






## Secured Lending Comparative Guide

walderwyss

## Secured Lending Comparative Guide

Article Author(s)	Contributing Editor
<p data-bbox="252 376 475 427"><b>walderwyss</b></p>  <p data-bbox="240 719 486 757"><b>Tervel Stoyanov</b></p>  <p data-bbox="248 1010 478 1048"><b>Roger Ammann</b></p>	<p data-bbox="671 387 904 421">MAYER   BROWN</p>  <p data-bbox="663 719 912 757"><b>Dominic Griffiths</b></p>
Switzerland	Contributing Editor

## 1. Legal framework

### 1. 1. Beyond general commercial and contract laws, what other specific laws and regulations govern secured finance in your jurisdiction?

#### Switzerland

Walder Wyss Ltd.

Despite the entry into force of the new financial market legislation in 2020, the Swiss legal framework for domestic and cross-border lending activities remains liberal.

In general, no banking licence is required under the Bank Act, provided that the domestic lender does not accept deposits from the public or refines itself via a number of other banks. In addition, foreign regulated entities operating on a strict cross-border basis (without having a physical presence, such as personnel or physical infrastructure, in Switzerland on a permanent basis) are not generally subject to authorisation by the Financial Market Supervisory Authority.

The granting of loans is further not considered to constitute a financial service subject to the Financial Services Act unless the loans are granted to finance transactions with financial instruments and the lender is or should be aware of this purpose, in which case further analysis is required.

The granting of loans to consumers (including in the form of consumer credit, leasing, credit and shopping cards and overdraft facilities) is subject to regulation under the Consumer Credit Act.

When real estate in Switzerland is involved, specific restrictions and requirements under the Federal Act on the Acquisition of Real Estate by Persons Abroad (also known as the 'Lex Koller') may apply.

Domestic tax laws – and in particular, the Federal Withholding Tax Act – are of relevance for bilateral or syndicated financings: as a general rule, the so-called 'Swiss non-bank rules' must be complied with in order for payments by a Swiss obligor not to be potentially subject to Swiss federal withholding tax. Further, special federal and cantonal source taxes may apply when security interests over real estate in Switzerland are created in favour of creditors domiciled outside Switzerland (subject to applicable double tax treaties). When securities are involved, the transfer (and the issuance) thereof may be subject to transfer (and issuance) stamp duty under the Federal Stamp Duty Act.

### 1. 2. Do any bilateral and/or multilateral treaties or trade agreements have particular relevance for secured finance in your jurisdiction?

#### Switzerland

Walder Wyss Ltd.

Switzerland has not ratified any bilateral or multilateral treaties specifically related to secured finance.

With respect to the recognition and enforcement of foreign judgments and arbitral awards, Switzerland is a party to:

- the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007; and
- the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral

Awards.

Further, Switzerland has entered into double tax agreements with more than 100 countries and is seeking to extend its agreement network further. Switzerland has also signed more than 120 bilateral investment promotion and protection agreements providing for international law protection from non-commercial risks associated with investments (eg, state discrimination, unlawful expropriation or unjust restrictions on payments and capital flows) for investments made by Swiss-based companies in partner countries and, vice versa, by foreign investors of partner countries in Switzerland.

1. 3. Beyond normal governmental institutions, are there regulatory or tax bodies that play a particular role in secured finance your jurisdiction? What powers do they have?

Switzerland  
Walder Wyss Ltd.

Advance tax ruling confirmations from the Swiss Federal Tax Administration are regularly obtained in connection with secured financings – in particular, regarding aspects of federal withholding tax. Further, when real estate in Switzerland is involved, the transaction (or aspects thereof) may be subject to prior approval by the competent (cantonal or communal) Lex Koller authorities.

1. 4. What is the government's general approach to secured finance in your jurisdiction? Are there government guarantee/support schemes available to lenders, and if so what are the qualifications to that support?

Switzerland  
Walder Wyss Ltd.

