borrowers, is still rather liberal. Foreign-regulated entities operating on a strict cross-border basis (without having a business presence in Switzerland) do not need to be authorised by FINMA, as a general rule. If, however, these activities involve a physical presence (such as personnel or physical infrastructure) in Switzerland on a permanent basis, the cross-border exemption is generally not available. In practice, FINMA considers a foreign entity to have a Swiss presence as soon as employees are hired in Switzerland. That said, FINMA may also look at further criteria to determine whether a foreign bank has a Swiss presence, such as the business volume of that bank in Switzerland or the use of teams specifically targeting the Swiss market.

This liberal stance has changed somewhat with the introduction of the Swiss Federal Financial Services Act (FinSA) and the Swiss Federal Act on Financial Institutions (FinIA). These statutes respond to the "third-country rules" of MiFID II (the EU's Markets in Financial Instruments Directive 2014) and introduce an obligation to register in Switzerland for foreign financial service providers that would be subject to an authorisation in Switzerland, as a prerequisite to providing financial services to Swiss-based investors. Certain exemptions are available for regulated financial institutions targeting exclusively institutional and professional clients in Switzerland.

Lending to individuals for purposes other than business or commercial activities (ie, consumer credits) is regulated by the Swiss Consumer Credit Act (SCCA). Lenders contemplating consumer credit activities falling under the SCCA must register with the canton in which they are established. Exemptions from this registration requirement are available for Swiss-licensed banks and for lending services that are ancillary to the commercial activity of the lender (ie, for the purpose of financing the acquisition of goods or services provided by the lender itself).

3. Structuring and Documentation

3.1 Restrictions on Foreign Lenders Providing Loans

With the exception of consumer credit activities, foreign lenders are not – as a general rule – restricted from granting loans to Swiss-based borrowers under Swiss law (see **2.1 Providing Financing to a Company**). Certain Swiss tax law points are to be considered where security is taken over Swiss real estate assets (see **3.2 Restrictions on Foreign Lenders Receiving Security**).

3.2 Restrictions on Foreign Lenders Receiving Security

There are no generally applicable Swiss law provisions restricting or prohibiting the granting of security or guarantees to foreign lenders in Switzerland – for example, there are no restrictions on the basis of national interest. That said, depending on the nature of the collateral, the type of security interest and the industry sector, specific restrictions may apply or may impact the enforcement of the security interest by a foreign secured creditor.

Real Estate Financing

One noteworthy example is the area of real estate financing transactions in Switzerland. The background is that the acquisition of Swiss real estate assets by foreign investors or foreign-controlled companies is subject to restrictions under the Swiss Federal Law on the Acquisition of Real Estate by Persons Abroad (the so-called Lex Koller).

In particular, residential properties can only be acquired by foreign investors or foreign-controlled companies if a licence is issued (and such licences are granted on limited grounds). This generally covers both direct investments in residential real estate and acquisitions of shares in a residential real estate company. The concept of acquisition under the Lex Koller is such that it also includes secured financings by foreign lenders if those financings exceed certain thresholds – in particular, loan-to-value thresholds.

The acquisition of commercial properties, by contrast, is subject to fewer restrictions, which mainly concern premises that are:

- empty;
- contain residential parts; or
- that are acquired in anticipation of expansion plans but without concrete plans to build at the time of acquisition.

In addition to this Lex Koller point, a Swiss tax at source can apply where the security package of a financing by foreign lenders includes Swiss real estate assets. Exceptions apply if the foreign lenders act through jurisdictions with a double taxation treaty that provides for full exemption from such tax.

Regulated Sectors

In certain regulated industries – for example, the financial sector (in particular, banking), telecommunications, nuclear energy, media and aviation – shareholders and controlling interests in companies active in the sector may be subject to review and approval by the competent Swiss authority, with a view to ensuring proper business conduct and, as the case may be, reciprocal rights for Swiss investments abroad. Such restrictions can also apply in the case of secured financings to companies in such sectors.

Control of Foreign Investments

In May 2022, the Federal Council initiated the consultation on a preliminary draft bill entitled the Swiss Federal Act on the Control of Foreign Investments, which seeks to introduce foreign investment control in Switzerland. The preliminary draft provided for a cross-sector (as well as a sector-specific) review of acquisitions by foreign investors. Accordingly, an acquisition by a foreign investor of certain Swiss companies (eg, those active in research, development and the production and distribution of medicines) and systemically important Swiss banks would need to be approved by the State Secretariat for Economic Affairs. The preliminary draft bill encountered general scepticism and the Federal Council will substantially revise its proposal. It is

expected that the Federal Council will present a more targeted bill to Parliament at the end of 2023 which will provide for investment screening when a foreign state-controlled investor aims to acquire a Swiss company operating in a sector critical to Switzerland's security (eg, defence equipment, electricity transmission and production, or health and telecoms infrastructure).

