Loans & Secured Financing 2020

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Getting The Deal Through

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Lexology Getting the Deal Through is delighted to publish the fifth edition of *Loans & Secured Financing*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

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 Belgium and India.

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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.

Lexology 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, George E Zobitz and Christopher J Kelly, of Cravath, Swaine & Moore LLP, for their continued assistance with this volume.

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Patrick Hünerwadel and Marcel Tranchet
Lenz & Staehelin

GENERAL FRAMEWORK

Jurisdictional pros and cons

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The bank loan market in Switzerland is a well-developed and stable market with experienced lenders, borrowers and advisers.

It is typically possible to put in place a bank loan financing quickly and on a 'non-public' (ie, confidential) basis.

The bank debt market generally allows for transactions ranging from low to large volumes, including volumes that are too large for the debt securities markets. Also, the bank debt market is generally available without much volatility (ie, is not subject to the 'window' characteristics of debt securities markets).

Bank loans are not subject to prospectus requirements, filing requirements, registration requirements and other requirements applicable to debt securities, especially listed debt securities (eg, listing procedure, minimum offering size, track record of issuer, capitalisation requirements and reporting obligations).

Also, unlike interest payable under debt securities, interest payable on bank loans is a, as a rule, not subject to Swiss withholding tax (see question 4 for a short description of the 'Swiss non-bank rules').

Forms

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

The most common forms of bank loan facilities in Switzerland are revolving credit facilities and term loan facilities. Bank guarantee instrument facilities (eg, letter of credit facilities) are also seen very frequently in Switzerland. Swingline facilities are also seen in the Swiss market, but less frequently.

Investors

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

The bank loan market in Switzerland is largely in the hands of banks (Swiss and non-Swiss). Certain other professional investors (eg, insurance companies or pension funds) are also on occasion involved in the bank loan market in Switzerland. An increase has also been observed in the participation of other alternative lenders, such as credit funds, in particular in leveraged finance transactions.

As far as debt securities transactions in Switzerland are concerned, such transactions are also typically coordinated by banks but the investor base in such financings is significantly broader than in the bank loan market.

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

As mentioned in question 3, it is predominantly banks that are active in the bank loan market in Switzerland. There are a number of reasons for this, one being the Swiss tax law rules commonly referred to as the 'Swiss non-bank rules'. The background to these rules is that under Swiss domestic tax laws, payments by a Swiss borrower under a bilateral or syndicated financing are, as a rule, not subject to Swiss withholding tax. This requires compliance with the Swiss non-bank rules which, in a nutshell, require that:

- a syndicate does not consist of more than 10 lenders which are not licensed as banks, if there is a Swiss obligor (the 10 non-bank rule);
- a Swiss obligor does not, in the aggregate (ie, not on a transaction-specific level), have more than 20 non-bank creditors as its lenders (the 20 non-bank rule); and
- a Swiss obligor does not, in the aggregate (ie, not on a transaction-specific level), have more than 100 non-bank creditors under financings that qualify as deposits within the meaning of the relevant rules (the 100 non-bank rule).

To ensure compliance with the Swiss non-bank rules, a number of provisions are included in facility agreements with Swiss borrowers, guarantors or security providers, including, depending upon the structure, assignment and transfer restrictions that limit the ability of the lenders to sell down the facilities to more than 10 non-bank lenders (or a lower number, if so negotiated).

The type of facility also has an impact on the spectrum and number of potential lenders. For instance, the spectrum of potential lenders is typically broader where a borrower seeks a working capital facility than where a borrower seeks a highly structured and highly leveraged financing or where a specific financing is sought (eg, rail stock or aircraft financing).

Bridge facilities

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Bridge to bond facilities (and other types of bridge facilities) are seen frequently in the Swiss market, particularly in the context of acquisition financings. In line with international practice, bridge facilities do have certain characteristics that are different from typical facilities, for example a shorter term and a pricing regime that 'steps up' (ie, pricing

increases with the lapse of certain periods of time). Also, the number of lenders under a specific bridge loan is typically low, even in situations when the amount of the bridge loan is high.

Role of agents and trustees

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

The role of the agent is typically assumed by on the of the large banks in the Swiss bank loan market. Swiss law does not as such address such activities specifically. However, facility agreements will typically address these aspects in quite some detail, such that the relationship between the agent and the other lenders on the one hand, and the relationship between the agent and the borrower on the other hand, is clearly governed by a set of contractual provisions.

