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The International Comparative Legal Guide to:

Project Finance 2013

2nd Edition

A practical cross-border insight into project finance

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the second edition of *The International Comparative Legal Guide to: Project Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of project finance.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting project finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in project finance laws and regulations in 38 jurisdictions.

All chapters are written by leading project finance lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor John Dewar of Milbank, Tweed, Hadley & McCloy LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in Switzerland?

The project market in Switzerland is focused on infrastructure projects in the areas of transport, energy, water, waste disposal and leisure. At present, many infrastructure projects are financed by public funds. It is expected that population growth and rising mobility will keep the demand for infrastructure and transport related construction high and will confront the public sector with increasing need for structured finance.

In addition, as from 2012, Switzerland has introduced a hospital financing system, known as a DRG (Diagnosis Related Groups) based system. This system also includes investment allowances in the case-based tariffs. As a result, the cantons must cease providing government deficit guarantees and bargain loans to public hospitals. Project finance schemes may become a valid solution to the provision and financing of infrastructure investment in this area.

1.2 What are the most significant project financings that have taken place in Switzerland in recent years?

In 2010, the project "Neumatt Burgdorf" set a landmark as Switzerland's first Public Private Partnership project which was carried out based on international project finance standards. The project encompasses the demolition of old buildings, as well as planning, financing, construction, and operation of administrative premises and of a prison (110 beds). Neumatt Burgdorf was explicitly designated as a pilot project and it is expected that other public bodies will initiate projects on their own. Moreover, substantial project financing schemes have been established for data centres and in the energy sector.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In Switzerland, asset security is commonly given either by pledge or by assignment or transfer for security purposes. A pledge grants the security holder a limited right *in rem* over an asset. The security holder (or a third party) will take possession of the pledged assets while the security provider retains ownership. The following assets may be pledged: (i) real estate property; (ii) movable assets (e.g. equipment, certificated shares); and (iii) claims and rights. In contrast to the pledge, the assignment or transfer for security purposes is a security under which full ownership of the asset is transferred to the security holder. The latter is, however, contractually obliged to re-assign/re-transfer the ownership to the security provider in accordance with the terms of the security agreement. Claims and rights may be assigned for security purposes while movable assets are transferred for security purposes.

Under Swiss law, the valid creation of a pledge or an assignment/transfer for security purposes requires that: (i) the security provider and the security holder conclude a security agreement whereby the security provider undertakes to pledge or transfer/assign for security purposes certain specified assets (so-called *Verpflichtungsgeschäft*) to the security holder; and (ii) the specific actions necessary for the perfection of the security interest for each type of asset are taken (e.g. a declaration of pledge/assignment, delivery of shares, recording with the real estate register) (so-called *Verfügungsgeschäft*). It is therefore possible to give asset security by means of a general security agreement if and to the extent that the specific actions necessary to perfect it are performed. In practice, the parties enter into separate agreements for each specific assets.

Swiss law distinguishes between accessory (the pledge) and non-accessory (the assignment) security. A prerequisite for a valid "accessory security" is that the secured parties must be identical with the creditors of the secured claim. This implies that a pledge cannot be granted to a third party security holder acting in its own name and for its own account. The pledge must instead be given to either each creditor of the secured claim or to a third party agent acting as direct representative in the name and for the account of all secured parties. In contrast to accessory security, non-accessory security may be granted to a third party security agent, who will hold such non-accessory security as fiduciary in its own name but for the benefit of all secured parties.

Registration of the pledge or assignment/transfer for security purposes is not required for the perfection of a security interest except for certain assets such as for instance airplanes, ships or real estate property. As a matter of Swiss law, even pledges over IP do not require registration to be validly created. However, if not registered, the IP may be acquired by a *bona fide* third party acquirer, in which case the pledge would become extinct.

2.2 Can security to be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

It is possible to grant security over real property, plant, machinery

and equipment. Swiss law distinguishes between movable and immovable assets. Movable assets comprise all property that does not qualify as immovable, for example machinery, inventory or equipment.

