Acquisition Finance 2019

Contributing editors
Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas

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Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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87 Lancaster Road
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Fax: +44 20 7229 6910

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Acquisition Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Germany and Sweden.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas of Simpson Thacher & Bartlett LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Switzerland

Patrick Hünerwadel and Marcel Tranchet
Lenz & Staehelin

GENERAL STRUCTURING OF FINANCING

Choice of law

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Acquisition agreements and related agreements are typically governed by Swiss law where the target is a Swiss company. Often, the debt finance documents for such transactions are also governed by Swiss law. Certain factors, such as the jurisdiction of the arrangers for a particular financing or if a financing is multi-layered in nature, may call for other laws to apply to certain debt finance documents. Equity and hybrid elements are generally governed by Swiss law as the law of incorporation of the relevant entity.

As for the choice of a foreign law as the governing law of transaction agreements, the relevant Swiss conflict of law rules generally permit this, subject to certain limitations. Foreign judgments and awards of foreign arbitral tribunals can be recognised and enforced in Switzerland, subject to certain requirements, limitations and procedures.

Restrictions on cross-border acquisitions and lending

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

Swiss law does not, generally speaking, restrict acquisitions by foreign entities in Switzerland. Particular requirements apply in certain regulated industries. For instance, the acquisition of a controlling stake in a Swiss bank by a foreign entity is subject to an additional permit and the satisfaction of the relevant requirements.

Also, while not seen very often in practice, it is possible that a Swiss target company has transfer restrictions in place that preclude or limit foreign entities from becoming shareholders in the company.

Where residential real estate is involved (including as part of the assets of a company), specific restrictions and requirements set out in the Federal Act on the Acquisition of Real Estate by Persons Abroad (known as Lex Koller) become relevant.

Regarding cross-border lending into Switzerland, there are, with the exception of the area of consumer credit, no specific restrictions. Certain restrictions may also be applicable where security is taken over real estate assets. Regarding licensing requirements, see question 6.

Types of debt

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

As in other jurisdictions, acquisitions in Switzerland are financed either by equity (or hybrid equity in the form of deeply subordinated shareholder loans) or by debt or, frequently, by a combination of equity and debt.

The structure of a debt package will typically vary as a function of, among other things, the required leverage.

Where low leverage is sufficient, the debt package will often consist of senior debt only. Such senior debt usually takes the form of a term loan. If, in addition to the acquisition loan, there is a need to refinance existing target debt or if there are working capital needs, the senior lenders will often also provide a working capital facility.

Where a higher leverage is sought, the senior debt may be increased by creating first lien and second lien senior debt, and junior debt will often be added. Such junior debt can consist of one or several layers (eg, mezzanine debt and high-yield debt) and it may provide for an in-kind payment component, in addition to or in lieu of cash interest.

Certain funds

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

In the context of public takeovers, Swiss law provides for 'certain funds' rules and requirements that must be complied with. Essentially, the offer prospectus must provide for financing details and a confirmation from a review body is required, confirming that the bidder has taken the necessary steps to ensure that the necessary funds will be available. The 'certain funds' requirements and provisions seen in the context of public takeovers in Switzerland are similar to international standards.

In the context of private mergers and acquisitions transactions, there are no 'certain funds' requirements under Swiss law. In practice, there is a wide variety in what parties negotiate in terms of funding certainty. Quite often, especially in the context of domestic transactions and where the seller and the acquirer are non-financial entities, parties work with a relatively low 'certain funds' threshold (eg, with a 'highly confident letter' or with a term sheet of a bank). In larger transactions, and especially in transactions where private equity sellers are involved, 'certain funds' requirements are typically seen in practice and the threshold is typically a high one, on occasion higher than in the context of public takeovers.

Restrictions on use of proceeds

5 | Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

Under Swiss law, there are no specific restrictions, but parties will typically agree upon the permitted use of proceeds in the relevant agreements.

Licensing requirements for financing

6 | What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

It is one of the core activities of many Swiss banks to provide financing to corporate borrowers. Yet, merely providing such financing does not by itself trigger a licensing requirement under Swiss banking laws. Rather, the licensing requirement is triggered only if the lender is refinancing itself by means of accepting deposits from the public or refinancing itself through a number of banks.

As far as cross-border lending is concerned, Swiss banking law is based on the principle of territoriality (ie, lending into Switzerland on a strict cross-border basis is not, for the time being, subject to licensing and supervision by the Swiss Financial Market Supervisory Authority – FINMA). Usually, lending services are cross-border if the lender does not use or have recourse to physical infrastructure in Switzerland or personnel of its own in Switzerland for the purposes of its lending activities.