3.3 Restrictions and Controls on Foreign Currency Exchange

There are no restrictions or controls on foreign currency exchanges or on the import and export of capital under Swiss law.

3.4 Restrictions on the Borrower's Use of Proceeds

There are no specific statutory restrictions on a Swiss borrower's use of proceeds from loans or debt securities under Swiss law. Parties do, however, generally agree contractually on the permitted use of funds.

3.5 Agent and Trust Concepts

Swiss law does not provide for specific rules governing the use of agency or trust structures in the context of secured lending transactions. However, such concepts are recognised and commonly used in practice.

As a rule, it is possible under Swiss law that security be granted to, and held by, an agent or trustee and for security documents to be drafted in such a way that it is not necessary to amend them upon a change of the secured parties. Depending on the type of security interest, the role and powers of the agent or trustee need to be structured differently.

- Where the security interest is a security assignment or a security transfer, the security can be held on trust – that is, by a security agent acting in its own name and for the benefit of the (other) secured parties.
- By contrast, where the security interest is a right of pledge, it is necessary that the security agent act as a direct representative of the (other) secured parties (ie, in the name and on behalf of the secured parties) because a Swiss law pledge is accessory to the secured obligations. This requires that the secured parties be identical to the creditors. Having the security agent act as a direct representative is the standard approach in Switzerland to address this. Alternative approaches (such as parallel debt) remain untested in Swiss courts, but practitioners generally take the view that the "parallel debt" concept should work under Swiss law.

With regard to trusts in particular, it should be noted that currently a substantive trust law does not exist in Switzerland. It is therefore not possible to set up a trust under Swiss law. That said, foreign trusts – as defined under the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985 (which Switzerland ratified in 2007) – may be recognised in Switzerland. This recognition is governed by the Swiss Private International Law Act (PILA).

This situation may change. The Federal Council issued a preliminary draft bill in January 2022 aimed at introducing the trust as a new legal institution into Swiss law and governing its taxation. Depending on the results of the consultation, which ended on 30 April 2022, a bill will be prepared for discussion by Parliament, likely during its 2023 sessions.

3.6 Loan Transfer Mechanisms

Loan transfers are generally achieved either by way of an assignment of a lender's rights under a credit facility or by a transfer of its rights and

obligations. Swiss law does not provide for general restrictions on such mechanisms. However, parties to a facility agreement frequently restrict such assignments and transfers contractually by subjecting them to a borrower's consent regime, such that the borrower's consent is required unless an exemption applies (eg, assignments or transfer upon the occurrence of an event of default or to an existing lender or an affiliate). Under Swiss law, a debtor does not need to be notified of the assignment of rights for it to be valid. However, a non-notified debtor may still validly discharge its obligations into the hands of the assignor. As mentioned in **3.5 Agent and Trust Concepts**, a loan can also be transferred pursuant to Swiss law. In such a case, the lender – with the agreement of the borrower - will transfer its rights and obligations relating to the loan agreement to a new lender.

Security interests of an accessory nature, such as a right of pledge, will follow the claims they secure when transferred. Security interests of an independent nature (such as security assignments, security transfers or certain types of personal guarantees) will, in principle, not automatically follow the claims they secure and must be transferred expressly with the consent of the security provider. As a result, it is generally recommended to expressly assign and respectively novate the security package to the benefit of the new lender in the case of a loan transfer. However, if the relevant security documents are prepared with a security agency concept, there is no need to assign or transfer the security package.

Finally, assignments and transfers are subject to continued compliance with the Swiss non-bank rules (see **4.1 Withholding Tax**).

3.7 Debt Buy-Back

There is no specific Swiss regulation addressing debt buy-backs, provided the debt instrument does not offer an equity option or a conversion feature.

In practice, where finance documents address the question of debt buy-backs, such transactions are generally contractually prohibited or restricted. In some cases, the parties may also provide that the participation of a borrower or financial sponsor (or other affiliates) will be disregarded when it comes to voting matters.

3.8 Public Acquisition Finance

Swiss takeover laws provide for "certain funds" rules and requirements that must be complied with in the context of public takeovers. These are generally similar to other well-known standards, such as the certain funds standards in the UK. In a nutshell, details about the financing of the transaction have to be included in the offering prospectus and a review body has to confirm that the bidder has the necessary funds available (or has taken measures to ensure their availability).