If movable assets are not permanently attached to an immovable asset, they may be pledged or transferred for security purposes – although in practice the pledge is the most widely used type of security. The creation of a pledge or a transfer for security purposes requires that (i) the security provider and the security holder conclude a written security agreement which clearly specifies the pledged assets, and (ii) the security provider does not retain the exclusive possession of the movable assets (so-called depossession requirement). The last condition is satisfied by either (a) the security provider handing over the assets to the security holder, or (b) if the movable assets are in third party's possession, the security provider notifying the third party possessor that the movable assets have been pledged. Because of this requirement, equipment, machinery or inventory is generally not taken as security. Specific rules apply to certain movable assets, such as ships, railroads or aircraft, where the security is perfected by the entry of the security in the respective register. Security over intermediated securities is subject to the provisions of the Federal Act on Book-entry Securities.

Immovable assets comprise in particular real property (i.e. land, including any fixed buildings). The two most common forms of security over real property are the mortgage note and the mortgage. To be valid, both forms require the conclusion of a mortgage agreement (a public deed), registration in the land registry and, if in certificated form, the hand-over of the certificate(s) (duly endorsed in case of a registered mortgage note). The mortgage note is issued in bearer form (*Inhaberschuldbrief*) or registered form (*Namenschuldbrief*). Generally, the mortgage note is the preferred security interest due to its nature as a tradable security which can itself be sold and pledged. As of 1 January 2012, mortgages may also be established by means of a registered mortgage certificate. Registered mortgage certificates are easily transferable instruments and may also be pledged.

2.3 Can security be taken over receivables where the chargor is free to collect in the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Receivables are considered to be claims and rights as a matter of Swiss law. The most efficient way to take security over receivables is by way of an assignment for security purposes. In particular circumstances, a pledge may be considered as well, but generally the assignment for security purposes is considered to be more robust (a pledge is especially avoided in situations where the secured party and the third party debtor of a claim are or may become identical as this would result in a receivable becoming extinct).

No assignment (for security purposes) is possible where the underlying agreement contains a ban on assignment. An assignment is possible where the underlying agreement is silent on that question. It is customary to obtain representations and warranties to this effect. However, if certain receivables are of very particular relevance, one should consider reviewing the underlying agreements.

The assignment for security purposes requires a written agreement between the assignor and the assignee that specifies the receivables. No notarisation or other involvement of official authorities is required. Future rights and claims can be assigned as well, provided the specification in the agreement allows for identification of the claims and rights when coming into existence; the perfection will however only occur upon such receivables coming into existence and, upon the opening of bankruptcy over the assignor, receivables coming into existence thereafter would no longer be assigned, but will become part of the bankrupt estate.

Notification of the third party debtor is not a perfection requirement (i.e. the assignment would be valid in an insolvency scenario). The assignment can thus be "silent". However, prior to notification, the third party debtor may still validly discharge its obligations towards the assignor. It is customary to agree that (i) the assignor is allowed to continue to collect in the receivables as long as no event of default occurs, and (ii) that the assignee can notify third party debtors upon the occurrence of an event of default. Note that certain authors take the view that an assignment is only effective if the assignee has the contractual and factual ability to notify the third party debtors of the assignment at any time.

Receivable lists (with addresses of third party debtors) should be provided quarterly or at least semi-annually.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

When taking security over Swiss cash bank accounts, security is taken over the claims that the account holder has against the account bank under the account relationship. Consequently, as set out in question 2.3, the security may either take the form of a pledge or an assignment for security purposes. If the security holder is identical to the account bank, only the form of the pledge will be considered since one cannot be assigned a claim of which it is the debtor (this would lead to the extinction of the claim). For the pledge/assignment to be valid, the security provider and the security holder must conclude a written security agreement which clearly specifies the pledged/assigned bank account claims. Again, notification of the bank is not required; however, it is standard practice to notify the bank of the pledge/assignment on day one and to request the account bank to waive any priority security right that the bank may have in the bank account on the basis of its general terms and conditions.

2.5 Can security be taken over shares in companies incorporated in Switzerland? Are the shares in certificated form? Briefly, what is the procedure?