With the Swiss economy being primarily export focused, and in order to mitigate certain political and credit risk involved with the export of goods and services, an export risk insurance framework is available for Swiss companies from the Swiss Export Risk Insurance (SERV), an independent public law entity of the Swiss Confederation. SERV may also provide support to exporting domestic companies by providing guarantees, counter-guarantees and insurance; and this protection may also be relied upon by (foreign) lenders that finance such export transactions where they face particular political or credit risks.

## 2. Secured finance market

2. 1. How mature is the secured finance market in your jurisdiction? Are the majority of the transactions purely bilateral and domestic, or is there an international syndicated market for secured financing under your domestic law?

Switzerland  
Walder Wyss Ltd.

The secured finance market in Switzerland is well developed, mature and stable, with experienced participants. When Swiss borrowers are involved, the market is still largely covered by banks (domestic and foreign banks); whereas in leveraged financings (Swiss and non-Swiss) professional investors (eg, debt funds) are more frequently involved. Depending on the volume of the financing and the borrowers, it is

common to see international syndicates providing the financing. The law governing the financing documents will essentially depend on the location of the agent and arrangers and the nationality of the syndicate members. It is common for the loan documentation to be governed by Swiss law for Swiss borrowers or Swiss arrangers.

2. 2. Are there any bodies in your jurisdiction/region that promote the use of standard documentation and best practices in secured finance transactions? If so, are these widely used and followed?

Switzerland  
Walder Wyss Ltd.

Whereas smaller transactions are documented by banks' standard agreements, larger transactions are based on templates from the Loan Market Association, adjusted to Swiss law and practice and to the transaction's specifics.

2. 3. What significant secured finance transactions have taken place in your jurisdiction in recent times?

Switzerland  
Walder Wyss Ltd.

There are no statistics or publicly available data; but it is worth noting that international groups often have at least one affiliate in Switzerland, which results in their involvement and has Swiss law implications within the context of group financing transactions – in particular, in relation to taking security over their assets.

### 3. Secured finance providers

3. 1. Who are the key providers of secured finance in your jurisdiction? Is there a thriving alternative credit market (beyond bank lenders)?

Switzerland  
Walder Wyss Ltd.

Beyond bank lenders, we see a growing number of alternative lenders, such as debt funds, although as yet they have not gained a significant market share. In that respect, the Swiss non-bank rules are particularly relevant, as these lenders are typically regarded as non-bank lenders (see question 9.1).

3. 2. What requirements and restrictions apply to secured finance providers in your jurisdiction? Do these vary depending on (a) the type of entity; (b) whether the lender is domestic or foreign?

Switzerland  
Walder Wyss Ltd.

Although in principle there are no restrictions or prohibitions related to foreign lenders taking the benefit of security interests in Switzerland, specific enforcement restrictions may apply, depending on considerations



such as the type of security interest and the underlying collateral – in particular, with respect to security interests over residential real estate located in Switzerland.

In particular, the acquisition of residential real estate in Switzerland by foreign investors or foreign-controlled companies is subject to restrictions under the Act on the Acquisition of Real Estate by Persons Abroad (also known as the ‘Lex Koller’). These restrictions are particularly relevant in an enforcement scenario, as they apply to:

- direct acquisitions of (residential or, to a lesser extent, commercial) real estate – relevant in case of a security interest in the form of or over mortgages or mortgage notes; and
- acquisitions of pledged shares in real estate companies.

Finally, restrictions may also apply in relation to security interests related to companies that are active in regulated industries, such as finance (in particular the banking and insurance sectors), telecommunications, energy, radio/television and aviation.

## 4. Secured finance structures

### 4. 1. What secured finance structures are most commonly used in your jurisdiction?

Switzerland  
Walder Wyss Ltd.

Secured financings are commonly provided by way of bilateral or syndicated credit facilities to the borrowers, whereby material group companies act as guarantors, providing guarantees and security interests over their assets in favour of the secured parties.

Also, state-of-the-art structured financings are widely used and regularly implemented in Switzerland for Swiss borrowers or, in transactions involving Swiss group companies, for non-Swiss borrowers, including factoring transactions, asset-based lending, securitisations and synthetic securitisations.

### 4. 2. What are the advantages and disadvantages of these different types of structures?

Switzerland  
Walder Wyss Ltd.