With regard to private M&A transactions, Swiss law does not provide for certain funds requirements. In this area, the matter is up to the parties to negotiate, and contractual clauses on funding certainty vary in practice. In domestic acquisitions, where the parties are non-financial entities, the threshold of certain funds is often low and accompanied by a "highly confident letter" or with a term sheet from a bank.

In certain instances (eg, in smaller transactions) a seller may even accept that the acquisition be subject to financing (ie, a financing-out). By contrast, in larger transactions, certain funds requirements are typical and the threshold is

often a high one – sometimes higher than it would be for a public takeover.

3.9 Recent Legal and Commercial Developments

No recent legal and commercial developments have had a major impact on the legal documentation, other than the transition from IBORs to risk-free rates and the increasing importance of sustainability-linked transactions.

3.10 Usury Laws

Except in the area of consumer credit, where a maximum interest rate is set and revised each year by the Swiss Federal Department of Justice and Police, there are no specific rules limiting the amount of interest that can be charged on a loan. However, high interest rates might be considered excessive and be subject to general Swiss law principles on usury.

In this context, the maximum allowable rate of interest is to be determined by various factors and circumstances of the case (eg, the currency of the loan and the corresponding inflation, the duration of the loan or the risk associated with a financing). There is no clear test or threshold, but practitioners and scholars usually agree on a limit in the range of 15–18% per annum. Swiss law also prohibits compound interest so that default interest due cannot itself bear default interest.

3.11 Disclosure Requirements

Public companies must provide their debt positions in their annual financial statements according to Swiss stock exchange rules (the disclosure of the details is not required however).

4. Tax

4.1 Withholding Tax

Generally, under Swiss domestic tax laws, interest payments by a Swiss borrower under a loan are not subject to Swiss withholding tax. By contrast, interests on bonds are subject to Swiss withholding tax (currently at a rate of 35%).

In order to avoid a requalification of a loan facility into a bond issuance (ie, a financing from the public) and the levy of Swiss withholding tax on payments under such financing, the so-called Swiss non-bank rules have to be complied with. Under such rules, a facility is at risk of being requalified into a bond issuance if:

- more than 10 non-bank lenders participate (or sub-participate) in the facility agreement (the "10 non-bank rule");
- a Swiss obligor has more than 20 non-bank creditors (the "20 non-bank rule") on an aggregate level (ie, all of its lenders and not just the lenders in a particular transaction); or
- a Swiss obligor has, on an aggregate level, more than 100 non-bank creditors under financings that qualify as deposits within the guidelines issued by the tax administration (the "100 non-bank rule").

Under these rules, a bank is generally defined as a financial institution that is licensed as a bank in Switzerland or abroad and carries out typical banking activities with infrastructure and personnel of its own. Non-compliance with the Swiss non-bank rules can result in the application of Swiss withholding tax, which has to be withheld by the Swiss obligor. As the case may be, this tax might be (partly or fully) recovered by a lender, depending on any applicable double taxation treaty.

It is noteworthy that the Swiss non-bank rules also apply where there is no Swiss borrower but there is a Swiss guarantor or security provider. Depending upon the structure, various approaches are available in such transactions to address the Swiss non-bank rules.

Finally, one should note that Swiss withholding tax laws generally prohibit a Swiss obligor from indemnifying a lender for Swiss withholding tax, so that standard gross-up clauses will not typically be valid and enforceable in Switzerland. In practice, there is an attempt to achieve the same commercial result by including a provision in facility agreements that provides for a recalculation of the applicable rate of interest (if and to the extent that Swiss withholding tax should become applicable and the tax gross-up is not valid). Such clauses remain untested in Swiss courts.

The Swiss government presented a revision of Swiss withholding tax laws that aimed at doing away with the Swiss non-bank rules restrictions. The Swiss population eventually rejected the revision of the bill in a referendum in September 2022.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Aside from the Swiss non-bank rules discussed in **4.1 Withholding Tax**, tax issues may arise depending on the security package.

- First, Swiss tax at source can apply on financings by non-Swiss lenders where the security package includes Swiss real estate assets. Applicable double taxation treaties, if any, may provide for exemption from such tax.
- Second, the Swiss non-bank rules need to be considered and addressed where a Swiss entity acts as guarantor or security provider.
- Finally, the granting of a guarantee or security by a Swiss direct or indirect subsidiary for the obligations of a parent company (so-called upstream security) or a sister company (so-called cross-stream security) may trigger Swiss withholding tax on payments under the guarantee or on the enforcement of such security interests (see **5.3 Downstream, Upstream and Cross-Stream Guarantees**).