Contractually agreed indemnifications and reimbursements are typical examples for this, in the sense that facility agreements will typically for an indemnification regime and a reimbursement regime for the benefit of the agent. To cover the time period prior to the signing date of the facility agreement, indemnification and reimbursement aspects (and certain other important aspects in connection with particular mandates) are often governed by a mandate letter or a similar document entered into at an early stage of the transaction.

Role of lenders

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

Arrangers will typically advise the borrower in connection with the structuring of a particular facility, will typically also be in charge of documentation (sometimes referred to as documentation agent) and will be responsible for syndication matters (whereas arrangers will often underwrite the facility on a firm basis in a first step, ie, prior to syndicating the loan to a larger group of lenders).

One or several types of fees will typically be associated with such services. Typically, such fees are referred to as arrangement fees. Structuring fees can also be observed in practice. In addition, agency and, where applicable, security agency fees are charged. In addition, the typical fees owed to each lender will also be owed to the arrangers in their capacity as lenders (eg, commitment fees).

Governing law

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Several factors are relevant in this context. As far as the governing law of facilities agreements is concerned, in practice one most often sees Swiss law (on transactions where the main borrower is a Swiss entity and where the arrangers act from Switzerland but also on transactions where the arrangers act from abroad but where the Swiss borrower expresses a preference for Swiss law), English law (eg, where the arrangers act from the United Kingdom or another European jurisdiction) or New York law (eg, where the arrangers act from the United States). Other laws (eg, German law) are also seen in practice but less often. As far as the governing law of security documents is concerned, this depends primarily upon the jurisdiction of the security provider and the law or laws governing the security assets. For instance, it is very typical to have a pledge over shares in a Swiss entity governed by Swiss law, to have a receivables security assignment by a Swiss security provider governed by Swiss law or to have a bank account pledge governed by the laws of the jurisdiction of the account bank.

REGULATION

Capital and liquidity requirements

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Capital and liquidity requirements do have an impact on the availability and pricing of bank loan financings. It is, in particular, the leverage ratio (with which Swiss banks have to comply) that has the effect of limiting the overall volume of credit.

Such regulatory requirements are important factors but not necessarily key drivers for the structuring of bank loans. It is noteworthy that increased attention is paid, on occasion, to collateral aspects to ensure that the particular transaction can be treated as a secured transaction for regulatory capital purposes.

Disclosure requirements

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

Swiss listing rules require public companies to provide an overview in their annual reports in relation to their debt positions.

Use of loan proceeds

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Parties will almost always agree upon the permitted use of funds in the facility agreement. Swiss law as such does not provide for a specific set of rules dealing with the use of bank loan proceeds. However, anti-money laundering rules, anti-corruption rules and sanctions regimes are applicable and must be complied with. Also, in this area, there has been a clear and strong trend for a number of years to include (often fairly detailed) sanctions and anti-corruption provisions in facility agreements. The concern of lenders in this area is typically reputational. It cannot be excluded, though, that, in addition to reputational issues, legal liability could arise in this area, depending, among other things, upon what regimes are not complied with and the scope and level of involvement or deemed involvement, if any, of lenders. Also, this is an area where foreign rules can become applicable to Swiss parties (especially in the area of sanctions and anti-corruption aspects). In practice, it is sometimes a bit challenging to find the right balance between the lenders' (internal) requirements and the borrowers' operational requirements when it comes to agreeing the details of sanctions provisions and anti-corruption provisions.

Cross-border lending

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Sanctions rules can have this effect – an example being the sanctions rules in connection with the Ukraine conflict. Under these rules, it is not permitted, for instance, to extend credit to certain Russian persons.

Debtor's leverage profile

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

There are no such limitations under Swiss law for corporate loans.

Interest rates

14 Do regulations limit the rate of interest that can be charged on bank loans?

Other than in the area of consumer credit, there is no specific legislation in Switzerland on the maximum rate of interest. However, rates of interest are subject to the general Swiss law principles on usury. Under such principles, the maximum permissible rate of interest depends upon a number of factors and the specific circumstances (such as, for instance, the currency in which the loan is extended and the inflation associated with such currency at the time, the duration of the particular financing and the risk profile of the particular financing). There is no clear test or limit but practitioners generally believe that the limit would, in many circumstances, be in the range of approximately 18 per cent per year.

Currency restrictions

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

There are no such limitations under Swiss law.

Other regulations

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

There are no other key regulatory requirements that have a general impact on the structuring or the availability of bank loan facilities.

