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Project Finance 2024

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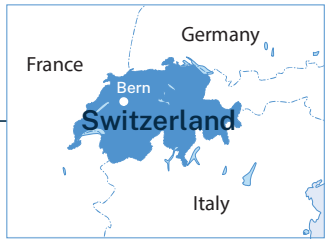

Law and Practice

Contributed by:
Roger Ammann and David Borer
Walder Wyss Ltd

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Walder Wyss Ltd is a leading law firm in Switzerland with around 250 legal experts across offices in Zurich, Basel, Berne, Geneva, Lausanne and Lugano, including a team of 14 partners and an additional 30 legal experts in the area of banking and finance. The firm advises all major Swiss and international banks, other lenders and also borrowers in domestic and cross-border lending transactions. In addition, Walder Wyss Ltd assists a considerable number of private equity investors in leveraged acquisition finance transactions. Another core competence of the team is its knowledge of and experience in structured finance and project finance transactions.

Authors

Roger Ammann is a partner in the banking and finance team at Walder Wyss Ltd. He regularly advises Swiss and international financial institutions and corporations on all aspects of secured lending and structured financings, including project finance and securitisation transactions (such as ABS, RMBS and covered bonds). Roger obtained his degrees from the University of St Gallen (HSG) in law and economics in 2008 and in accounting and finance in 2009. He was admitted to the Zurich Bar in 2011 and is a member of both the Zurich Bar Association and the Swiss Bar Association.

David Borer is a partner in the banking and finance team at Walder Wyss Ltd. David is a corporate finance specialist with a focus on complex national and international financing and capital markets transactions. He regularly advises banks, sponsors and corporate clients on leveraged and acquisition financings (private and public takeovers), project financings, real estate financings, export financings, asset-backed financings (securitisations and covered bonds), and bond issuances. David obtained his MLaw from the University of Berne in 2008 and his LLM from Tulane University Law School in 2015. He was admitted to the Zurich Bar in 2012 and is a member of both the Zurich Bar Association and the Swiss Bar Association.

Walder Wyss Ltd

Seefeldstrasse 123
PO Box
8034 Zurich
Switzerland

Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
Email: reception@walderwyss.com
Web: www.walderwyss.com

1. Project Finance Panorama

1.1 Sponsors and Lenders

In Switzerland, projects are financed by (Swiss and international) public and/or private funds. On the sponsor side, private equity sponsors based across Europe (predominantly in Germany, France, Switzerland and the UK), Asia and the USA have become more important in recent years.

In the Swiss market, the majority of institutions acting as lenders are Swiss and international banks. On the other hand, debt funds continue to be active in the Swiss market and it appears that the number of leveraged finance transactions involving debt funds is continuing to increase. However, the market share of debt funds has not yet reached a level close to that in other jurisdictions such as Germany or the UK.

Although there is no exact data available, the reasons for such a relatively low market share of debt funds in the Swiss lending market could be that Swiss banks:

- continue to be very active in the market and are normally able to offer attractive rates and overall conditions;
- have become more flexible when it comes to leverages (even though debt funds tend to accept higher leverages compared to most banks, in addition to accepting certain other very attractive terms); and
- are still considered to be reliable partners that:
  (a) grant waivers in a reasonable way; and
  (b) offer pragmatic and flexible solutions upon commercially justified request.

1.2 Public-Private Partnership Transactions

There is no specific legislation in Switzerland that deals with PPP transactions in the traditional sense. However, PPP transactions are permissible in principle under the current legislation at a federal and cantonal level. Depending on the particularities of a specific project and on the sectors involved (eg, infrastructure and construction, culture, education, healthcare, defence, or waste removal), various legal statutes and regulations may apply at the federal, cantonal and also communal level, such as the Federal Public Procurement Act for the Swiss Confederation□s public procurement projects.

One of the first PPP projects in Switzerland in the strict sense was the construction and operation

of the Culture and Congress Centre in Lucerne (*KKL Luzern*) back in the mid-1990s. The *KKL Luzern* was a PPP between the City and Canton of Lucerne and private participants. Further notable infrastructure PPP projects include the construction and operation since 2002 of Onex, a local heating grid (*chauffage à distance*) in the Geneva area, and the radiology project between the Cantonal Hospital Lucerne and the Swiss Paraplegic Centre, which was one of the Swiss healthcare system's pioneer PPP projects in 2008.