4.3 Foreign Lenders or Non-money Centre Bank Lenders

Aside from the Swiss non-bank rules discussed in **4.1 Withholding Tax,** Switzerland may levy a withholding tax, if:

- interest is paid on loans granted by foreign lenders to borrowers in Switzerland, which are secured by collateral on Swiss real estate (see **4.2 Other Taxes, Duties, Charges or Tax Considerations**);
- an up/cross-stream security or guarantee is not granted at arm's length terms, the difference between the consideration granted and the consideration actually paid by the Swiss affiliate to the security provider (if any), which may constitute a hidden dividend distribution on which Swiss withholding tax is payable (see **4.2 Other Taxes, Duties, Charges or Tax Considerations**);
- a bank in Switzerland owes interest to a non-bank lender; or
- bonds are issued by foreign issuers, but guaranteed by their Swiss parent company – these bonds may be requalified as domestic issuances under certain conditions, thus triggering Swiss withholding tax on interest payment.

By being compliant with the Swiss 10/20 non-Bank rules, the interest payments paid by a Swiss obligor will not be subject to Swiss withholding tax on that basis. For this purpose, specific language is generally incorporated in the relevant loan documentation to make sure that the Swiss obligor is compliant with the above-mentioned rules.

Withholding tax on an up/cross-stream security or guarantee is also generally recoverable if the recipient or beneficiary is a Swiss-resident entity (subject to certain conditions). In the case of a non-Swiss resident, however, the withholding tax paid may only be recovered in part or entirely under the terms of a double tax treaty.

5. Guarantees and Security

5.1 Assets and Forms of Security

Security Packages

The type of security interest, as well as the applicable formalities and perfection requirements, will generally depend upon the particular security asset. Typically, in corporate lending transactions, a security package will consist of a combination of a pledge over shares, a security assignment of (certain) rights and receivables, a pledge over bank accounts and guarantees issued by certain group entities.

As a matter of Swiss law, the creation of a security interest requires parties to enter into a security document identifying the collateral (see also **5.2 Floating Charges and/or Similar Security Interests**) and determining the secured claims in a sufficient manner.

Generally speaking, the notification of a debtor is not required to create a secured interest. However, it is advisable to notify, given that a debtor can otherwise validly discharge its obligations into the hands of the security provider.

Formal requirements might apply for the security document to be valid – for example, mortgage arrangements must take the form of a notarised deed. Perfection requirements, however, will vary according to the type of security and collateral.

Financial instruments

With regard to financial instruments (such as shares), a right of pledge is typically granted. The creation of the right of pledge requires parties to enter into a security document. Perfection requirements vary, depending on the type of financial instrument. Certificated financial instruments must be physically transferred to the secured party or the security agent. If the certificates are registered, they must be duly endorsed – typically in blank. A specific regime applies to intermediated securities, which can be pledged either by a transfer of the intermediated securities to the account of the secured party or by virtue of an irrevocable written agreement (known as a control agreement) between an account-holder and the depositary institution – provided the institution complies with any instructions from the secured party.

Movable assets

With regard to movable assets, the most common form of security interests is the right of pledge. The perfection of a pledge requires, in addition to a valid security document, that the security provider transfer possession of the pledged asset to the secured party or to a third-party pledgeholder. In practice, this often collides with operational requirements and restrictions, meaning that typically no security is taken over movable assets (or is only taken over selected movable assets).

This requirement does not apply to publicly registered aircraft and ships. Similarly, a pledge over registered intellectual property rights (eg, patents, designs or trade marks) is typically also registered in the relevant intellectual property register.

Claims and receivables

Security over claims and receivables, such as receivables or rights under contracts, can be taken by means of a security assignment or a right of pledge. In practice, putting in place a security assignment is the typical approach. These arrangements allow for the transfer of the full ownership of collateral assets. The use of the title is, however, contractually limited to the liquidation of the assets in an enforcement scenario and the retention of the proceeds up to the amount of the secured claim.

The advantage of this form of security interest resides in the fact that, in the case of bankruptcy of a security provider, the collateral will not fall in the bankruptcy estate of the security provider (see **7.1 Impact of Insolvency Processes**). The assignment for security purposes requires a written agreement between the assignor and the security provider.

Bank accounts

Where bank accounts are concerned, the typical approach is to work with a right of pledge. One point to consider in connection with bank account security is that the bank will typically have a first-ranking security interest (and other preferential rights, such as a right of set-off) over its client's account by virtue of the applicable general terms and conditions. In practice, parties often attempt to obtain a partial or full waiver from the account bank for such priority rights. Where no full waiver is granted – and in order to perfect the then second-ranking security interest – it is required that the bank be given notice.

