

Switzerland

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Creating collateral security packages

1 What types of collateral and security interests are available?

Under Swiss law, many types of collateral are available for securing a loan. Often a combination of different types of collateral is used. Collateral may include real estate, ships and aeroplanes, inventory and movable property, after-acquired property, securities such as shares or promissory notes, but also bank accounts, receivables or intellectual property rights like patents, trademarks, designs and copyrights.

Unlike in other jurisdictions, the floating charge is not a recognised concept under Swiss law. Further, trade secrets and know-how may not serve as collateral. Security may be granted by the debtor and also by a third party (eg, parent company or group affiliate). Lastly, guarantees or sureties given by third parties may also serve as security. However, the provision of upstream or side-stream security may be limited by corporate benefit issues and corporate capital protection rules.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

The debt is often documented by a facility agreement. In a syndicated facility agreement or multiple lien financings, one creditor or a third party is typically appointed to act as security agent and to hold the security for and on behalf of the project lenders. In the case of non-accessory security, the agent usually acts as indirect representative of the secured parties, namely, the security is usually granted to the agent itself. In the case of accessory security, the agent acts as direct representative of the secured parties with the effect that the security is granted to both the project lenders and the agent to secure its own claims. Generally, there is no requirement for the security agent to hold a licence.

The parties enter into a written security agreement that governs, in essence, the type of, and way of granting, the collateral, the deposition, representations and warranties as to existing liens, covenants, duties and obligations of the grantee, enforcement rights such as private sale or public auction, governing law and jurisdiction.

For some types of collateral, registration in public registers is available or even necessary. Most importantly, the registration of encumbrances over real estate, ships and aircraft is necessary for perfection. There are special registers for recording ownership of, and holders of encumbrances on, real estate, ships or aircraft. The registration is binding in rem against the counterparty and third parties. On the other hand, certain other types of collateral need not be registered for perfection among the parties but to cause binding effect on third parties. For example, the pledge of registered intellectual property rights such as patents, trademarks and designs, which need to be registered in the relevant IP register. Among the parties, however, the pledge agreement is sufficient for perfection. Further, there may be registration fees.

Real estate is normally encumbered by way of a mortgage or a mortgage note. A mortgage must take the form of a notarised deed and be registered in the land register. Since the beginning of 2012, mortgages

do not have to be in paper form anymore. It is possible to issue mortgages that are only registered in the *Register-Schuldbrief* (land register). For such types of mortgages (which have become the standard in the past years) all modifications, especially creditor changes, can be made in the land register. Registration fees for notarisation vary between cantons but are often calculated on the amount secured. If the mortgagor encumbers his or her land by a mortgage declaration, no notarisation is required and no notarisation fees are payable. The mortgage note constitutes a novation of the secured amount and will be issued by the land registry, in bearer or registered form. The mortgage note can be given by way of pledge or full title transfer for security purposes, the latter of which is the customary way of taking security over real estate. Also the full title transfer for security purposes requires the possession of the transferee. In certain situations, clearance needs to be sought from the appropriate authorities that the real estate is not subject to Swiss rural and land protection legislation.

Companies that do not have a registered office or place of effective management in Switzerland are subject to taxation if they are creditors with claims secured by a mortgage on real estate in Switzerland. This source tax is 14 per cent of gross income in the canton of Zurich based on the Zurich Cantonal Tax Act and 3 per cent based on the Federal Act on Direct Federal Taxes, unless a tax treaty reduction applies, and is deducted from the gross interest payment.

Company shares are normally pledged. To perfect the pledge of bearer shares, the pledgee must have physical possession; for registered shares, the pledgee must have physical possession and a duly endorsed share certificate (typically an endorsement in blank is provided). In the case of registered shares, the pledge is commonly registered in the company's share ledger.

Receivables are normally assigned by way of global assignment. The assignment is independent from, and non-accessory to, the secured obligation. During the term of the agreement, the assignor should be obliged to deliver, on a regular basis (eg, monthly or quarterly), to the assignee its lists of receivables showing the assigned receivables, otherwise the assignment may be deemed terminated over time. Third-party debtors are often not notified of the assignment until the borrower's default. As long as third-party debtors are unaware of the assignment, they can validly fulfil their obligations by payment to the assignor. Global assignments are very often used.