Swiss law provides a robust and flexible framework for all types of lending and financing structures, and allows for adaptation to the specific needs of borrowers and lenders on a case-by-case basis. There are no specific laws in Switzerland that deal with financings or structured financings, but the general principles (eg, for creating security interests) apply; as a result, there are no specific advantages or disadvantages of bilateral or syndicated lending over structured financings (eg, receivable securitisations) – for example, in terms of creating and implementing a security structure. However, the transaction costs of implementing structured financings as opposed to standardised bilateral or syndicated lending may potentially be slightly higher, depending on the specific requirements and the complexity of the transaction.

### 4. 3. What other factors should parties bear in mind when deciding on a secured finance structure?

Switzerland  
Walder Wyss Ltd.

In general, the factors to be borne in mind from a legal perspective are similar for all types of finance structures and will generally entail issues such as:

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

## 5. Security

5. 1. What types of security interests are available in your jurisdiction? Which are most commonly used and which are recommended (if different)?

Switzerland  
Walder Wyss Ltd.

The main types of security interests that are available under Swiss law and that are most commonly used to secure lending obligations are:

- pledges;
- transfer of ownership (for security purposes) of certain assets, such as shares, intellectual property or real estate;
- security assignments of certain receivables; and
- mortgages over certain types of assets.

A pledge or a mortgage constitutes a limited right *in rem* in favour of the pledgee. By contrast, the secured party acquires full legal title in the relevant asset in a transfer of ownership for security purposes or an assignment for security purposes.

While pledges are considered to be accessory security interests, a transfer or assignment for security purposes is considered to be a non-accessory security interest under Swiss law. In case of an accessory security interest, the validity of the security interest (eg, a pledge) depends on the continuing validity of the secured obligations, and the creditor of the secured obligations must be identical to the holder of the security interests. However, in the case of non-accessory security interests, the transfer or assignment is independent from the (continuing) validity of the secured obligations and the secured party need not necessarily be identical to the creditor of the secured obligation.

As a consequence, if there is more than one secured party (eg, in syndicated financings), a security agent will be appointed to act as a direct representative in the name and for the account of the secured parties in the case of accessory security interests governed by Swiss law, whereby, in the case of non-accessory security interests governed by Swiss law, the security agent will act as a fiduciary for the account of the secured parties (see question 8.1).

Unlike in certain other jurisdiction, Swiss law does not allow for the granting of floating charges or other global/unspecified security interests. A fundamental rule of Swiss property and collateral law requires the relevant collateral to be clearly specified.

5. 2. What are the formal, documentary and procedural requirements for perfecting these different types of security interests (ensuring that they are enforceable against debtors and third parties)?

Switzerland

Walder Wyss Ltd.

In addition to execution of the relevant security agreement, specific perfection requirements apply depending on the security interests and the collateral at stake. For instance, the following perfection requirements apply – in relation to:

- bank account pledges, the notification of the pledge purported to be created to the relevant account banks, if the account bank itself already has a lien on the bank account (which is commonly the case for Swiss account banks, which provide for such rights in their general terms and conditions);
- share/quota pledge, if the relevant shares and quotes are in the form of certificates, the physical transfer of the share/quota certificate(s) (duly endorsed or assigned, respectively in blank) to the pledgees (effectively to the security agent on their behalfs);
- mortgage note security:
  - the physical transfer to the secured parties of the original mortgage note certificates, to the extent they are bearer mortgage notes and are duly endorsed to the secured parties in case of registered mortgage notes; and
  - the registration of the secured parties in the relevant land register as new owner(s) of the mortgage notes in case of paperless mortgage notes; and
- pledge or assignment of claims, the physical transfer to the pledgee or assignee of all borrower's notes.

Under Swiss law, the assignment of claims (including for security purpose) need not be notified to the underlying debtor in order for the assignment to be validly perfected. However, as long as the underlying debtor has not been notified of the assignment, the debtor may continue to validly discharge its obligations to the assignor.

For certain types of collateral, registration of the security interests in public registers is possible or even required in order to perfect the security interest. Most importantly, encumbrances over real estate, ships and aircraft must be registered for perfection in special registers available for the recording the ownership and title to security interests in real estate, aircraft and ships. By contrast, registration of pledges over intellectual property (eg, patents, designs and trademarks) is not required to perfect the pledge, but may be beneficial for the secured parties, as it will protect them against a *bona fide* third party acquiring such intellectual property.