In the canton of Jura, construction of Delsberg's first theatre was completed in the capital's centre at the end of 2021. The PPP model was used as part of the CHF100 million real estate project *Le Ticle*, which involved a private operator building a car park with 270 parking spaces, commercial space and 108 apartments (in addition to the theatre and a shopping centre).

In the sports and event sector, notable PPP projects include the new Sports and Events Centre (*Polo Sportivo e per gli Eventi,* or PSE) in Lugano, which features a football arena, other sports facilities and a city administration centre. The first stage of the Sports and Events Centre is expected to be operational in 2026. Further notable PPP projects include the CHF220 million completion of the *La Maladière* stadium in Neuchâtel (operational since 2007) and the CHF300 million *Sportarena Luzern*, which features a football arena, other sports facilities and additional buildings. The *Sportarena Luzern* has been in operation since mid-2011. Another CHF200 million PPP sports project was the construction of the stadium in Bienne (*Stades de Bienne*), which has been operational since July 2015.

In a town called Burgdorf near Bern, a CHF150 million project that encompassed business premises and facilities for the local administration (including a prison) was opened in spring 2012.

1.3 Structuring the Deal

Project financings are commonly provided to borrowers by means of syndicated or bilateral credit facilities, with project companies and certain group companies providing guarantees and security interests over their assets in favour of the secured parties.

Swiss law provides a flexible and robust framework for those types of lending and financing structures and allows for adaptation to the specific needs of borrowers and lenders on a case-by-case basis. The general issues to bear in mind from a legal perspective are:

- the contractual, regulatory and tax aspects of the transaction;
- the enforceability of transaction documents;
- the bankruptcy remoteness of the security structure; and
- the provision of corresponding legal opinions covering these aspects.

1.4 Active Industries and Sectors

In Switzerland, project financing is predominantly focused on infrastructure projects in the leisure, sports and property, transport, energy and water sectors. Infrastructure projects in the energy arena are expected to be particularly significant in the coming year.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

Under Swiss law, various types of collateral are available to secure the claims of lenders – in

particular, real estate, ships and aircrafts, movable property, securities (such as shares). Bank accounts, insurance claims, receivables or IP rights (such as patents, trade marks, designs and copyrights) are also used as collateral.

The main forms of security interests under Swiss law are transfers of full legal title for security purposes, assignments for security purposes, pledges, and mortgages on certain types of assets. Also, corporate guarantees are often issued in financing transactions.

In cases of a transfer of legal title for security purposes or an assignment for security purposes, the secured party acquires full legal title in the relevant asset. By contrast, a pledge or mortgage provides only a limited right in rem in favour of the secured party.

Pledges are considered to be accessory security interests under Swiss law. As a consequence, the validity of the pledge depends on the continuing validity of the secured obligations and the creditor of the secured obligations must be the same as the secured party. This is different from transfer or assignment for security purposes, which is considered to be a non-accessory security interest – meaning that the transfer or assignment is independent of the (continuing) validity of the secured obligations and the secured party does not necessarily have to be the same as the creditor of the secured obligation.

As a consequence, if there are several secured parties, a security trustee or agent will be appointed and act:

- as the direct representative in the name and on behalf of the secured parties for accessory security interests governed by Swiss law; and
- as a fiduciary in its own name but on behalf of the secured parties in the case of non-accessory security interests governed by Swiss law.

The provision of upstream or cross-stream security interests, guarantees and other benefits may be limited by financial assistance rules.

Perfection of Security Interests

Under Swiss law, a security interest is created by way of a security agreement and completion of the perfection steps. The security agreement typically details:

- the type of security interest;
- the collateral and the perfection steps;
- representations, warranties and undertakings of the security provider;
- enforcement rights such as private sale or public auction; and
- the governing law and jurisdiction.

For some types of collateral, registration of the security interest in public registers is available or even required for perfecting the security interest. Specifically, the registration of liens on real estate, ships and aircraft is necessary for perfection.