Security can be taken over shares in companies incorporated in Switzerland. The creation of such security must be based on a valid security agreement. The perfection requirements depends on the type of the shares: (i) the pledge or transfer for security purposes of certificated shares requires physical delivery of the certificate(s) to the security holder and, if the shares are registered shares, an endorsement or assignment; (ii) the pledge or assignment for security purposes of uncertificated shares only requires a written declaration of pledge or assignment (for security purposes) to the security holder by the security provider; and (iii) a security interest over book-entry securities (i.e. uncertificated participation rights which are credited to a securities account and are at the disposal of the account holder under the regulations of the Federal Act on Book-entry Securities (BESA)) can be created with or without transfer of the book-entry securities: (a) the security interest with transfer is perfected by the security provider instructing the depository of the book-entry securities to transfer and credit the book-entry securities to the securities account of the security holder; and (b) the security interest without transfer requires an irrevocable agreement between the account holder and the depositary that the latter shall follow the instructions of the security holder without further consent or involvement of the account holder.

In practice, it is standard to request the issuance of physical share certificates as the position of the security holder is – in an enforcement scenario and from a factual point of view – considered to be stronger if it holds share certificates. It is further common practice to request the deletion of any transfer or security interest related restrictions there might be in the articles of association of the relevant entity in order to ensure a maximum of flexibility when enforcing the security interest.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

As a general principle, there are no notarisation, registration, stamp duty or other fees in relation to security over assets.

There are, however, exceptions to the rule, in particular: (i) security over real property may incur notaries' fees, registration fees and cantonal and communal stamp duties; (ii) the transfer of ownership of securities to secure a claim may be subject to securities transfer stamp tax of up to 0.3%, calculated on the transaction value, if a Swiss bank or other securities dealer as defined in the Swiss stamp tax law is involved as a party or intermediary; and (iii) registration of security over IP in the relevant intellectual property registers triggers registration fees.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As a general principle, the filing, notification or registration requirements in relation to security over assets do not involve a significant amount of time. Registration of security over real property may sometimes take longer as certain cantonal land registries may be – especially by the end of the year – overloaded.

Please see question 2.6 regarding notarisation, registration, stamp duty and other fees.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground) etc.?

As a general principle, there are no regulatory or similar consents required with respect to the creation of security over real property, plant, machinery and equipment.

There are, however, exceptions to the rule where specific regulations subject the creation of security to authorisation of relevant authorities, in particular: (i) the pledge of shares may be subject to a Lex Koller permit (see question 6.1 below); and (ii) pledges over railways and navigation enterprises operating under a federal concession require the consent of the competent authority.

3 Security Trustee

3.1 Regardless of whether Switzerland recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Switzerland has ratified the Convention on the Law Applicable to Trusts and their Recognition (The Hague, 1 July 1985) and, accordingly, foreign trusts are recognised on the basis of the convention. However, a substantive trust law does not exist in Switzerland and, therefore, it is not possible to set up a trust under Swiss law.

This notwithstanding, the security agent concept and role is recognised and frequently used in Switzerland and the security agent can generally enforce the security and apply the proceeds from the security to the claims of the lenders. The security agent must, however, comply with certain requirements which depend on the nature of the security:

(i) since the pledge is an accessory security, the secured parties must be identical to the creditors of the secured claim (see question 2.1); consequently, the latter must be parties to the security agreement as signatories or through the security agent acting as direct representative in the name and for the account of the secured parties;

(ii) as an non-accessory security, the assignment (for security purposes) does not require that all the creditors of the secured claim be also parties to the security agreement (see question 2.1); consequently, the security agent may hold such non-accessory security as fiduciary in its own name but for the benefit of all secured parties; and

(iii) it is disputed whether security over book-entry securities are accessory or non-accessory; it is likely that the accessory doctrine does not apply where the securities are transferred to the secured party's account, but may apply where a control agreement is entered into (see question 2.5).

3.2 If a security trust is not recognised in Switzerland, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Alternatives structures to the ones set out in question 3.1 are frequently used, in particular the parallel debt construct, which aims at reinforcing the position of the security trustee acting as direct representative of the secured parties in a pledge agreement. Although market practice, the parallel debt construct remains untested under Swiss law.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Enforcement procedures differ depending on the nature of the security interest granted.

Security granted as a full transfer/assignment for security purposes may be enforced privately without involvement of an insolvency official or bankruptcy administrator. A private enforcement is possible, even after the opening of bankruptcy of the security provider. In relation to receivables and other claims, enforcement will occur most likely in the receivables or the other claims simply being collected from the third party debtor. However, the beneficiary may also enforce by selling the receivables to a third party.