Real estate

Where security is taken over real estate, the security will take the form of a mortgage certificate or a mortgage. No other type of charge on real property is permitted under Swiss law. Mortgage certificates are usually preferred in practice, as they constitute negotiable instruments that can be pledged or transferred for security purposes. A mortgage certificate can take the form of a paperless registered mortgage certificate or a mortgage certificate on paper. Both types of mortgage are created and perfected by an agreement of the parties on the creation of the security right (by a notarised public deed) and an entry in the land register. Notary and registration fees vary, depending on the cantons where the real estate is located, and will often be calculated as a percentage of the secured amount.

5.2 Floating Charges and/or Similar Security Interests

Floating charges and similar security interests over all present and future assets of a company or blanket liens are not available under Swiss law. Such security interests are not in line with the Swiss law requirement that collateral be specifically identified.

In addition, the requirement that a security provider must transfer possession of movable assets to the secured party would render any "floating" charge over inventory, machinery, equipment or other movable assets excessively burdensome and impracticable.

5.3 Downstream, Upstream and Cross-Stream Guarantees

Under Swiss law, upstream guarantees (ie, guarantees for obligations of a direct or indirect parent company) or cross-stream guarantees (ie, guarantees for obligations of an affiliate other than a subsidiary) are subject to certain limitations and formal requirements.

Broadly speaking, upstream and cross-stream guarantees are treated like dividend distributions as far as formal requirements and substantive limitations are concerned. In particular, it is held that upstream or cross-stream guarantees should be limited to the amount of freely distributable equity; ie, the amount that could be distributed as a dividend. Otherwise, sums paid in excess of this amount could be deemed to represent an unlawful return of capital.

From a formal perspective, the granting of an upstream or cross-stream guarantee should be approved by both the board of directors and the general meeting of shareholders of the Swiss guarantor. In addition, payments under upstream or cross-stream guarantees may be subject to tax, including Swiss withholding tax.

By contrast, downstream guarantees are generally not subject to restrictions, except in particular circumstances – for example, if the relevant subsidiary is in substantial financial hardship or if it is not a wholly owned subsidiary of the guarantor.

5.4 Restrictions on the Target

When a Swiss target grants guarantees or other security interests for obligations of an acquirer, any such security interest would be upstream in nature and therefore subject to the limitations discussed in **5.3 Downstream, Upstream and Cross-Stream Guarantees**.

The following factors need to be taken into account in this respect.

- The articles of association of the Swiss target should expressly permit upstream financial assistance.
- The guarantees should be approved not only by the board of directors but also by the shareholders of the Swiss target company.
- The finance documents should include language that limits such upstream undertakings to the amount of freely distributable equity and provide for a compensation of the Swiss target by a security or guarantee fee, as well as include certain undertakings of the Swiss target to mitigate upstream limitations.
- Certain Swiss tax withholding issues should also be addressed in the finance documents.

Another issue that arises, in particular where the target is a listed company, is that of minority shareholders. If (and for as long as) a guarantor/security provider is not a wholly owned subsidiary of the parent entity whose obligations are to be guaranteed/secured, minority shareholder considerations can constitute a material issue/risk.

5.5 Other Restrictions

The main restrictions concerning the provision of security interests in the context of financings are those related to upstream and cross-stream undertakings (see **5.3 Downstream, Upstream and Cross-Stream Guarantees**).

Other restrictions might also apply depending on the context, such as bankruptcy legislation (for avoidance actions, see **7.5 Risk Areas for Lenders**) and general restrictions pertaining to the principle of good faith and public policy.

5.6 Release of Typical Forms of Security

A security is generally released through a release agreement and a release action. The release action depends upon the type of security interest that is to be released. Essentially, the release action will consist of "reversing" the actions that were necessary for the perfection of the security interest, such as a return of movable assets or share certificates, or the reassignment of rights and receivables. Also, it is good practice to notify all relevant parties (eg, account banks) of the release.

5.7 Rules Governing the Priority of Competing Security Interests

As far as real estate assets are concerned, the priority of competing security interests results from the time of entry of the mortgage or mortgage note into the land register. The same applies to the public register for aircraft and ships. The land registers contain all pre-existing security interests with rank and amount. Security interests on real estate may be established in a second or any lower rank, provided that the amount taking precedence is specified in the entry. When security interests of different ranks are created on real property, any release of higher-ranking security interest will not entitle the beneficiaries of lower-ranking security interest to advance in rank – unless an agreement providing for advancement in rank is recorded in the land register.

As far as movable assets and certificated shares are concerned, the perfection of a security interest requires a transfer of the particular asset to the secured party. As a result, third parties are not able to take and perfect subsequent security interest over these assets without the consent of the secured party, with the exception of good faith acquisitions. A third party acting in good faith will acquire a valid security interest over the assets, irrespective of the fact that the pledgor had no authority over the assets.