Bank accounts can be taken by means of a written accounts pledge agreement. However, a Swiss bank at which the account is held will regularly have a pre-existing right of set-off and pledge, which is normally set forth in its general terms and conditions. These rights should be waived by the bank.

As for movables, Switzerland adheres to the system of the possessory pledge, meaning that movable property needs to be transferred into the possession of the pledgee or a pledge holder who holds the pledge for and on behalf of the pledgee. Thus, the security agent acts as direct representative of the lenders. No pledge is perfected as long as the pledgor retains exclusive control over the movable asset. Owing to the pledge's possessory nature, particular thought must be given to structuring suitable security over inventory, (raw) materials in the manufacturing process or movables in transit. In certain cases, a seller will wish to retain full legal title until full payment is received from an acquirer. This can be achieved by a special retention of title provision in the sales agreement plus registration in a retention of title register.

The agreement has binding effect only among the parties, whereby the registration has effect against third parties. The registration can occur at any time during the term of the agreement and be initiated by the seller or the acquirer. However, such registration is complicated and in practice hardly ever used and then only in a situation of potential financial distress.

Also, capital market instruments such as bonds or structured products may need to be secured. Today, this is usually done by way of a guarantee and no longer by surety. The guarantee according to article 111 of the Swiss Code of Obligations is a direct, independent and non-accessory payment obligation of the guarantor and, thus, provides better security than a surety, which is accessory to the secured debt obligation.

If book-entry securities serve as collateral, the Book-Entry Securities Act (BESA) applies. Book-entry securities constitute fungible claims or membership rights against the issuer having all functional features of a security in paper form without, however, being a right in rem. The creation of book-entry securities is effected in two stages. First, securities or a global certificate are deposited with a depositary institution, or dematerialised rights are registered in the main register maintained by a depositary institution.

Second, a credit entry is effected to the securities account of an account holder. Such credit entry is of constitutive effect for the creation of book-entry securities.

Dispositions over book-entry securities (including granting of security) are effected based on a transfer order of the account holder to the depositary institution and a credit entry of the book-entry securities to the acquirer's securities account. The account holder may cancel his or her order until such point in time as agreed in his or her agreement with the depositary institution or, as the case may be, as stipulated in other regulations of a settlement and clearing system. The account holder's order becomes irrevocable in any case with the debit of his or her securities account. Orders given by the account holder pursuant to the BESA are unilateral declarations of the account holder towards his or her depositary institution. The credit entry in the acquirer's securities account is of constitutive effect for the transfer of book-entry securities.

The granting of security interests over book-entry securities may also be effected by an irrevocable written agreement between the account holder (pledgor) and the depositary institution. In such an agreement, the depositary institution agrees to execute orders received from the secured party (pledgee) without the cooperation of the security provider (pledgor). In this case, the book-entry securities remain in the securities account of the security provider.

Whether the security assets are separable from the bankrupt estate in the event of a security agent's bankruptcy largely depends on the chosen security structure. The enforceability of the parallel debt clause concept is questionable because it has not yet been tested in court.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

As to real estate, priority depends on the time of registration. The land register excerpt shows all pre-existing encumbrances with rank and amount. The same applies to ships and aircraft. As to other movable property, it is more difficult to be assured of the absence of liens ranking senior to the creditor's lien. Here, legal due diligence with the pledgor is key as well as obtaining a representation and warranty that the security is free of any lien. This is particularly true for the pledging of bearer company shares and bank accounts as well as the global assignment of receivables.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

The foreclosure procedure for collateral under the Debt Enforcement and Bankruptcy Act (DEBA) is the public auction (in particular, enforcement into real estate), subject to certain exemptions. The DEBA sets forth respective rules and procedures and requires the involvement of the debt enforcement office. However, under Swiss law the parties of a security agreement on claims, movables and security papers (including mortgage notes) are free to a large extent (albeit not completely) to agree on other foreclosure mechanisms. Not permissible is an agreement by which the collateral shall per se and immediately fall into the

property of the pledgee if the pledgee's claims are not satisfied. But the parties can agree, for example, on a public auction or public offering without regard to the procedures and formalities of the DEBA or on a private sale. A private sale clause should expressly mention the right of the secured party to purchase the collateral. The value of the collateral will be determined based on the market value (eg, stock exchange price) or by appraisal as per the date of the sale. If the value is higher than the secured amount, the surplus amount is to be paid out to the securing party. A private sale in foreign currency can be agreed. However, claims in foreign currency will be enforced in Switzerland only in Swiss francs. Further, the purchase of real estate by foreign nationals might be subject to approval by the appropriate authorities (see question 10).