Security granted as a pledge is in principle enforced through enforcement proceedings initiated with an insolvency official. This generally results in a public auction of the relevant asset and may involve substantial delays and substantial court, custodial and other costs. Under Swiss law, private sale is also allowed if the parties have so agreed in the security agreement. The security agreement may also include the right of the secured party to purchase the relevant asset for its own account.

If the parties do not agree on private sale in the security agreement and if general bankruptcy has not been ordered against the security provider at that point in time, the enforcement of security is conducted in accordance with the special procedures set forth in the Bankruptcy Code (BC) (articles 151 *et seq*. BC). The creditor must apply to the debt collection office for a payment order, which is officially submitted to the debtor. In the absence of a payment or any objections by the debtor, the creditor then requests the sale of the pledged assets at the earliest one month after the issuance of the payment order (six months in the case of real property) and at the latest a year (two years in the case of real property) after the issuance of the payment order. The debt collection office will then organise an auction. The debt collection office may allow the auction to be replaced by a private sale if either (i) all parties agree, or (ii) securities or other assets with a market value are to be sold and the offered price corresponds to the market value, (iii) precious metals are to be sold for which the market value is offered and which could not be sold at their market value at the previously carried out auction, or (iv) assets are concerned which are perishable, require expensive maintenance or entail disproportionate storage costs.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Generally no, but restrictions may apply to assets which are subject to special legislations.

5 Bankruptcy Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

A distinction must be made between security granted in the form of the assignment/transfer for security purposes and security granted in the form of the pledge.

Collateral which has been transferred or assigned to the secured party for security purposes is not affected by a bankruptcy proceeding over the project company as security provider because the respective collateral does not form part of the assets of the security provider any more.

In the case of a pledge, the security provider retains ownership (see question 2.1). Once bankruptcy has been declared over the security provider, the security provider is no longer entitled and capable to dispose of these assets and payments to the security provider do not discharge creditors unless monies are channelled to the bankruptcy estate. For creditors, the bankruptcy results in all the obligations of the security provider becoming due (except for obligations secured by mortgages). All of the seizeable assets of the security provider at the time of the adjudication of the bankruptcy form the bankrupt estate. This implies that the pledged assets also fall into the bankrupt estate. However, the preferential rights of the secured parties remain fully intact and the secured obligations are satisfied directly out of the proceeds of the collateral's realisation (after deduction of certain costs of the bankruptcy administrator (inventory, administration and realisation costs)). Creditors secured by security over real estate and other assets that must be entered in a register (for example aircraft and ships), are satisfied according to their rank which, absent contractual stipulations to the contrary, is determined by the time of entry into the land register; the first rank is paid in full before the second rank receives any distribution, etc, and unsecured claims are ranked into three classes. For security over assets that does not need to be registered, the ranking of security is determined by the chronological order in which the security was granted, meaning that the security granted earlier in time ranks senior to security granted over the same asset later.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

In case of the security provider being adjudicated bankrupt, the insolvency official or, under certain conditions, creditors of the security provider may challenge the granting of security subject to the satisfaction of certain conditions (articles 285 *et seq*. BC).

Security may become subject to challenge under the following conditions:

(i) undervalue transactions (article 286 BC): the security provider disposes of assets for free or for inadequate consideration (not at arm's length) in the year before the adjudication of bankruptcy;

(ii) voidability for over-indebtedness (article 286 BC): the security provider grants collateral for previously unsecured liabilities, which the security provider was not obliged to secure, in the year before the adjudication of bankruptcy, and the security provider was overindebted (its liabilities exceeded its assets) at that time and the secured party was aware of such overindebtedness; and

(iii) preference (article 287 BC): the granting of security by the security provider occurred in the five years before the adjudication of bankruptcy and the security provider had the intention to disadvantage or advantage certain creditors and the other party was aware of the security provider's intent.

Note that these rules not only apply to the granting of security, but to any disposal of assets by the security provider. Accordingly, assignments or transfers for security purposes may also be affected by the above rules.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are specific regulations for bankruptcy proceedings with respect to certain entities, in particular communes and other entities of cantonal public law, ships, aircraft, railway, banks or insurance companies.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Please see question 4.1.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

There are only a few restrictions specifically applicable to foreign ownership of a project company and Swiss law generally ensures free and non-discriminatory competition between foreign and domestic market participants. Foreign ownership of a project company may, however, be restricted in sectors with a public monopoly or where special licensing or concession requirements apply (please see question 7.3).