For certain other types of collateral, registration of a security interest is not required, but has certain benefits with regard to third parties. The pledge of registered IP rights (such as patents, trade marks, and designs) may be registered in the relevant IP register, for example, in order to protect the secured party against a bona fide third party acquiring such IP rights.

Real estate

Real estate in Switzerland is normally encumbered via the security transfer or pledge of mortgage notes or land charges.

Mortgage notes

The mortgage note is issued as a negotiable instrument in paper form (as a bearer or registered mortgage note) or as a paperless mortgage note. In each case, security over the mortgage note may be created via pledge or transfer of full legal title for security purposes. The mortgage note is created by way of a notarised deed and registration in the land register. The security interest over a mortgage note is then created via a security transfer agreement or pledge agreement and perfected either by:

- transfer of the mortgage note to the secured party (ie, transfer of possession and endorsement for registered mortgage notes) in the case of paper mortgage notes; or
- registration in the land register in the case of paperless mortgage notes.

Land charges

A land charge is a security interest that is registered in the land register and may secure any kind of claims. Other than the mortgage note, no negotiable instrument is issued and the secured claim is not registered in the land register. A land charge is created by way of a notarised agreement between the parties regarding the creation of the land charge and perfected by registration thereof in the land register.

In practice, land charges are less common than mortgage notes.

Additional rules for cross-border transactions

In cross-border transactions, additional rules may apply. Parties may be advised to obtain clearance from the appropriate authorities with regard to the Federal Act on the Acquisition of Real Estate by Persons Abroad (known as the "Lex Koller") and Swiss rural legislation.

When taking security over real estate in cross-border transactions, it must also be noted that – unless the lender is located in a jurisdiction that benefits from a double tax treaty with Switzerland providing for a zero rate – interest payments to non-Swiss resident creditors of loans secured by Swiss real estate may be subject to withholding tax at source under Swiss law. Accordingly, if a transaction is secured by Swiss real estate, it must be ensured that only "Swiss treaty lenders" will be secured by Swiss real estate in order to avoid the risk of withholding tax being applied to interest payments.

Swiss treaty lenders are persons who:

- have their corporate seat – or are lending through a facility office that qualifies as a permanent establishment for tax purposes – in Switzerland and are entitled to receive any payments of interest without any deduction under Swiss tax law; or
- lend in a jurisdiction with whom Switzerland has a double tax treaty that provides for a 0% withholding tax rate on interest payments.

Shares

Security interest over company shares is typically created in the form of a pledge. The parties enter into a pledge agreement for this purpose and, if physical share certificates have been issued, the pledge is perfected by way of transferring physical possession over these share certificates to the pledgee. (Any shares registered in addition will usually be duly endorsed in blank.) The pledge is typically registered in the company's share ledger for registered shares; however, this is not a perfection requirement.

Receivables

Receivables and other claims (eg, claims from insurance policies or intercompany claims) are

normally assigned for security purposes via global assignment. The assignment is created through an agreement between the assignor and the assignee and perfected by a declaration in writing. Notification of the underlying debtors is not a perfection requirement under Swiss law. However, as long as the underlying debtors are unaware of the assignment, they can continue to validly fulfil their obligations by payment to the assignor. Furthermore, the assignee should have the right to notify the underlying debtors of the assignment at any time. Written acknowledgements of debt representing the assigned claims must be transferred to the assignee in order to perfect the security interests.

Bank accounts

Cash deposits held in bank accounts are treated as claims of the account holder against the account bank under Swiss law and the creation of security over such cash deposits is thus based on the same principles that apply to receivables. Security interest over bank accounts can take the form of a pledge (created via a written pledge agreement) or of an assignment for security purposes (created by way of an assignment agreement and assignment declaration in writing).

Swiss account banks typically have pre-existing rights of set-off, pledge or other preferential rights under their general terms and conditions. If an additional pledge is created over such a bank account, the account bank must be notified thereof in order to perfect any additional pledge. Account banks are then usually also asked to waive their priority rights in favour of the secured parties.

Movable property

Under Swiss law, security interests over movable property can generally be created in the form of a pledge or a transfer of full legal title for security purposes. In this context, it must be noted that Switzerland adheres to the system of the possessory pledge, which means that movable property must be transferred into the possession of the pledgee (or a pledge holder who holds the movables for and on behalf of the pledgee). As long as the pledgor retains exclusive control over the movable asset, no pledge is perfected.