5 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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Swiss bankruptcy law provides for avoidance actions. With the exception of the customary occasional presents, all gifts and voluntary settlements that the debtor made during one year before the seizure of assets or the *Konkurreseröffnung* (adjudication of bankruptcy) are voidable. The following transactions are deemed equivalent to a gift:

- transactions in which the debtor accepted a consideration out of proportion to his or her own performance; and
- transactions through which the debtor obtained for him or herself or a third party a life annuity, an endowment, an usufruct or a right of habitation (article 286 DEBA).

Further, the following acts are voidable if the debtor carried them out within one year prior to seizure of assets or the adjudication of bankruptcy, provided that it was, at that time, already insolvent:

- the granting of collateral for existing obligations that the debtor was hitherto not bound to secure;
- the settlement of a debt of money by another manner than in cash or by other normal means of payment; or
- the payment of an unmatured debt.

However, the transaction is not voided if the recipient proves that he or she was unaware, and should not have been aware, of the debtor's insolvency (article 287 DEBA). Finally, all transactions are voidable that the debtor carried out within the five years prior to seizure of assets or the adjudication of bankruptcy with the intention, apparent to the other party, of disadvantaging his or her creditors or of favouring certain of his or her creditors to the disadvantage of others (article 288 DEBA).

In the case of a bankruptcy, creditors whose claims are secured by collateral have preferential rights. All other claims are divided into three ranking classes. Employee and social security claims are preferred (article 219 DEBA).

As a rule, apart from bankruptcy proceedings, debt enforcement against communities, cantons, the Swiss Confederation or state-owned enterprises resulting in seizure and realisation of assets is permissible, but subject to certain restrictions.

Foreign exchange and withholding tax issues

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

In Switzerland there are no foreign exchange restrictions or meaningful fees, taxes or charges on currency exchange.

7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

In Switzerland there are no remittance restrictions. However, Swiss withholding tax of 35 per cent may have to be deducted from interest payments by a Swiss debtor if, in essence, it borrows from more than

10 non-banks under one facility agreement or from more than 20 non-banks in general. Withholding tax may be refundable based on a double taxation treaty. In a facility agreement with a Swiss debtor a respective representation or covenant is typically included.

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There are no statutory repatriation or conversion requirements, but this might be requested by the creditors to increase control over the project company's income and cash flow.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes, project companies may establish and maintain foreign currency accounts in other jurisdictions and locally.

Foreign investment issues

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Based on the GATT/WTO treaties, bilateral treaties with the European Union and further Swiss legislation, foreign participants are no longer excluded from public projects, etc, and their tender offers must be considered in competition with those of Swiss companies. If real estate is subject to Swiss rural and land protection legislation, approval might be sought from the appropriate authorities for an investment by foreign nationals. There are few other restrictions as to foreign ownership, for example on projects relating to the exploitation of oil (see question 17). The greater question, however, is whether private investment and ownership as such are permitted. This basically depends on whether a sector is subject to a state monopoly. Some sectors such as telecommunications, aviation, transport or energy have been privatised and liberalised (see also question 16). So private entities are basically free to engage in these areas, but they need a government concession and may be subject to state supervision. The state may also act as a competitor in certain markets (eg, in telecommunications through Swisscom).

Other sectors are not open to private entities. For example, the Federal Reserve System is handled exclusively by the Swiss National Bank (SNB), a stock corporation subject to special legislation. The New Rail Link through the Alps, one of the world's largest railway tunnel construction projects, was led by AlpTransitGotthard, a private corporation subject to special legislation and wholly owned by the Swiss Federal Railways (SBB), which itself is a private corporation subject to special legislation and wholly owned by the Swiss Confederation. Large companies that are private stock corporations subject to special legislation operate in other sectors as well, with the Swiss Confederation, the cantons or the communities holding, directly or indirectly, at least a controlling stake in these corporations. Here, the possibility for private persons for equity investment is excluded, or permitted only to a certain extent; for example AlpTransit Gotthard and the SBB are not open to private shareholders and the SNB has tight restrictions on private shareholders. Under the Federal Electricity Supply Act, Swissgrid, the owner and operator of the nationwide electricity transmission grid, is expressly excluded from stock exchange listing but, within limits, open for private shareholders. On the other hand Swisscom is stock exchange-listed, although controlled by the Swiss Confederation.