Withholding tax on debt repayments

7 | Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Under Swiss domestic tax laws, payments by a Swiss obligor under a bilateral or syndicated financing are, as a rule, not subject to Swiss withholding tax if the 'Swiss non-bank rules' are complied with.

These rules address, among other things, a potential tax recharacterisation of a borrowing that is not subject to Swiss withholding tax into a financing from the public that is subject to Swiss withholding tax. A Swiss withholding tax law issue is triggered where:

- a syndicate consists of more than 10 non-bank lenders (the 10 non-bank rule);
- a Swiss obligor has, on an aggregate level (ie, not on a transaction-specific level), more than 20 non-bank creditors (the 20 non-bank rule); or
- a Swiss obligor has, on an aggregate level (ie, not on a transaction-specific level), more than 100 non-bank creditors under financings that qualify as deposits within the meaning of the relevant rules (the 100 non-bank rule).

For these purposes, a 'bank' is essentially defined as a financial institution (Swiss or non-Swiss) that is licensed as a bank and that carries out genuine banking activities with infrastructure and personnel of its own.

A breach of the Swiss non-bank rules can result in Swiss withholding taxes becoming applicable (currently at a rate of 35 per cent). These taxes would have to be withheld by the Swiss obligor and may, based on any applicable double taxation treaty, be recoverable (in full or partially) by a lender.

Also, a standard gross-up clause may, in light of a prohibition in the Swiss Withholding Tax Act for a borrower to indemnify a lender for Swiss withholding tax, not be valid and enforceable in Switzerland: in particular, where the reason for such withholding tax is a breach of any of the Swiss non-bank rules.

Restrictions on interest

8 | Are there usury laws or other rules limiting the amount of interest that can be charged?

Other than in the area of consumer credit, there is no specific legislation on the maximum rate of interest that can generally be charged on a loan. However, excessive rates of interest are subject to the general Swiss law principles on usury. Under such principles, the maximum allowable rate of interest depends upon a number of factors and specific circumstances. There is no clear test or limit, but many practitioners believe that the limit would, in many circumstances, be in the range of approximately 15–18 per cent per year.

Indemnities

9 | What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

In line with international standards, a borrower must typically indemnify its lenders for a breach of representations and covenants. In the context of acquisition financings, such representations and covenants tend to be quite comprehensive. In addition, one would typically see:

- tax indemnities;
- funding indemnities;
- currency indemnities and increased costs; and
- break costs regimes.

Assigning debt interests among lenders

10 | Can interests in debt be freely assigned among lenders?

Swiss law does not provide for any general restrictions on this. In practice, parties often agree in facility agreements that assignments of a lender's rights or transfers of its rights and obligations to a new lender are subject to the borrower's consent, apart from certain exceptions, such as if an event of default is continuing or if an assignment or transfer is made to an existing lender or to an affiliate of an existing lender. In addition, assignments and transfers, as well as certain sub-participations and other risk exposure transfer transactions, are subject to continued compliance with the Swiss non-bank rules (see question 7).

Requirements to act as agent or trustee

11 | Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

These activities are not regulated activities under Swiss law, and Swiss law does not provide for specific rules governing them. In Swiss market practice, these activities are typically exercised by licensed banks.

Debt buy-backs

12 | May a borrower or financial sponsor conduct a debt buy-back?

Debt buy-back is not specifically regulated under Swiss law. Where debt buy-backs are addressed in finance documents (which is often the case in larger acquisition finance documentations), parties generally prohibit or restrict such transactions or provide that the borrower's or financial sponsor's participation be disregarded when it comes to voting matters.

Exit consents

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Swiss law does not specifically restrict a borrower from soliciting lenders' consent in the context of amendment requests. The relevant debt agreements will determine whether a majority is sufficient or whether all lenders need to consent to a particular amendment request.

With no contractual provisions to the contrary, Swiss law permits, in our view, that majority requirements are solicited in a buy-back scenario, subject to compliance with general principles of law (eg, acting in good faith). As to buy-backs, see question 12.

GUARANTEES AND COLLATERAL

Related company guarantees

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

It is the prevailing view in Switzerland that the provision of upstream guarantees (ie, guarantees for obligations of direct or indirect shareholders of the guarantor) and cross-stream guarantees (ie, guarantees for obligations of sister companies of the guarantor) is subject to a number of requirements and restrictions.