Given these requirements, particular thought must be given to structuring suitable security over inventory (raw) materials in the manufacturing process or movable assets in transit. In addition to the pledge, when the seller of movable property wishes to retain full legal title until full payment is received from an acquirer, parties may agree upon the retention of title and have such retention registered. However, in practice, such registration is hardly ever used and then only in a situation of potential financial distress.

Book-entry securities

A security interest over book-entry securities can be created either through a transfer or by a control agreement.

Transfer for security purpose

Book-entry securities are transferred via a transfer order of the account holder to the depositary institution and a credit entry of the book-entry securities into the acquirer's securities account. The order of the account holder may be cancelled until such point in time as provided in the agreement with the depositary institution (or in other regulations of a settlement and clearing system). The order of the account holder becomes irrevocable in any case with the debit of their securities account. Such orders given by the account holder are unilateral declarations towards the depositary institution. The credit entry in the acquirer's securities account is of

constitutive effect for the transfer of book-entry securities.

Control agreements

In the case of a control agreement, the security interest over book-entry securities is created via an irrevocable written agreement between the account holder and the depositary institution. In such an agreement, the depositary institution agrees to execute orders received from the secured party without the co-operation of the security provider. The book-entry securities remain in the securities account of the security provider.

Security Agents

The concept of security trustees or agents is well recognised and used in syndicated credit financings or multiple lien financings, where one creditor or a third party is typically appointed to act as a security trustee or agent who holds the security for and on behalf of the project lenders. Generally, there is no requirement under Swiss law for the security trustee or agent to hold a licence. However, in practice, this role is typically exercised by a licensed bank.

The role of the security trustee or agent and its appointment depends on the types of security interests governed by Swiss law.

Non-accessory security interests

In the case of security interests that are considered non-accessory under Swiss law (such as an assignment of receivables or the transfer for security purposes of movable assets), the security trustee or agent will be appointed by the secured parties to act as fiduciary in its own name but for the benefit of the secured parties. The security trustee or agent will enter into the agreement and hold and administer the security interests in its own name.

Accessory security interests

By contrast, for security interests that are considered to be accessory under Swiss law (such as pledges), the secured parties must be identical to the creditors of the secured claims. As a consequence, the security trustee or agent will be appointed by the secured parties to act as their direct representative and also enter into the agreements and hold and administer the security interests in their names and on their behalf (and for itself if it is also a secured party). In this context, it is worth noting that parallel debt structures have not been tested under Swiss law or in Swiss courts and there is therefore no certainty that a security interest based on a parallel debt concept would be enforceable in Switzerland.

2.2 Charges or Interest Over All Present and Future Assets of a Company

Under Swiss law, the assets over which security interest is created must be individually determined or determinable – and specific requirements apply depending on the nature of the asset. Additionally, only specific forms of security interest are available for each specific type of asset. Swiss law does not know the concept of a floating charge or other non-possessory security over movable assets. As a result – and unlike in other jurisdictions – a floating charge or other universal or similar security interest over all present and future assets of a company are not recognised concepts under Swiss law.

2.3 Registering Collateral Security Interests

Notaries' fees, registration fees (land register), and cantonal and communal stamp duties may be payable in order to create security interests over real estate, depending on the particularities of the specific transaction. The fees are typically calculated based on the securities' face value and also depend on the location of the real

estate, for which the rates vary according to the canton.

2.4 Granting a Valid Security Interest

Under Swiss law, as a general rule, each item of collateral over which security interests are created must be individually determined or determinable. However, specific requirements may apply depending on the nature of the asset and the type of security interest.

2.5 Restrictions on the Grant of Security or Guarantees

The granting of a guarantee, indemnity or security interest for obligations of a Swiss company's direct or indirect shareholder (upstream) – or an affiliate or subsidiary of such direct or indirect shareholder (cross-stream) – is subject to Swiss financial assistance limitations. Notably, if not granted at arm's length, the following conditions apply:

- the amount of such (up- or cross-stream) guarantee, indemnity or security interest may be limited to the freely distributable equity capital of the Swiss company; and
- the granting of such guarantee, indemnity or security interest needs to be approved by the competent corporate bodies.