As a further important exception, various restrictions and authorisation requirements apply for the acquisition of non-commercial or rural property. According to the Federal Act on the Acquisition of Real Estate Property by Persons Abroad (Lex Koller), a person that is neither Swiss nor has legal and effective domicile in Switzerland requires governmental authorisation for the acquisition of non-commercial, namely residential, real estate. The same applies to companies with foreign domicile and companies with Swiss domicile, which are dominated by foreigners. A transaction requiring authorisation is invalid until a legally binding permit by the competent authority is obtained. Similarly, also the acquisition of rural real estate is strictly controlled by rural land legislation. Commercial premises, however, are not subject to a Lex Koller permit and respective investments can be made without specific restrictions or authorisations. In addition, due to an initiative "Stop the Endless Construction of Secondary Homes" ("Secondary Home Initiative") accepted by Swiss voters on March 2012, the construction of new holiday homes in tourist regions is widely restricted. Such provisions are obviously of utmost importance for touristic projects.

Concentrations of enterprises is regulated by the Federal Act on Cartels and Other Restraints of Competition and is controlled by the Federal Competition Commission. Foreign investments are subject to its review if the reported turnover of the enterprises involved surpasses certain worldwide or Swiss-market thresholds or a dominant market position is obtained as a result of the concentration. In such a case, the Competition Commission's approval of the investment must be obtained. Note that these rules apply likewise to Swiss enterprises and are not administrated in a discriminatory manner.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Switzerland has signed over 120 Investment Promotion and Protection Agreements (BITs) and therewith has the world's third largest network of such agreements (after Germany (135) and China (125), status: end of 2010). These BITs afford international law protection from non-commercial risks associated with investments made by the nationals and companies of partner countries in Switzerland - and, inversely, investments made by Swiss nationals and Swiss-based companies in partner countries. Such risks include state discrimination against foreign investors in favour of local ones, unlawful expropriation or unjustified restrictions on payments and capital flows. In addition, most BITs provide for dispute settlement mechanisms.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Property rights are protected by the Swiss Constitution and expropriations are only permitted if they are based on law, are in the public interest, are commensurate and the expropriated owner is fully compensated. Various expropriation laws exist on the federal and cantonal level, but only rights *in rem* on real estate property and personal rights of lessees of such property may be expropriated. Swiss law does not specifically protect any forms of investment. For protection offered by investment protection treaties, please see also question 6.2.

7 Government Approvals/Restrictions

7.1. What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Since Switzerland is federalist state, legal competence in typical project sectors is shared amongst federal, cantonal and communal authorities. In the aviation, railway, transport, power generation, energy, telecommunication and radio and television sectors, the authorities at federal level are in charge of legislation and project approval, whereas cantonal and municipal authorities will only become involved if a specific project affects their interests. The main competent body at federal level is the Department of the Environment, Transport, Energy and Communications (DETEC). In the electricity and communications sector (both recently liberalised markets), the DETEC has entrusted independent regulatory authorities with the responsibility for securing the smooth transition from the monopoly situation to a market based on the principles of competition. In the electricity market, the independent regulatory authority is the Swiss Federal Electricity Commission (ElCom). It monitors compliance with the applicable federal laws and electricity prices, monitors electricity supply security and acts as a judicial authority for disputes. In the telecommunications market, it is the independent Federal Communications Commission (ComCom) that is entrusted with monitoring compliance with the applicable federal laws. The ComCom is also responsible for granting licences for the use of radiocommunication frequencies and promulgating access conditions.