Essentially, it is held that these guarantees should be treated as the equivalent of a dividend distribution as far as formal and substantive requirements and limitations are concerned. The key implication of this is that upstream and cross-stream guarantees are, in practice, limited to the amount that the guarantor could distribute to its shareholders as a dividend at such time as payment is demanded under the guarantee. This limitation is sometimes referred to as the 'free equity limitation'. Also, payments under upstream and cross-stream guarantees may be subject to tax implications, including Swiss withholding tax.

Downstream guarantees (ie, guarantees for obligations of subsidiaries of the guarantor) are not typically subject to restrictions. Exceptions are possible under certain circumstances, for instance, if the subsidiary is not a wholly owned subsidiary of the guarantor or if the subsidiary is in significant financial distress.

As far as foreign entities are concerned, there are no specific limitations under Swiss law on the ability of such entities to provide guarantees for obligations of Swiss entities.

Assistance by the target

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

The requirements and limitations applicable to upstream and cross-stream guarantees, as referred to in question 14, are also applicable to upstream and cross-stream security interests. That said, where a Swiss target provides guarantees and security interests for obligations of the acquirer (which will become the parent company of the Swiss target as a result of the acquisition), this Swiss security package would be upstream in nature and therefore subject to the various requirements and limitations, including the free equity limitation referred to in question 14.

Swiss law does not provide for whitewash or similar procedures. A number of steps are taken in practice, however, to bolster the validity of an upstream security package and to mitigate, as far as possible, the imperfections of such security packages. The starting point is to make sure that the articles of association of the Swiss entity explicitly permit upstream undertakings. It is also important to ensure that the transaction documents and the transactions contemplated are properly approved by the relevant corporate bodies. In addition, transaction documents will typically address the free equity limitation and certain Swiss withholding tax law points and they will also typically provide for certain undertakings and assurances by the security provider to mitigate, as far as possible, the upstream limitations. Moreover, parties are typically advised, for corporate law and tax law reasons, to compensate the Swiss entity for the granting of the upstream security package by means of a guarantee or security fee.

Specific Swiss law issues can be faced where a Swiss target group company with minority shareholders is required to grant a guarantee or security interests for the obligations of the obligors under an acquisition financing. Such issues must be analysed and addressed on a case-by-case basis.

Types of security

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Floating charges and blanket liens are not available under Swiss law. Such types of security interests are, among other things, not in line with the Swiss law requirements on the required level of specification of the collateral assets and they are also not typically in line with the Swiss law requirement that a security provider no longer be in possession of the collateral assets (in the case of movable assets).

In corporate lending transactions, the two most commonly used forms of security interests are the right of pledge and the security assignment or security transfer. Specifically, in the context of secured acquisition financing transactions, the Swiss security package often consists of a pledge over the shares in the Swiss target, a security assignment of certain receivables, a security assignment of rights and receivables under the acquisition agreements, a pledge over bank accounts and guarantees by certain entities. The scope of the security package may, of course, be narrower or broader, depending on the specifics of the transaction.

Requirements for perfecting a security interest

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

These matters are primarily governed by the Swiss Code of Obligations, the Swiss Civil Code and, in an international context, the Swiss Private International Law Act. Also, specific rules can be applicable for certain specific asset types (for instance, the Swiss Book-Entry Securities Act, where security is taken over book-entry securities).

Under Swiss law, the perfection requirements depend on the form of the security interest and on the type of collateral asset.

In general, a security interest over movable assets requires that the security provider give up possession of the relevant assets. Possession of such assets must pass to the secured parties or to a third party. This requirement does not apply to immovable assets and does not apply to movable assets for which there is a special register (in particular, ships and aircraft).

Notification is not, as a general rule, required under Swiss law to create a security interest but it is required to prevent that the underlying parties (eg, debtors under receivables assigned for security purposes) can validly discharge their obligations by means of payment to the security provider.

Renewing a security interest

18 | Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

There are no such requirements in Switzerland.

Stakeholder consent for guarantees

19 | Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No works council or similar consents are required to approve the provision of a guarantee or security interest by a Swiss company.