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Based on the Swiss Insurance Supervisory Act, in principle, foreign insurers may only offer insurance relating to risks situated in Switzerland through a Swiss branch or subsidiary. Apart from this, there are no major restrictions on insurance policies over project assets.

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Citizens from the EFTA member states and the EU countries are granted easy access to the Swiss labour market based on bilateral treaties. New rules on unemployment that limit the impact of foreign workers on the domestic job market will soon be implemented in Switzerland. Such rules will not, however, limit EU/EFTA immigration in general. Apart from nationals from the EU and EFTA member states, foreign workers need work and residence permits. The Swiss government has allocated quotas per nation. Workers are admitted if their skills are urgently required and they are well qualified. The employer must demonstrate that in spite of considerable efforts no suitable Swiss national or citizen from an EU or EFTA member state has been found to fill a particular vacancy. EU and EFTA nationals taking up a job in Switzerland for up to three months may stay in Switzerland even without a residence permit. They only have to register with the authorities.

13 What restrictions exist on the importation of project equipment?

There are no major restrictions on the importation of project equipment.

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

Expropriation is permissible, but in each case subject to a statutory basis, sufficient public interest, appropriateness and compensation. The expropriation procedure is governed by the Federal Expropriation Act. Decisions by the administration on expropriation and compensation are subject to appeal to the Swiss Supreme Court.

Fiscal treatment of foreign investment

15 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?

When security papers are involved, Swiss transfer tax may apply. As to source tax see question 2 and as to withholding tax on interest payments see question 7. Further, by incorporating a Swiss stock company with capital over 1 million Swiss francs a moderate stamp duty rate applies.

Government authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Because of Switzerland's state organisation, federal as well as cantonal authorities could be relevant, depending on the matter involved. The relevant cantonal authorities deal with mineral extraction and other natural resources including oil and gas, and both the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and cantonal authorities are competent regarding water. Most importantly, the DETEC and its agencies deal with matters like transport, railway system, aviation, energy, power generation, telecommunication, radio and television. In particular as to telecommunications, the Federal Communications Commission, which is an independent commission deciding disputes over concessions and interconnections, etc, and the Federal Office of Communications, which is a DETEC agency acting as supervisory authority, are competent. Regarding energy, the Federal Electricity Commission (ElCom) acts as regulator of the electricity market, supported by the Federal Office for Energy.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

On the one hand, the ownership of real estate extends to the property's integral parts and natural products. Further, the ownership of the soil implies the ownership of all that is above and below the surface to such a height and depth as the owner may require. It extends, subject to

certain restrictions, to all buildings on the ground as well as plants and springs in it. On the other hand, the right of mining and exploitation of natural resources such as minerals, oil and gas or natural waters can be regulated, restricted or prohibited by federal or cantonal legislation based on public interest, depending on the matter involved. In such an event, a concession for mining and exploiting is necessary. Foreign nationals may acquire such rights to a certain extent, subject to federal or cantonal rural and land protection legislation.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The granting of a concession is subject to payment of concession fees or royalties. Typically, the amount depends on the value of the concession. As a rule, domestic and foreign parties are treated equally.

19 What restrictions, fees or taxes exist on the export of natural resources?

Most notably, export restrictions may extend to nuclear energy, water for energy production and goods that are useable for military purposes.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

Depending on the sector, project financing transactions might be subject to government approvals. This may apply to investments in equity, debt or to operating activities, etc. Approval authorities are basically the DETEC and its agencies or cantonal governments (see also questions 16 and 17). As a rule, with regard to financing, a private entity, albeit state-controlled such as Swisscom, applies private law, and no government approvals are required.

21 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?