Water management and mining law, on the other hand, are a cantonal competence. Accordingly, the legal framework for the use and exploitation of natural resources such as oil, gas and minerals may differ from canton to canton. Due to the minor and mostly historic importance of mining in Switzerland, there is only little legislation in this sector.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Generally, no. However, legal transactions involving real estate have in most cases to be notarised and registered. Should Lex Koller or rural land legislation apply (please see question 6.1), a permit or a ruling of the competent authority must be obtained. Construction projects need to be in accordance with construction, zoning, environmental and safety laws and need to be approved by construction authorities. Also in the area of public service or in sectors where special licensing or concession requirements apply,

projects might have to be registered with the competent authority and project documents will need to meet licensing or concession requirements.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Ownership of land and undertaking the business of ownership and operation of land does not require a licence (please see question 6.1 for exceptions by Lex Koller and rural land legislation). According to the Swiss Civil Code, land ownership extends upwards into the air and downwards into the ground to the extent determined by the owner's legitimate interest. Thus, with the exception of ground water rivers that belong to the cantons, any natural resources belong to the owner of the property. For their exploitation, governmental permit or licence may, however, be necessary.

If the land, however, is state-owned, extraction and exploitation rights and/or operation rights with respect to pipelines may be granted to private entities under licences and/or concessions based on, and subject to, federal, cantonal and/or municipal legislation and against payment of fees or royalties. Often, the foreign applicant has to have a legal domicile or a branch in Switzerland during the tenure of the license or concession to ensure compliance with Swiss law.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Please see question 7.3 regarding extraction of natural resources. Export restrictions apply in the energy sector.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

No, there are not.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are not (apart from regularly applicable direct taxes). Please refer to question 17.1 regarding tax consequences.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Switzerland or abroad?

No, there is not, as long as dividends are only paid from the disposable profit (after mandatory allocation of profits to the legal reserve of the project company).

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Switzerland has enacted various general and sector-specific environmental, health and safety laws and regulations. However, they would, as a rule, not impact upon the financing of a project.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

The Confederation and each of the 26 cantons has its own procurement law. International treaties ratified by the Confederation provide, however, the legal framework for both federal and cantonal procurement legislation. In particular, Switzerland is signatory state to the General Procurement Agreement dated 15 April 1994 (GPA) and such treaties' provisions are adopted in the relevant legislation (basically for all public tender procedures, even beyond the scope of the GPA).

Hence, the relevant legislation explicitly provides for the fundamental principles of public procurement such as equal treatment, transparency and competition. Furthermore, the Confederation and all cantons have implemented challenge procedures according to article XX GPA and the award is subject to appeal at an independent court (Federal Administrative Court and cantonal administrative courts, respectively). To a limited extent, such decisions may be appealed at the Swiss Supreme Court.

Generally, an application for review has no automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract. However, courts generally grant suspensive effect (typically, on request of the applicant solely).

To facilitate business relations between the contract-awarding authorities, the bidders and the public sector, the federal government, cantons and municipalities operate an online procurement platform together (www.simap.ch). The platform offers a simple procedure for public contract-awarding authorities to post their tenders and relevant tender documents. The website also gives an overview of all existing contracts across Switzerland and tender documents can be downloaded.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Foreign insurance companies require a licence under the Federal Insurance Supervisory Act to insure risks situated in Switzerland. The act requires them to establish a subsidiary or a branch in Switzerland and they are not allowed to offer their policies cross-border or through a representative office.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, they are.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

As a result of the Agreement on the Free Movement entered into between the European Union and Switzerland in 1999, citizens from EFTA and EU (other than, presently, Bulgaria and Romania) enjoy unrestricted free movement and may apply for a residence permit if they have secured a gainful employment or meet the requirements that apply for not gainfully employed persons. For all other foreign citizens work and residence permits are strictly controlled. They are only granted by the competent cantonal authority if (i) the relevant employee is highly qualified, and (ii) his/her skills are urgently required and cannot be secured by means of a Swiss or EU/EFTA Member State citizen by the employer. In addition, visa requirements may apply.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Generally applicable import customs duties and VAT may apply. Apart from that, there are no specific restrictions, controls, fees and/or taxes.