In addition, any up- or cross-stream guarantee, indemnity or security interest must be permitted by the Swiss company's articles of association, which will typically include explicit financial assistance provisions in its corporate purpose clause.

2.6 Absence of Other Liens

Under Swiss law, there is no central register of existing liens on collateral, and the due diligence to be performed with regard to the potential pre-existence of such liens depends on the type of collateral. In the case of real estate, for example, the land register excerpt shows all pre-existing encumbrances with rank and amount. However, there are some exceptions, which relate to certain legal liens in favour of authorities for claims of outstanding taxes – in particular, real estate capital gain taxes and transfer taxes, charges and other fees.

The same applies with regard to the respective registers for ships and aircraft. For non-registered assets, it is more difficult to assess the absence of pre-existing liens, and legal due diligence with the pledgor is required. The same applies to security over bank accounts and the assignment of receivables or other claims. As a consequence, the security provider will typically be asked for representations and warranties.

2.7 Releasing Forms of Security

Land charges over real estate are released by deleting the security interest from the land register. When physical mortgage notes have been pledged or transferred for security purposes, possession must be returned to the security provider (duly endorsed in the case of registered mortgage notes) and full legal title must be re-transferred (in the case of full title transfers). Security over paperless mortgage notes is released by deleting the secured party from the land register.

Receivables and other claims that have been assigned for security purpose will need to be reassigned to the security provider by way of written assignment declaration.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

The main types of security interest are enforced either via private enforcement or by official debt and bankruptcy proceedings in accordance with the Swiss Act on Debt Enforcement and Bankruptcy (DEBA).

The procedure for enforcing collateral under the DEBA is public auction (subject to certain exemptions), whereby the DEBA sets forth the applicable rules and procedures. These official enforcement proceedings require the involvement of the debt enforcement office.

However, under Swiss law, the parties to a security agreement concerning collateral such as claims, movable property, and securities (including mortgage notes) are also largely free to agree on private enforcement proceedings in advance. Private enforcement is considered to be faster and less cumbersome than official enforcement proceedings in most cases – although an agreement by which the collateral would immediately fall into the property of the pledgee in an enforcement event is not permissible. However, the parties may agree on a public auction or a private sale without regard to the procedures and formalities of the DEBA, including the right of the secured party to itself purchase the collateral.

In a private enforcement, the secured party is obliged to execute the enforcement in a way that enables it to obtain the best price for the assets under the given circumstances. The value of the collateral will thus typically be determined based on the market value (eg, stock exchange price, if available) or by appraisal as per the date of the sale. If the enforcement proceeds are higher than the secured claims, any surplus must be returned to the secured party.

Although the parties may agree to settle a private sale in a foreign currency, claims in foreign currency will be enforced by official enforcement proceedings in Switzerland only in Swiss francs. Furthermore, the purchase of real estate by foreign nationals might be subject to approval by the appropriate authorities.

3.2 Foreign Law

Agreements on the choice of foreign law or jurisdiction are usually valid and enforceable. However, notwithstanding a valid choice of law, a Swiss court or other authority:

- will not apply a provision of foreign law that would be in violation of Swiss public policy (*ordre public*) or similar general principles;
- will apply any provisions of Swiss law (and, subject to further conditions, of a foreign law) that it considers imperatively demand application in view of their specific purpose (*lois d'application immédiate*);
- can find that provisions of a law other than the law chosen by the parties apply if important reasons call for such applicability and if the facts are closely linked to such other law; and
- will apply Swiss procedural rules.

Also, a choice of law may not extend to non-contractual obligations.

3.3 Judgments of Foreign Courts

Swiss courts would recognise a final and conclusive civil judgment of a foreign court, or an arbitral award for a monetary claim obtained in the competent foreign courts or from the competent arbitral tribunal, subject to limitations set forth respectively in the Swiss Private Inter-

national Law Act and – with respect to foreign arbitral awards – in international treaties such as the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

3.4 A Foreign Lender's Ability to Enforce

Depending on the particularities of a specific case, additional matters might impact a foreign lender's ability to enforce its rights under a loan or security agreement, which needs to be analysed on a case-by-case basis.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

Generally, Swiss law does not restrict foreign lenders from providing cross-border lending into Switzerland.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Under Swiss law, there are no general restrictions on foreign lenders taking a security interest in Switzerland. However, specific enforcement restrictions may apply, depending on the type of security interest or underlying collateral. Notably, the acquisition of (non-commercial) residential real estate in Switzerland by foreign investors or foreign-controlled companies is subject to requirements and restrictions under the Lex Koller. Additionally, specific restrictions for foreign lenders may apply on security interests relating to companies active in regulated industries, such as the financial sector (including banking and insurance), telecommunications, energy, radio/TV and aviation.