SECURITY INTERESTS AND GUARANTEES

Collateral and guarantee support

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

Where a financing is guaranteed, it is not unusual in the Swiss market to see a guarantee by the parent company of the borrower (often referred to as 'downstream guarantees'), guarantees by subsidiaries of the borrower (often referred to as 'upstream guarantees') and guarantees by sister companies of the borrower (often referred to as 'cross-stream guarantees'). The same holds true for security interests, where a financing is secured.

Generally, the provision of downstream guarantees (and, equally, of downstream security interests) does not come with specific limitations or requirements under Swiss law. Exceptions are possible under certain circumstances, for instance, if the subsidiary (ie, the borrower under the guaranteed or secured obligations) is not a wholly-owned subsidiary of the Swiss guarantor or security provider or if such subsidiary is in significant financial distress.

The provision of upstream guarantees (and, equally, of upstream security interests) and of cross-stream guarantees (and, equally, of cross-stream security interests) does, according to the prevailing view in Switzerland, come with a number of limitations and requirements. Essentially, it is held that such guarantees or security interests should be treated as the equivalent of a dividend distribution as far as formal and substantive requirements and limitations are concerned. This has several implications: the key implication is that such guarantees and security interests are, in practice, limited to the amount that the Swiss guarantor or security provider could distribute to its shareholders as a dividend. This limitation is sometimes referred to as the 'free equity limitation'. Also, payments under upstream and cross-stream guarantees (and, equally, the enforcement of upstream and cross-stream security interests) can be subject to Swiss tax implications, in particular Swiss withholding tax.

Specific issues can be faced, for instance in an acquisition financing context, where a Swiss entity with minority shareholders is required to grant a guarantee or provide security interests for the obligations of the borrower under the financing. Such issues must be analysed and addressed on a case-by-case basis.

It should further be noted that the Swiss non-bank rules described under question 4 are also applicable, as a rule, where a Swiss entity acts as guarantor and security provider.

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

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

This depends upon the specifics of the transaction. Where a hedging is put in place in connection with a secured bank loan facility, it is not unusual for the hedging to also be secured and to be covered equally and ratably with the obligations under the facility agreement.

Commonly pledged assets

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The scope of a Swiss security package depends on the specifics of the transaction and on what the meaningful assets are of the relevant security provider. It is not uncommon for a Swiss security package to consist of share pledge/s, receivables security assignment/s and bank account pledge/s. It may also include security over intellectual property rights or over mortgage certificates. Other security assets may be relevant, depending upon the specifics of the transaction and of the relevant entity.

Creating a security interest

20 Describe the method of creating or attaching a security interest on the main categories of assets.

In Switzerland, the two most commonly used types of security interests are a right of pledge and a security assignment or security transfer. Swiss law does not know the concept of a floating charge or the concept of a blanket lien (or similar concepts).

Perfecting a security interest

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

Under Swiss law, the perfection requirements depend upon the type of the security interest and upon the type of security asset. These aspects

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 types of assets (eg, the Swiss Book-Entry Securities Act, where security is taken over book-entry securities).

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 it does not apply either to movable assets for which a special register exists (in particular, aircraft and ships). A security interest over shares requires that the original share certificates (if any are issued) be delivered to the secured parties.

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

Failing to perfect a security interest has the consequence that it is not enforceable, for instance in an insolvency context).

Future-acquired assets

22 | Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Both is generally possible under Swiss law. As far as future assets as security are concerned, it is necessary that the relevant assets are specified or specifiable. Similarly, as far as future obligations are concerned, it is necessary that the documents are drafted in a way that the scope of the secured obligations is sufficiently specific.

Maintenance

23 | Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

There are no such maintenance requirements under Swiss law.

Where amendment transactions are concerned (ie, amendments or other modifications to the underlying facility agreement), it is market practice in Switzerland, especially where the amendment or modification is material in nature (such as, for instance, the increase or extension of the underlying financing), to put in place a security confirmation or to amend and restate the Swiss security documents. Also, Swiss security providers are typically requested to pass confirmatory corporate resolutions in such transactions.

Release

24 | Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

Security interests on an asset are not automatically (ie, by virtue of Swiss law) released following its sale by the debtor. However, this can be, and often is, contractually agreed, especially where the facility documentation provides for the concept of permitted disposals (ie, specific types of disposals which are permissible without the need for lenders' consent, which is a fairly common concept especially in leveraged financings).