Granting collateral through an agent

20 | Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

It is possible under Swiss law that security is granted to, and held by, an agent and security documents can be drafted such that it is not necessary to amend them upon a change of the secured parties. Where the security interest is a security assignment or a security transfer, the security agent can act in its own name for the benefit of the secured parties. Where the security interest is a right of pledge, it is necessary that the security agent act as direct representative of the secured parties (ie, in the name and on behalf of the secured parties). The reason for this is that a Swiss law pledge is accessory in nature, meaning, among other things, that the secured party must be identical to the creditor. This can be achieved by having the security agent act as a direct representative, which is the standard approach in Switzerland for accessory security interests (with exceptions for very specific transactions, where it can be necessary to adopt another approach). An alternative approach would be to create a parallel debt and to secure such parallel debt, as this is done in a number of other jurisdictions. The concept of parallel debt remains untested, however, in Switzerland. It is for this reason that the parallel debt concept is still not frequently used in Swiss security documents (at least not on a standalone basis).

Creditor protection before collateral release

21 | What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

Not applicable.

Fraudulent transfer

22 | Describe the fraudulent transfer laws in your jurisdiction.

Swiss insolvency laws provide for clawback rules (see question 33). In addition, Swiss insolvency laws provide that a creditor can request the court to open bankruptcy proceedings without prior enforcement proceedings against a debtor that acted fraudulently, or that is attempting to act fraudulently, to the detriment of its creditors.

In addition to the insolvency law rules, the Swiss criminal laws provide that it is a criminal offence if a debtor reduces its assets to the detriment of its creditors if bankruptcy proceedings are commenced against it or if a certificate of unsatisfied claims has been issued.

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

23 | What documentation is typically used in your jurisdiction for acquisition financing? Are short-form or long-form debt commitment letters used and when is full documentation required?

The documentation for acquisition financings varies, depending on, among other things, the size and structure of the particular transaction. Smaller transactions are often financed by a limited number of banks stepping in as senior lenders and the documentation for such transactions is often, especially where the borrower is a non-financial buyer, relatively straightforward. In such transactions, it is not uncommon in Switzerland, especially in domestic transactions, that parties work with a short-form debt commitment letter or even without a formal debt commitment letter but with a 'highly confident letter' or solely with a term sheet of a bank. By contrast, in the context of larger acquisition financings, and especially in leveraged transactions and in cross-border transactions, the documentation is typically more complex and also frequently suitable for the international syndicated loan markets. In such transactions, it is not uncommon to see long-form debt commitment letters. In the context of public takeover transactions, parties typically sign the full documentation prior to the publication of the offer.

Level of commitment

24 | What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

Swiss market practice recognises both fully underwritten transactions and best efforts' transactions.

Conditions precedent for funding

25 | What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

The set of conditions precedent in a debt commitment letter depends on the particular transaction. Quite often, the conditions precedent will include:

- that no major default has occurred or is continuing (major defaults being a subset of particularly important defaults as more fully set out in the full documentation);
- that no major representations and warranties have been breached (major representations and warranties being a subset of particularly important representations and warranties as more fully set out in the full documentation);
- that no major covenants have been breached (major covenants being a subset of particularly important covenants as more fully set out in the full documentation);
- that it is not unlawful for a lender to perform its obligations or to fund its participation; and
- certain other points (eg, evidence that additional funds (eg, equity) are available to the borrower, copies of the signed acquisition agreements, and delivery of utilisation request).

Flex provisions

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

As mentioned in question 23, if any commitment letter is used it is not uncommon in Switzerland that parties work with a short-form debt commitment letter. Short-form debt commitment letters often do not set out market flex provisions. However, there is generally a mandate letter in place in such transactions and mandate letters will typically provide for market flex provisions. These provisions will typically entitle the arrangers to increase the interest margin, increase certain fees, or change other terms or the structure of the facilities. These rights are typically drafted such that the arrangers can only exercise them where they, in good faith, determine them to be necessary. Parties sometimes also agree on a cap that any such changes are allowed to fall within.

Securities demands

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

This is not frequently seen in Switzerland.

Key terms for lenders

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

Lenders typically want to make sure that they are not obliged to fund if the bidder is not obliged to close the acquisition transaction. Attention is therefore paid, among other things, to the drafting of the material adverse change provisions in the acquisition documents, on the one hand, and the finance documents on the other hand. In addition, lenders will typically want to have an 'out' in the finance documents if a material adverse change occurs in relation to the bidder, if a change of control occurs in relation to the bidder or if certain other draw-stop events occur.

As regards liability protection afforded to lenders in acquisition agreements, such provisions are relatively uncommon in Switzerland. Parties generally take sufficient comfort from making sure that the seller is not party to any of the finance documents and that the finance documents are drafted such that the seller does not have a legal basis for a claim against the banks. On the rare occasion that this is not viewed as giving sufficient comfort, banks seek the inclusion of specific liability protection in acquisition agreements.