4.3 Foreign Investment Regime

Switzerland has not introduced any general foreign investment controls so far. However, the Swiss Parliament has voted in favour of a motion that mandates the Swiss Federal Council to prepare a draft legislation for foreign investment control.

In August 2021, the Federal Council specified the key elements of its proposal, including a mandatory filing for foreign state or state-affiliated investors (as well as private foreign investors, in a more limited sense) when acquiring control of domestic private and public companies. In May 2022, the Federal Council published a preliminary draft for a new foreign investment control act, together with an explanatory report, which largely followed the key points published 2021. The consultation procedure concerning the Federal Council's preliminary draft ended in September 2022. In December 2023, the Federal Council published a draft Investment Screening Act. Investment screening as proposed by Federal Council will focus on state-controlled investors and domestic companies operating in particularly critical sectors. The draft Investment Screening Act is now subject to parliamentary deliberation and may still undergo significant changes. The Investment Screening Act is not expected to come into force before 2025.

Foreign entities may participate in public projects and their tender offers must be considered in competition with those of Swiss companies, as per international treaties (including the General Agreement on Tariffs and Trade (GATT), WTO treaties, and bilateral treaties with the EU) and further Swiss legislation. Also, Switzerland has entered into more than 120 bilateral investment treaties that provide for protection of foreign investments in Switzerland and frequently for dispute resolution mechanisms as well.

Certain restrictions apply to foreign investors if:

- real estate that is subject to Lex Koller and Swiss rural legislation is involved; and
- approval might be required from the appropriate authorities for an investment by foreign nationals.

There may be other restrictions and requirements for foreign investors, particularly in public monopoly sectors or sectors where licence or concession requirements apply (eg, finance, telecommunications, energy, radio/TV and aviation).

4.4 Restrictions on Payments Abroad or Repatriation of Capital

There are no statutory restrictions on payments abroad or on the repatriation of capital by foreign investors. For taxes, see **8. Tax**.

4.5 Offshore Foreign Currency Accounts

Project companies located in Switzerland may establish and maintain foreign currency accounts in jurisdictions other than Switzerland.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

Depending on the specific project, topics and the parties involved, financing and project agreements and ancillary documents may need to be submitted to competent authorities for information or approval – for example, in cases pertaining to planning and zoning, tax, construction and environmental issues and concessions. Provided the public sector is also party to an agreement, such agreements will need to be duly authorised by the competent authority. For Swiss Confederation public procurement projects, the rules for participation, qualification and awarding under the Federal Public Procurement Act may apply.

In most cases, the disposition of – and the providing of security interests over – real estate located in Switzerland requires a notarised deed and registration of such disposition in the relevant land register. If the project involves the acquisition of – or the granting of security interests over – non-commercial real estate located in Switzerland by a foreigner, the specific restrictions and requirements with regard to Lex Koller may need to be observed and a permit or prior ruling from the competent authorities may be required. Likewise, if the respective real estate is subject to Swiss rural and land protection legislation, approval may need to be sought from the competent authorities for an investment by foreign parties.

5.2 Licence Requirements

The ownership of land does not require a licence, subject to certain exceptions (see **5.1 Registering or Filing Financing of Project Agreements**).

The right of mining and exploitation of natural resources (eg, minerals, oil and gas, or natural waters) may be subject to regulations, restrictions or prohibitions under federal or cantonal legislation, based on public interest. A governmental permit or licence may also need to be obtained. Subject to federal or cantonal rural and land protection legislation, foreign parties may acquire such rights to a certain extent.

5.3 Agent and Trust Concepts

Trusts may not be established under Swiss law. However, trusts established under foreign law may be recognised in accordance with the Hague Convention. For more on the concept of

security trustees and agents, see **2.1 Assets Available as Collateral to Lenders**.