Non-fulfilment of guarantee obligations

25 | What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

The scope of available defences depends upon whether the particular instrument is a Swiss law guarantee or a Swiss law surety (and, in each case, also upon the drafting of the particular instrument). Essentially, a Swiss law guarantee is an instrument that is not ancillary to the underlying guaranteed obligation. As such, very limited defences are available only to a guarantor. A surety on the other hand is an instrument that is ancillary to the underlying guaranteed obligation. As such, the surety has available to it defences also from the underlying contractual relationship. In the context of financing transactions, lenders typically request guarantees rather than sureties and the few defences available under a guarantee are typically (largely) waived.

Parallel debt requirements

26 | Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

Where a security package includes a Swiss law governed pledge, it is necessary to structure the security agency such that the security agent acts as a direct representative of the other secured parties (ie, it is under such security documents not possible to work with a security trustee concept).

As far as parallel debt is concerned, there is no requirement under Swiss law to use such concept (or similar concept). There are certain benefits though (especially from an insolvency law perspective) to using a parallel debt concept (in addition to, rather than instead of, securing the direct claims). The concept of parallel debt is still untested in Switzerland, however, and doctrine is still somewhat scarce. While the concept is still not seen frequently in the Swiss bank loan market, practitioners tend to agree that it should be upheld by a Swiss court.

Enforcement

27 | What are the most common methods of enforcing security interests? What are the limitations on enforcement?

Upon the opening of bankruptcy proceedings, creditors secured by means of a pledge must, as a rule, hand in the collateral to the bankruptcy administration (ie, they are at such time no longer entitled to realise the collateral privately). They will, however, still be satisfied on a priority basis out of the net enforcement proceeds of such collateral (ie, ahead of any other creditors). Exceptions to this rule (of having to hand in pledged collateral to the bankruptcy administration) exist, in particular, where the collateral consists of book-entry securities traded on a representative market. Also, creditors secured by means of a security assignment or security transfer generally remain entitled to enforce privately.

Fraudulent conveyance and similar doctrines

28 | Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Swiss insolvency laws provide for clawback rules (avoidance actions). In a nutshell, these rules allow for a clawback in insolvency proceedings of certain arrangements or dispositions made by the insolvent during a suspect period preceding the declaration of bankruptcy or the grant of a moratorium. These potential challenges relate to three categories of dispositions made by the debtor:

- donations and dispositions made by the debtor with or without adequate consideration within a suspect period of one year;
- the grant of a security interest for existing debt if the security provider was not by prior agreement contractually obligated to provide the 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 due at the time of payment, provided, in each case, that the debtor was overindebted at the time of the relevant disposition and provided further that the relevant 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 relevant 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.

As far as restrictions applying to upstream and cross-stream guarantees and security interests are concerned, see question 17.

INTERCREDITOR MATTERS

Payment and lien subordination arrangements

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

Payment subordination arrangements and lien subordination arrangements are seen in the Swiss bank loan market. The exact details depend upon the specifics of the transaction.

Generally, Swiss law recognises subordination arrangements. It remains untested, however, whether such arrangements are binding also on an insolvency official. It is, for this reason, not uncommon to see senior lenders requesting that junior lenders assign to them by way of security their claims against the obligors.

Creditor groups

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

This again depends upon the specifics of the transaction but typically all levels of lenders (eg, senior lenders, mezzanine lenders and junior lenders) and any other creditors (eg, hedging counterparties) will be party to an intercreditor agreement. Such parties will agree and negotiate their respective rights (including voting rights), priorities, etc. As far as voting rights in particular are concerned, this is an area that is typically relatively heavily negotiated and thus 'tailor-made'.

Rights of junior creditors

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors are generally stayed from enforcing remedies until senior creditors have been repaid (or unless the senior creditors grant their consent to enforcement steps by the junior lenders).

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

In the absence of a security assignment of the relevant claim by the junior creditors (see question 29), junior creditors have the same statutory rights and remedies in an insolvency proceeding as senior creditors. This may, however, be governed differently in an intercreditor agreement (and is negotiated on a transaction-specific basis).

Pari passu creditors

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

Typically, on pari deals, proportional voting is seen in practice and one would not typically see priority payment regimes or priority enforcement rights for specific creditors. An important area of negotiation is typically the definition of 'instructing group'.