In finance documents, one would typically see waiver of liability provisions for the benefit of the lenders. Also, as regards indemnities for the benefit of the lenders, see question 9.

Public filing of commitment papers

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Commitment letters do not have to be and are not publicly filed under Swiss law and do not, as a matter of law, have to be made public. The same holds true for acquisition agreements, with exceptions for specific transactions for which the agreements have to be filed with the commercial register. In asset transactions, registration requirements exist for certain assets. Finally, as in other jurisdictions, merger control provisions and filing requirements exist under Swiss competition law. Special rules apply in the context of public takeover transactions. See question 4.

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

30 What restrictions are there on the ability of lenders to enforce against collateral?

In bankruptcy proceedings, creditors secured by means of a pledge must submit the collateral to the bankruptcy administration and are not entitled to realise the collateral privately, but will be satisfied, before any other creditors, out of the net enforcement proceeds of the sale of such collateral. This holds true for all movable assets that have been pledged to the secured party, rather than transferred or assigned for security purposes.

Additional exceptions to the above-mentioned principle apply to intermediated securities that are traded on a representative market. In turn, real estate mortgages are only realised and proceeds paid out to the creditors if their claims against the debtor are due; claims secured by real estate mortgages that are not yet due are assigned to the acquirer of the real property.

In composition proceedings leading to a composition agreement with assignment of assets, secured creditors with a pledge on movable assets are not obliged to deliver the collateral to the liquidator. After the moratorium, they are generally entitled to liquidate the pledged collateral by official enforcement proceedings or, if the pledge agreement so provides, by private sale.

Debtor-in-possession financing

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Swiss law does not provide for a specific financing instrument for companies in financial distress. Still, a Swiss entity that is in financial distress may, as an alternative to an application for bankruptcy, seek a composition with its creditors and apply for a moratorium while negotiations are ongoing. Whereas an entity would be dissolved at the end of bankruptcy proceedings, composition proceedings aim to restructure the debts of the debtor. New liabilities incurred by the debtor with the administrator's consent during such a moratorium will be separated from the pre-existing creditors' claims and will be satisfied first before the payment of percentage dividends or liquidation proceeds under a settlement agreement. The administrator's consent will only be given if the rights of the existing creditors are not jeopardised. This privilege will also be maintained if the company is adjudicated bankrupt at a later stage. Secured claims are not subject to the composition agreement, except for such part of the secured claim that may remain unsatisfied after realisation of the collateral.

Stays and adequate protection against creditors

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Under Swiss debt enforcement law, the opening of bankruptcy proceedings leads to the cessation of all other enforcement proceedings against the debtor, and new enforcement proceedings for claims that arose before the declaration of bankruptcy are not permissible.

Upon the opening of bankruptcy proceedings, all obligations of the debtor (except for claims secured on real estate) immediately become due. The realisation of assets is reserved to the bankruptcy

administrator. Secured creditors will be satisfied first, before any other creditors, out of the net enforcement proceeds of the relevant collateral.

Whereas bankruptcy proceedings lead to the dissolution of the debtor, it is a key rationale of composition proceedings to either facilitate the dissolution of the debtor by applying a more flexible procedure than in bankruptcy proceedings or to restructure the debts of the debtor.

In general, there are two different procedural stages of composition proceedings: the stage of a (definite) moratorium; and the stage after the composition agreement has been concluded among the creditors and approved by the competent court. In addition, the competent court may appoint a temporary administrator and grant a temporary moratorium of up to two months as preliminary measures before it decides on the opening of composition proceedings.

During a definite moratorium, creditors of claims other than first-class claims or claims that are secured by real estate, are not entitled to commence or continue debt enforcement proceedings and the periods of limitation and peremptory deadlines do not run. In any event, realisation of collateral is not permitted during a moratorium. This not only affects enforcement proceedings with the assistance of debt enforcement authorities, but also private realisation of collateral. After the moratorium, creditors are generally entitled to liquidate collateral by official enforcement proceedings for the realisation of collateral or, if the security agreement so provides, by private sale.

As mentioned above, secured claims are satisfied directly from the net enforcement proceeds of the relevant collateral. If several security interests exist in the same property, they are ranked in chronological order of establishment, or in the case of 'register assets' (eg, real estate), as indicated in the relevant register.