10.2 If so, what import duties are payable and are exceptions available?

All merchandise must be declared in accordance with the customs tariff upon import. The Swiss Federal Customs Administration makes the customs tariff available on the Internet (www.tares.ch). Exceptions exist for commercial samples and specimens, returned goods (i.e. Swiss goods that are re-imported or foreign goods that are later re-exported), as well as for goods intended for non-profit organisations.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Generally, yes, however, there are certain areas where Swiss law sets forth a liability for damages even in the absence of fault of a party.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Corrupt business practices and bribery are scorned by the Swiss public and accordingly Switzerland has an effective policy and legal framework to combat corruption. The Swiss Criminal Code provides rules incriminating active and passive bribery of members of judicial and other Swiss and foreign authorities. Anyone who (i) offers, promises or grants, or (ii) requests, accepts a promise to or accepts a bribe may be indicted to a maximum of five years of imprisonment or a fee. Also in the private sector, active and passive bribery is punishable by a maximum sentence of three years in prison. Moreover, criminal liability lies not only with the misconducting individual, but may also be extended to his employer company. A company that has not undertaken all requisite and reasonable organisational precautions required to prevent the bribery of public officials or persons in the private sector by its staff, is subject to criminal prosecution and a fine of up to five million Swiss francs, if one of its employees is indicted for such a crime.

13 Applicable Law

13.1 What law typically governs project agreements?

Typically, agreements for Swiss projects are governed by Swiss law.

13.2 What law typically governs financing agreements?

Typically, project finance agreements are governed by the laws of the jurisdiction of the arranger of the financing, i.e., locally arranged facility agreements are governed by Swiss law. If a foreign law is chosen to govern the agreement, it is recommended that the security documents creating security interests over assets located in Switzerland are governed by Swiss law ensure their validity and enforceability in case of insolvency.

13.3 What matters are typically governed by domestic law?

Please see questions 13.1 and 13.2.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Generally yes, subject to the rules of Swiss private international law and applicable treaties such as, in particular, the Lugano Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, subject to the rules of Swiss private international law and applicable treaties such as the New York Convention. In general, a Swiss court must decline its competence in favour of an arbitral tribunal if a valid arbitration clause has been agreed between the parties and the dispute at hand is arbitrable (i.e. does not involve other issues than monetary claims).

15.2 Is Switzerland a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, Switzerland is a contracting state to the New York Convention,

as well as a member of the International Center for the Settlement of Investment Disputes (ICSID).

15.3 Are any types of disputes not arbitrable under local law?

Disputes involving other issues than monetary claims are not arbitrable under Swiss law.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

In the context of project finance transactions, no.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Generally, no.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Swiss law imposes a 35% withholding tax on distributions in respect of 'movable assets' (*bewegliches Vermögen*), which include interest paid on accounts with Swiss banks and savings institutions. Furthermore, such a withholding tax is levied if the borrower owes interest bearing debt to more than 10 non-bank lenders under identical terms or to more than 20 non-bank lenders under differing terms, however, the instruments or loan participations need to be subject to transfer restrictions which ensure that the limitations on the number of non-bank debt-holders or non-bank lenders are not breached.

Interest paid on cross-border loans secured by a security interest in a Swiss real estate property maybe subject to local interest withholdings at the rate of 13% to 33% unless a benign double tax treaty provides a shelter for the foreign tax resident lender.

The proceeds of a claim under a guarantee or the proceeds of enforcing security may be subject to 35% withholding tax if the granting of the guarantee or security by a Swiss entity is deemed to be a constructive dividend (which is normally the case if up- and crossstream guarantees and security are granted).

Under the applicable double tax treaties the lenders may reclaim a partial or full refund of the interest withholding tax if it is proven that the lender is the beneficial owner of the interest received.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

In principle there are no tax or other incentives provided preferentially to foreign investors. However, under the tax holiday provision of the Swiss Regional Policy Law, which aims to improve the economic attractiveness of rural areas in Switzerland, an existing or newly incorporated company may qualify, under certain conditions, for a partial or full tax holiday at the federal level, in combination with and to the extent of a tax holiday granted at the cantonal/communal level, for a period of up to 10 years.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Switzerland?

No, there are not.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

There are no special legal impositions in Switzerland to project companies issuing bonds or similar capital market instruments. As for any other company, the requirements for a listing on the main equity exchange in Switzerland, the SIX Swiss Exchange Ltd (SIX), are set out in its listing rules (SIX Listing Rules), as well as in various additional rules which provide for specific listing requirements depending on the applicable regulatory standard. The issuer needs to comply with the applicable standard and meet requirements regarding trading records and accounts, working capital and free float as well as minimum size of the issuance. In addition, the issuer must publish a listing prospectus and an issue prospectus.

Note

The contents of this chapter are for reference purposes only, they do not constitute legal advice and should not be relied upon as such.

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