5.4 Competing Security Interests

Under Swiss law, the priority of competing security interests over an asset is determined by the following rules.

Security Over Registered Assets

The rank of a security interest over registered assets (eg, real estate, aircrafts and ships) is determined by the rank registered in the relevant register. Parties may agree on such rank when creating the security interest. However, already registered security interests (and certain other rights) have the benefit of time priority, which means new security interests cannot be registered in a rank that would negatively affect the security and rank of third parties that are already registered unless such third parties consent.

Security Over Non-registered Assets

By contrast, the rank of security interests over assets for which no register exists (eg, other movable property) will be determined by the chronological order in which they have been created. Similarly, the involved parties may mutually agree on a different ranking. However, when a security interest is granted over non-registered assets via full title transfer as opposed to pledges, it is worth noting that:

- such assignment/full title transfer ranks first; and
- no additional lower-ranking security interests can be created and perfected over such assets by the security provider.

In such cases, and in order for different creditors to participate in an enforcement of such assets nonetheless, the security interest will typically be granted to a security trustee or agent who holds the security interest for the benefit of all creditors. The participation and ranking of different creditors in the enforcement proceedings will then be contractually agreed among such creditors in an intercreditor agreement.

5.5 Local Law Requirements

Whether a project company domiciled in Switzerland is required or advisable for a specific project needs to be analysed on a case-by-case basis. The preferred company form for Swiss project companies is the stock corporation.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

In Switzerland, company reorganisation procedures are mainly governed by the DEBA. The DEBA provides for two main types of proceedings:

- bankruptcy proceedings; and
- composition proceedings, which are the main Swiss restructuring proceedings.

A composition proceeding is a measure to protect the debtor from the consequences of bankruptcy proceedings. It allows the debtor to postpone and/or satisfy the payment of its debts (in full or in part), according to a specific plan approved by the debtors creditors.

Swiss composition proceedings are designed to restructure the debtor under the supervision of the court or to restructure the debtors unsecured and unprivileged claims as a whole. Any company in financial difficulties seeking an agreement with its creditors may initiate composition proceedings by submitting to the competent court a reasoned application demonstrating

its current and future financial status, as well as a provisional restructuring plan.

6.2 Impact of Insolvency Process

Upon the opening of bankruptcy proceedings, all obligations of the debtor will become immediately due – with the exception of claims secured by real estate. The assets of the debtor will be realised by the bankruptcy administration, in which secured creditors will be satisfied first via the net enforcement proceeds from the realisation of the collateral.

Furthermore, when official enforcement proceedings have been initiated or bankruptcy declared against the debtor, private enforcement of certain security interests (eg, pledges) is no longer possible and requires co-operation with the bankruptcy and enforcement administrators.

6.3 Priority of Creditors

Swiss bankruptcy law provides that claims of creditors shall be satisfied in the following order upon the opening of bankruptcy proceedings against a debtor.

- Claims that are secured by collateral have preferential rights, meaning that such secured claims will be satisfied directly by the net proceeds from the enforcement of the relevant collateral.
- Obligations incurred by the bankruptcy estate during the bankruptcy proceedings or during a moratorium (with the consent of the bankruptcy administration) will be satisfied before the claims of unsecured creditors.
- All other unsecured claims – and the amounts of secured claims that remained unsatisfied – will be satisfied using the proceeds of the remainder of the bankruptcy estate and are divided into three ranking classes. The first class consists of certain claims of employees (among others). The second class consists of social security claims (among others). All other claims are ranked in the third class and only satisfied after all prior ranking claims have been satisfied in full.

6.4 Risk Areas for Lenders

Swiss bankruptcy law provides for the following claw-back rules, under which certain dispositions may be voidable that were made during certain suspect periods before the opening of bankruptcy proceedings or the grant of a moratorium.