The disposition, including encumbering, of real estate requires a notarised deed and registration in the land register. If real estate is subject to Swiss rural and land protection legislation, approval may be sought from the appropriate authorities for an investment by foreign nationals (see question 10). Further, depending on the project, party and question involved (eg, in relation to PPP), relevant financing and project documents may need to be submitted to competent authorities for information or approval. This can include, but is not limited to, planning, zoning, tax, construction and environmental issues and concessions. Of course, if the public sector is party to an agreement, the execution, delivery and performance of respective agreements must be duly authorised by the competent authority. In addition, the Federal Public Procurement Act (PPA), in force since 1 January 1996, applies to public procurement projects of the Swiss Confederation and sets forth rules for participation, qualification, and awarding. Awarding of projects is done by means of formal decrees, which are subject to appeal.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Switzerland is a very arbitration-friendly country and an important arbitration venue. Not only Swiss disputes, but also foreign disputes are regularly arbitrated in Switzerland. Switzerland is a signatory state to the International Centre for Settlement of Investment Disputes (ICSID) Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, therefore, foreign arbitration awards are recognised and enforceable in Switzerland.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Project or joint-venture agreements are normally governed by Swiss law, in particular, when there is a Swiss project company. The law

governing financing agreements may follow the country of the arranger, lead manager or original lender, in particular, in large internationally syndicated loans. Security agreements involving Swiss security interest or Swiss companies are regularly subject to Swiss law. Irrespective of the chosen law, Swiss tax rules may apply and must be dealt with appropriately (see also questions 1, 7 and 15).

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

A Swiss company may subject itself to foreign jurisdiction. Also, state-owned private enterprises are free to do so with respect to their private (as opposed to public) activities. Swiss courts would recognise a final and conclusive judgment of a foreign court, subject to Swiss conflict of law rules and international treaties such as the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

See questions 16, 17 and 20.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

In Switzerland, the preferred company form is the stock corporation. International holding structures are sometimes used. When setting up the financing structure, Swiss tax issues should be considered. The principal financing sources are national or international lending syndicates, capital markets and state subsidies.

Public-private partnership legislation

27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

In Switzerland, there is no legislation that deals specifically with PPP projects in the narrow sense. However, under the present legislation on a federal and on a cantonal level PPP projects are permissible in principle. Depending on the sector involved (eg, infrastructure, construction, culture, education, health care, social infrastructure, defence, waste removal or development), multiple legal statutes and regulations on a federal and cantonal or even communal level may apply. Worthy of note is, for example, the PPA, which applies to public procurement projects of the Swiss Confederation (see question 21). The public awareness and desirability of PPP projects has very much increased over the past years. The current (political) discussion is more about stimulating, facilitating and furthering rather than about questions of permissibility. These discussions may lead to enactment of new legislation or amendment of existing sector legislation.

PPP - limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

In principle, the state is permitted to contract with private participants. To what extent, however, certain public functions can be divested to private participants depends on the topic involved and the respective sector legislation (see also questions 10, 21 and 27).

PPP - transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

One of the first PPP projects in the strict sense is the construction and operation of the culture and congress centre in Lucerne (KKL Luzern). Its multimillion Swiss franc realisation dates back to the mid-1990s. The KKL Luzern is a PPP by the City and Canton of Lucerne and private participants.

As to infrastructure, one can mention the construction and operation of a local heating grid in the Geneva area (Chauffage à distance Onex), in operation since 2002.

As a pioneer PPP project in the Swiss health-care system, the radiology project of the Cantonal Hospital Lucerne and the Swiss Paraplegic Centre can be mentioned. Since April 2008 a magnetic resonance tomograph has been operated jointly.

Some important PPP activity has recently taken place in the sports sector: the 220 million Swiss franc completion of the stadium La Maladière in Neuchâtel, operational since 2007, is a PPP model case in this sector. Another sports-related PPP project is the Sportarena Luzern, which is a 300-million Swiss franc project and includes a football arena, other sports facilities and further buildings. The whole complex has been operational since mid-2011. In Burgdorf, a town near the capital Berne, a 150-million Swiss franc project includes business premises, facilities for the local administration (including a prison) and was opened in spring 2012. Another 200-million Swiss franc PPP sports project was the construction of the stadium in Bienne (Stades de Bienne) that became operational in July 2015.

There are a number of PPP projects pending that cover other sectors such as schooling, construction and nursing homes.

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