As far as rights and receivables are concerned, the order of priority is chronological, with the first security interest granted being senior to any subsequent security interest. Parties can, however, agree on a different ranking among themselves. Because there is no public register, legal due diligence is sometimes conducted to verify that the particular assets are free from third-party rights. Also, it is customary to obtain a respective representation and to provide for the necessary negative undertakings (no disposals, negative pledge, etc) in the relevant security document(s).

As a general rule, priority ranking can be contractually varied and Swiss law recognises agreements setting priorities. Any party having a first-ranking security interest can decide to waive its priority right. Generally speaking, contractual subordination provisions will usually survive in insolvency proceedings of a Swiss security provider. However, questions can arise - particularly regarding whether an insolvency official is bound to them – and, where things are unclear, it is not uncommon in practice to bolster the contractual arrangements of claims among different groups of creditors by means of security assignments.

5.8 Priming Liens

The concept of priming liens (ie, liens specifically approved by insolvency officials or courts for post-petition loans and taking security over existing liens) is a concept not known under Swiss law.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Security interests can be enforced if a secured party has a secured claim that is overdue. The relevant finance documents will generally define the enforcement trigger.

Under Swiss law, there are two main avenues for enforcing a security interest.

- First, the enforcement of a right of pledge can follow the rules set out in the Debt Enforcement and Bankruptcy Act (DEBA). Under the DEBA, the usual form of enforcement is a public auction sale. Assets may, however, be sold without a public auction if:
  - (a) they would lose value during the time required to prepare the auction;
  - (b) the costs for the safekeeping of the assets are unreasonably high;
  - (c) the assets have a market price (ie, are traded on a stock exchange); or
  - (d) all parties agree to the private sale.
- Second, where the collateral consists of pledged claims, movables or security papers (including mortgage notes), the parties are to a certain extent free to agree on a private foreclosure mechanism. Private enforcement is generally preferred in practice, as it can be processed more expediently and with a simpler process than enforcement under the DEBA. By contrast, if a security right consists of a security assignment or transfer, enforcement can only be effected by way of private enforcement, as title to the collateral has passed to a secured creditor precisely with such purpose.

Private enforcement can be achieved through a public auction, public offering or a private sale.

If a private sale has been agreed upon in the relevant security document, it is advisable to arrange expressly in the security document for the right of a secured creditor to purchase the collateral itself. The value of the collateral will be determined based on fair market value and any surplus remaining after application of the proceeds to the secured amount would be paid out to the security provider. Private enforcement of a right of pledge is, subject to exceptions (eg, for intermediated securities), only available as long as no official enforcement proceeding under the DEBA has been initiated.

6.2 Foreign Law and Jurisdiction

A choice of a foreign law as the governing law of a contract is generally possible under Swiss law, save for specific contracts such as contracts with consumers. A choice of law to govern security documents, although binding for the parties, will not bind third parties.

Swiss courts will generally refuse to apply provisions of foreign law if this would lead to a result that would be incompatible with Swiss public policy. In addition, a Swiss court may apply provisions of a different law from the one chosen by the parties if important reasons call for it and if the facts of a case have a close connection with that other law.

Similarly, jurisdiction clauses are also generally binding, subject to certain exceptions.

With regard to immunity, if and to the extent a person is subject to immunity, waivers are generally not possible.

6.3 Foreign Court Judgments

As a rule, Swiss courts will generally recognise a final and conclusive judgment of a competent

foreign court. Recognition of a foreign decision may, however, be denied if:

- such a decision is manifestly incompatible with Swiss public policy;
- a party establishes that it did not receive proper notice;
- the decision was rendered in violation of fundamental principles of procedural law; or
- if the principle of ne bis in idem has been violated.

Where proceedings in relation to the same subject matter and between the same parties have been started earlier in another competent court, Swiss courts tend to neither enforce a judgment nor take up the case until a decision capable of being recognised in Switzerland is rendered by the foreign court.

As for arbitral awards, Switzerland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and will recognise and enforce foreign arbitration awards pursuant to and to the extent provided for by that convention.

6.4 A Foreign Lender's Ability to Enforce Its Rights

As mentioned in **3.2 Restrictions on Foreign Lenders Receiving Security**, the purchase of Swiss real estate by foreign or foreign-controlled investors might be subject to approval by the Swiss authorities under the Lex Koller. Any acquisition of residential real estate assets in Switzerland by foreign or foreign-controlled investors, in particular, is subject to restrictions and permit requirements. If certain loan-to-value thresholds are exceeded, such restrictions and requirements can also apply to financings secured by Swiss real estate assets.