- With the exception of the occasional customary gifts, all dispositions that the debtor made without any adequate consideration during a one-year suspect period before the moratorium or the adjudication of bankruptcy are voidable.
- The granting of security interests for existing obligations (if the debtor was not contractually obliged to create such security interest by prior agreement), the settlement of a monetary claim by unusual means and the payment of claims that were not yet due may be voidable, provided such dispositions were made within a suspect period of one year and at a time where the debtor was already overindebted.
- Finally, dispositions made within a five-year suspect period by the debtor with the intention to prefer a creditor over other creditors (in which the preferred creditor knew or should have known such intent) may also be voidable.

6.5 Entities Excluded From Bankruptcy Proceedings

As a general rule, communities, cantons, the Swiss Confederation and certain state-owned companies are exempt from bankruptcy pro-

ceedings. Debt enforcement resulting in seizure and realisation of assets is in principle permissible, but subject to certain restrictions.

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Based on the Swiss Insurance Supervisory Act, insurers need to be licensed by the Swiss Financial Market Supervisory Authority (FINMA). Foreign insurers may only offer insurance relating to risks situated in Switzerland through a Swiss branch or subsidiary and must also obtain a licence for their activities from FINMA. Apart from this, there are no major restrictions on insurance policies over project assets. In general, a federal stamp duty (currently at 5%) is levied on insurance premiums – to which exemptions may apply.

7.2 Foreign Creditors

Insurance policies over project assets are also payable to foreign creditors.

8. Tax

8.1 Withholding Tax

Interest payments made by Swiss borrowers under certain collective fundraising transactions (including bonds and syndicated credit financings) may be subject to Swiss withholding tax (at a current rate of 35%). Such withholding tax is levied if a Swiss debtor borrows from more than ten non-banks under one instrument (the "Ten Non-bank Rule") or from more than 20 non-banks in aggregate (the "20 Non-bank Rule") (known together as the "Swiss Non-bank Rules").

Under the Swiss Non-bank Rules, special consideration must also be given when Swiss entities act only as guarantors in the structure (but not as borrowers) – for example, where proceeds from the financing might be used in Switzerland. For purposes of the Swiss Non-bank Rules, a "bank" is defined as a financial institution that:

- is licensed as a bank in Switzerland (or at its foreign place of incorporation); and
- carries out genuine banking activities with infrastructure and personnel of its own.

In contrast, any entity or person that is not a "bank" in this sense qualifies as a "non-bank".

The facility agreements with a Swiss debtor or guarantor are typically drafted to address the Swiss Non-bank Rules, including respective representation and warranties. The Swiss withholding tax would need to be withheld by the Swiss obligor and may be refundable (in full or in part) by a lender, depending on applicable double taxation treaties.

8.2 Other Taxes, Duties, Charges

The transfer of certain security papers may be subject to Swiss federal transfer stamp duty. Special source taxes may apply at cantonal and federal level on interest payments in connection with claims that are secured by real estate in Switzerland (subject to applicable double tax treaties). A Swiss withholding tax (currently 35%) may apply on dividend payments made by a Swiss company, which may be refundable depending on applicable double taxation treaties. Furthermore, a moderate issuance stamp duty rate applies when incorporating a Swiss stock company with capital of more than CHF1 million.

Also, when taking security over real estate in cross-border transactions, it must also be noted that – unless the lender is located in a jurisdiction that benefits from a double tax treaty with Switzerland providing for a zero rate – interest payments to non-Swiss resident creditors of loans secured by Swiss real estate may be subject to withholding tax at source under Swiss law (see **2.1 Assets Available as Collateral to Lenders**).

8.3 Limits to the Amount of Interest Charged

There is no specific legislation in Switzerland limiting the rate of interest that may generally be charged on loans, except in the area of consumer credits. However, interest rates are subject to the general principles of Swiss law when it comes to usury. Under these principles, the maximum permissible interest rate depends on various factors and the particularities of the case in question.

9. Applicable Law

9.1 Project Agreements

Project or joint venture agreements are typically governed by Swiss law, especially when a Swiss project company is involved.

9.2 Financing Agreements

The law governing financing agreements typically follows the jurisdiction of the arranger, lead manager or original lender, particularly in the case of large internationally syndicated financings. Security agreements involving assets located in Switzerland or Swiss companies are regularly subject to Swiss law. Irrespective of the laws chosen, Swiss tax rules may apply and must be considered appropriately.

9.3 Domestic Laws

Please see **9.1 Project Agreements** and **9.2 Financing Agreements**.