Clawbacks

33 | In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

Swiss insolvency laws provide for clawback rules. To summarise, certain arrangements or dispositions made by the insolvent during a period (suspect period) preceding the declaration of bankruptcy or the grant of a moratorium may be clawed back in bankruptcy proceedings. This potential challenge relates to:

- donations and dispositions made by the debtor without any or without adequate consideration within a suspect period of one year;
- the granting of a security interest for existing debts, if the debtor was not, by prior agreement, contractually obliged to create the relevant security interest, the payment of a claim in a manner other than by the usual means of payment and the payment of a debt that was not yet due, provided the debtor was over-indebted when the disposition was made and further provided that the disposition took place within a suspect period of one year; and
- dispositions made by the debtor within a suspect period of five years, if the disposition was made with the intent to prefer one creditor to the detriment of other creditors and if the privileged creditor knew or should have known of such intent.

Ranking of creditors and voting on reorganisation

34 | In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Under Swiss law, claims of creditors are satisfied in a specific order. Secured claims are satisfied directly out of the net enforcement proceeds of the relevant collateral. Debts incurred by the bankruptcy or liquidation estate or during a debt restructuring moratorium with the administrator's consent rank above unsecured claims. Unsecured claims are satisfied out of the proceeds of the remainder of the bankruptcy estate. There are three classes of unsecured claims. The first class consists of, inter alia, certain claims of employees as well as claims of pension funds. The second class consists of claims regarding various contributions to social insurances and tax claims. All other claims are ranked in the third class. Creditors for such claims only get paid after all privileged claims are satisfied in full.

A Swiss corporation in financial distress may, as an alternative to an application for bankruptcy, seek a composition with its creditors and apply for a moratorium while negotiations are ongoing. Approval of a composition agreement by the creditors requires the affirmative vote of either a majority of creditors (headcount) representing two-thirds of the total debt that is subject to the composition agreement or a quarter of the creditors (headcount) representing three-quarters of the total debt that is subject to the composition agreement. In addition to creditors' approval, a composition agreement also requires confirmation from the composition court. Once court confirmation has been obtained, a composition agreement becomes binding upon all creditors whose claims are subject to the composition agreement, whether or not they have participated in the composition proceedings.

Intercreditor agreements on liens

35 | Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Swiss law recognises agreements addressing lien priorities. A distinction is made between security interests in relation to assets for which there is a register (register assets) and assets for which there is no register. For register assets (in particular, real estate, ships and aircraft), the ranking of the security is determined by the rank in the relevant register. This rank is agreed between the parties at the time the security interest is granted. However, parties cannot agree on a ranking that would affect the security of a third party whose rights are already entered in the register, unless the third party agrees. To be effective, any agreed new ranking must again be entered in the register. For security over non-register assets, the ranking of security is determined by the chronological order in which the security interests were granted (time priority concept). Parties can, however, agree on a different ranking among themselves.

Discounted securities in insolvencies

36 | How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

In the absence of precedents, it is our view that the claim made in an insolvency of a Swiss issuer of such instrument could be the full amount of the instrument but discounted for the remaining duration of such instrument.

Liability of secured creditors after enforcement

37 | Discuss potential liabilities for a secured creditor that enforces against collateral.

As a general point, where a secured creditor enforces against collateral in a manner that is not commercially reasonable (or not in line with applicable statutory or contractual rules, or both), this may open up a risk of claims for damages.

Also, specific liabilities can arise, for instance, in connection with real estate, namely, where a secured creditor forecloses into real estate assets and becomes the legal owner of the real estate asset.

UPDATE AND TRENDS

Proposals and developments

38 Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? If so, please give a reference to any written material, whether official or press reports.

In February 2019, the Swiss Federal Tax Administration announced an additional exception to its current practice under the 'Swiss non-bank rules' (see question 7 above). It is now possible to seek a tax ruling confirming that funds raised outside of Switzerland and guaranteed by a Swiss parent company can be used in Switzerland in an amount up to the aggregate of the equity of all non-Swiss subsidiaries and all intra-group funding extended to non-Swiss group members. This improves the ability of groups to use, in Switzerland, the proceeds of debt transactions conducted outside of Switzerland.

LENZ & STAEHELIN

Patrick Hünerwadel
patrick.hunerwadel@lenzstaehelin.com

Marcel Tranchet
marcel.tranchet@lenzstaehelin.com

Brandschenkestrasse 24
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01
www.lenzstaehelin.com

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