Furthermore, a lender's ability to enforce its rights under finance documents may be limited by the occurrence of a bankruptcy or insolvency event with the Swiss debtor (see **7. Bankruptcy and Insolvency**).

7. Bankruptcy and Insolvency

7.1 Impact of Insolvency Processes

Once bankruptcy has been declared over a Swiss obligor, or a composition agreement with assignment of the Swiss obligor's assets has been approved, the Swiss obligor becomes insolvent. All its obligations become due and payable and the insolvent loses legal capacity to dispose of its assets. All of its assets will form part of the bankruptcy estate, including pledged assets. Private enforcement of any assets that are part of the bankruptcy estate is no longer possible. The enforcement of creditors' rights in this context will be governed by the DEBA.

Assets from which the legal title was transferred for security purposes, however, do not fall in the bankruptcy estate but remain with the assignee, respectively the transferee. These assets may still be privately enforced by the secured party. Any eventual surplus from liquidation must then be returned to the bankruptcy estate for distribution to other creditors.

Subject to avoidance actions (see **7.5 Risk Areas for Lenders**), the initiation of insolvency proceedings should not affect valid acts of disposition made prior to such an occurrence.

7.2 Waterfall of Payments

Unsecured creditors are ranked into three groups, with financial creditors typically falling into the third group. Secured creditors are sat-

isfied on a priority basis out of the enforcement proceeds of the relevant security assets.

7.3 Length of Insolvency Process and Recoveries

The time taken for an insolvency process to complete depends significantly on how complex the particular insolvency is and on what type of insolvency proceeding is being applied. It can range from a few weeks (in straightforward cases) to a few years (in complex cases).

7.4 Rescue or Reorganisation Procedures Other Than Insolvency

Switzerland does not provide for a system similar to Chapter 11 or comparable schemes available under the laws of certain European jurisdictions. However, Swiss law is fairly flexible in its ability to accommodate reorganisation procedures outside of a formal bankruptcy and is also fairly flexible with regard to its interaction with non-Swiss reorganisation schemes.

7.5 Risk Areas for Lenders

Under the DEBA, dispositions taken to disadvantage certain creditors prior to the opening of bankruptcy proceedings may be subject to avoidance actions. This includes acts of disposition of assets made against no consideration or against inadequate consideration during the year preceding the declaration of bankruptcy. It also includes acts taken during the five years prior to the opening of bankruptcy proceedings with the purpose of disadvantaging creditors or favouring some creditors to the detriment of others.

If a debtor was over-indebted at the time, the following acts may be voidable if carried out during the year prior to the opening of a bankruptcy proceeding:

- the granting of collateral for previously unsecured debt;
- the settlement of debt by unusual means of payment; or
- the repayment of debt not due.

Such acts are not voidable if the party that benefited from the act demonstrates that it did not have actual or deemed knowledge about a debtor's over-indebtedness.

8. Project Finance

8.1 Recent Project Finance Activity

Project finance continues to be of interest as a financing approach in Switzerland. There is, however, no specific trend currently in terms of industries that apply this method of finance.

8.2 Public-Private Partnership Transactions

Switzerland does not have specific federal or cantonal legislation dealing with public-private-partnership (PPP) transactions. The applicable rules therefore vary depending on the sector involved.

An important aspect of PPP transactions when these are structured within public procurement projects will be to abide by the rules for participation and awarding public projects. At the federal level, these rules are set out in the Federal Public Procurement Act (PPA) and, where the Swiss federal government is party to a project, the rules of the PPA must be complied with.

In addition, Switzerland is a signatory to the WTO Agreement on Government Procurement that applies to procurements by the Swiss Confederation and the cantons, as well as public

companies in the water, electricity and transport sectors.

The federal and cantonal bodies have implemented an electronic platform for public procurement purposes called "Simap". It offers a procedure for public contract-awarding authorities to post their tenders and any relevant tender documents. Bidders and interested companies are given an overview of all existing contracts across Switzerland and documents are freely accessible.

8.3 Governing Law

Depending on the sector of a project and its scope, relevant documents and information may need to be submitted to competent authorities for information or for approval. This will typically be the case in relation to construction, zoning and environmental issues and concessions.

8.4 Foreign Ownership

Jurisdiction over public sector projects is allocated between federal, cantonal and municipal authorities, depending upon the sector involved. At a federal level, the main responsible government body is the Department of the Environment, Transport, Energy and Communications (DETEC) and the agencies attached to it. The DETEC is in charge of transport, energy, communications, aviation and the environment.

The Federal Communications Commission is the regulatory body for the telecommunications sector. It is responsible for granting licences for the use of radio communication frequencies and promulgating access conditions when service providers fail to reach an agreement.