LOAN DOCUMENT TERMS

Standard forms and documentation

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

No Swiss law governed form documents have been established by the Loan Market Association (LMA) or any other association. However, especially in syndicated transactions, it is quite common in the Swiss market to take the appropriate LMA form document as a starting point for the drafting of the particular facility agreement. As far as bilateral agreements are concerned, it is not uncommon for Swiss banks to work with in-house form documents (especially where the facility amount is not large).

Pricing and interest rate structures

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

In the Swiss bank loan market, both fixed rate and floating rate pricings are seen, the latter more frequently. The pricing on a floating rate financing is determined by reference to LIBOR or EURIBOR (or another reference rate, depending upon the relevant currency) and by adding the contractually agreed margin (which, in turn, is often determined by reference to a margin grid).

The currency of a bank loan does not usually have an influence on pricing or interest structures (other than that the underlying reference rate will be different, eg, LIBOR versus EURIBOR). Also, from time to time, it can be observed in the market that lenders request an additional interest element where a particular currency is concerned. For instance, it could be seen that in the market for a while an additional interest element (eg, an extra 100 basis points) was charged on US dollar denominated loans.

36 Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

No clear market practice has yet been established on this topic in Switzerland. However, in most cases, parties agree on a regime that is similar to the recommendations published by the LMA.

Other loan yield determinants

37 What other bank loan yield determinants are commonly used?

In light of the current, very low levels of interest rates, it has become common to see facility agreements providing for a 'floor at zero' regime (eg, if LIBOR is negative, it is deemed to be zero for the purposes of

calculating the level of interest rate owed on the bank loan). Original issue discount transactions are not seen frequently in the Swiss market.

Yield protection provisions

38 Describe any yield protection provisions typically included in the bank loan documentation.

In line with international standards, facility agreements in the Swiss law bank loan market typically provide for a tax gross-up clause (backed up, for Swiss tax law reasons, with a minimum interest clause or recalculation of interest clause), a tax indemnity clause, an increased costs regime and the concept of break costs (relevant, in particular, in the context of prepayments).

Accordion provisions and side-car financings

39 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

Accordion provisions and increase facilities are not unusual in the Swiss bank loan market (but clearly only included where there is a need for such a structural element). Apart from that, facility agreements do typically provide that the borrower must not have or incur any other financial indebtedness (with certain limited exceptions, including a basket amount) and that it must not remain outstanding or grant security interests to third parties (again with certain limited exceptions and again including a basket amount).

Financial maintenance covenants

40 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Financial covenants are negotiated on a transaction-specific basis. In the Swiss market, one often sees leverage ratios, interest cover ratios, cash flow ratios and tests relating to net assets. Such ratios are typically tested two times a year (but this can differ), with a written reporting from the borrower to the agent.

As far as equity cures are concerned (ie, the cure of a financial covenant's breach by means of a capital contribution), these are not standard in the Swiss market generally but are not unusual in leveraged transactions.

Other covenants

41 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Covenants (more specifically, negative covenants, positive covenants and information covenants) are negotiated on a transaction-specific basis to fit the specific financing and borrower. Typically, as far as negative covenants are concerned, a common core of negative covenants would include restrictions on additional financial indebtedness, a negative pledge, possibly a restriction on disposals, possibly a restriction on mergers and acquisitions and other changes to the group structure and possibly a restriction on the change of the business. Other covenants are typically seen as well, depending upon and tailored to the specific financing and borrower.

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Mandatory prepayment

42 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

Mandatory prepayment regimes are negotiated on a transaction-specific basis. In the Swiss market, it is not uncommon to have mandatory prepayments triggered in case of receipt of insurance or litigation proceeds or in case of refinancing transactions. It is also not unusual to see mandatory prepayments triggered in case of disposals or in case of a change of control. Furthermore, it is not unusual to find provisions in facility agreements allowing for a reinvestment of the relevant proceeds (where this is agreed as a concept, it typically applies to insurance proceeds, litigation proceeds and disposal proceeds), thus doing away with the obligation to make a mandatory prepayment in case of reinvestment. Other exceptions (such as adverse tax consequences associated with the repatriation of funds from foreign subsidiaries) are seen in leveraged transactions but not frequently otherwise.

Debtor's indemnification and expense reimbursement

43 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

In line with international standards, a debtor generally has to indemnify its lenders for costs and expenses and for a breach of representations or covenants. Typically, there are certain negotiated exceptions to these regimes. In addition, one would typically see tax indemnities, funding indemnities, currency indemnities and increased costs and break costs regimes.

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