The Swiss Federal Electricity Commission is Switzerland's independent regulatory authority in the electricity sector. It monitors electricity prices as well as electricity supply security and regulates issues relating to international electricity transmission and trading. In Switzerland, cantonal and municipal bodies generally have authority over natural resources such as oil, gas and mineral resources.

With regard to state ownership in Switzerland, three central sectors used to be fully state-owned.

- Railways – the Swiss federal government is currently the sole shareholder of the Swiss Federal Railways, which used to be a government institution. Shareholder responsibilities of the federal government are performed by the General Secretariat of the DETEC in co-operation with the Federal Finance Administration.
- The postal service – Swiss Post is still entirely owned by the Swiss government as a public limited company.
- Telecommunications services – Swisscom (a telecommunications provider) is also a public limited company but its shares are listed on the SIX Swiss Exchange. Currently, the Swiss federal government holds the majority of the share capital and the voting rights.

8.5 Structuring Deals

The preferred legal form of a project company is the stock corporation. Sometimes, international holding structures are also used. Tax issues should always be considered when setting up the structure.

With regard to foreign investment issues, there are only a few restrictions, and non-discriminatory competition between foreign and domestic entities prevails. The main restriction occurs with respect to real estate property by application of the Lex Koller, which contains several

restrictions and authorisation requirements for the acquisition of non-commercial property by foreign or foreign-controlled investors (see **6.4 A Foreign Lender's Ability to Enforce Its Rights**). In this context, foreign investment in a project company holding non-commercial real estate may be restricted by the Lex Koller.

Switzerland has signed more than 120 bilateral investment promotion and protection agreements (BITs) with developing and emerging market countries around the world. BITs improve legal certainty and the investment climate. Switzerland has the world's third-largest network of such agreements after Germany and China.

The purpose of BITs is (i) to afford international law protection from non-commercial risks associated with investments made by Swiss nationals and Swiss-based companies in partner countries, and (ii), reciprocally, investments made by nationals and companies of partner countries in Switzerland. Such risks include state discrimination against foreign investors in favour of local ones, unlawful expropriation and unjustified restrictions on payments and capital flows.

The Swiss Constitution protects property rights. However, in order to achieve planning goals, the competent authorities may – subject to the rules of expropriation – dispossess land from private persons. Expropriations are permitted if they are:

- based on sufficient legal foundations;
- in the public interest;
- compliant with the principle of proportionality; and
- unable to be achieved by other reasonable means.

In addition, full compensation has to be made.

8.6 Common Financing Sources and Typical Structures

The typical funding techniques for project financings are debt financing (including financings covered by the export credit agency), mezzanine financing, capital markets and state subsidies. Switzerland has an official export credit agency, the Swiss Export Risk Insurance (SERV), which offers various insurance and guarantee products to cover political and credit risks. So far, SERV's products have primarily been relied upon for financings in the power, railways and mechanical engineering industries. That said, SMEs are increasingly relying on SERV's support, which contributes to expanding the scope of industries seeking out SERV's policies and commitments to facilitate financings.

8.7 Natural Resources

Under Swiss law, land ownership extends downwards into the ground to the extent determined by the owner's legitimate interest. Therefore, any natural resources found on a property belong to the owner of the property, with the exception of groundwater rivers.

However, mining rights and exploitation of natural resources – such as oil, gas or minerals – are usually regulated by federal or cantonal legislation, and a governmental permit, licence or concession is necessary. A concession will be granted in exchange for the payment of concession fees or royalties. The amount of concession fees typically depends upon the value of the concession. Domestic and foreign parties are treated equally in this regard. Export restrictions extend to nuclear energy, water for energy production, protected plants and animals.

8.8 Environmental, Health and Safety Laws

Switzerland has enacted various environmental, health and safety laws and regulations. Such rules do not generally impact upon the financing of projects. The main regulatory body at a federal level is the DETEC. In particular, the Federal Office for the Environment within the DETEC deals with issues relating to the environment and health and safety.

The main federal acts regarding the environment and health and safety are:

- the Federal Act on Protection Against Dangerous Substances and Preparations;
- the Federal Act on the Protection of the Environment;
- the Federal Act on the Protection of Waters;
- the Federal Act on Narcotics and Psychotropic Substances;
- the Federal Act on Radiological Protection;
- the Federal Act on Foodstuffs and Utility Articles; and
- the Federal Act on Protection Against Infectious Diseases in Humans.

Many secondary federal ordinances are also applicable in various areas, such as biodiversity, climate, contaminated sites, biotechnology and major accidents. In addition, cantonal or municipal legislation is abundant.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com