5. 3. What are the main types of collateral used as security in your jurisdiction and what specific points should be borne in mind regarding each?

Switzerland

Walder Wyss Ltd.

Under Swiss law, various types of collateral are available for securing claims. A combination of different types of collateral is commonly used.

The types of collateral over which security interests are typically created in Switzerland include:



- shares and other financial instruments;
- bank accounts;
- receivables or other claims;
- real estate;
- intellectual property (eg, patents, trademarks, designs and copyrights); and
- in certain instances, movable property.

#### 5. 4. Can security be taken over property, plant and equipment in your jurisdiction? If so, how?

Switzerland  
Walder Wyss Ltd.

Under Swiss law, ‘real estate’ is defined as immovable property which includes, in particular:

- land and the buildings thereon (if any);
- distinct and permanent rights recorded in the land register (eg, rights to build); and
- co-ownership shares in immovable property (condominiums).

Security interest over real estate located in Switzerland usually takes the form of:

- a mortgage, which can secure any kind of debt and must be created pursuant to a notarised deed and filed with and recorded by the relevant land register; or
- a mortgage note, which creates a personal, non-accessory claim against the debtor, secured by a property. It is a negotiable instrument which can be pledged or transferred for security purposes (the transfer of which makes it bankruptcy remote in case of the bankruptcy of the security provider; thus, its transfer for security purposes is favoured in practice). Whereas the creation of a mortgage note requires a notarial deed and the recording of the mortgage note in the relevant land register, its subsequent pledge or transfer for security purposes requires a written agreement only. Mortgage notes exist in the form of:
  - bearer notes (delivery of which is a perfection requirement);
  - registered notes (delivery and endorsement by the secured party are perfection requirements); or
  - paperless mortgage notes (registration of the secured parties in the land register is a perfection requirement).

Plant, machinery, equipment and inventory are qualified as tangible movable property (ie, as opposed to immovable property such as real estate). Under Swiss law, security interests over such tangible movable property can generally be created in the form of a pledge or a security transfer of full legal title. However, Swiss law 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 (holding possession for and on behalf of the pledgee). As long as the pledgor retains exclusive control over the movable asset, no pledge is perfected. As a consequence, particular thought must be given to the potential structuring of suitable security over movable property such as inventory and equipment. Such security interests are generally rare because the security provider must not be deprived of its ability to operate its business, but also because the implementation may be too burdensome (including in terms of costs for the mere transfer of possession and the maintenance and management of the plant, machinery, equipment and inventory or tangible movable property). There are

exceptions where there are specific assets (eg, raw materials with substantial value, larger car fleets, aircraft parts). Further, if a seller wants to retain full legal title until full payment is received from an acquirer of movable property, this can be achieved by an agreement of retention of title in the sales agreement plus a registration in a retention of title register. However, such registration and the maintenance thereof are considered to be rather burdensome, so in practice this is hardly ever used (unless in a situation of potential financial distress of the acquirer).

## 5. 5. Can security be taken over cash (including bank accounts generally) and receivables in your jurisdiction? If so, how?

Switzerland  
Walder Wyss Ltd.

Security interest over existing and future receivables (eg, trade receivables, intercompany receivables, bank account claims and insurance claims) is commonly granted under Swiss law in the form of either a pledge or an assignment for security purposes. Cash deposits held in bank accounts are treated under Swiss law as claims of the account holder against the account bank and therefore the general principles for the creation of security interests over claims and receivables apply.

In order to create and perfect the security interest, both forms of security interests (pledge and assignment for security purpose) require a written security agreement and the following requirements must additionally be met:

- In case of the assignment of claims and receivables, such claims and receivables must be freely assignable (ie, the assignability must not be restricted by law, the nature of the receivable or a contractual ban on assignment). As a consequence, the parties must ensure, among other things, that the underlying agreements do not provide for any restrictions on assignments (eg, sales agreement for trade receivables, loan agreements, share purchase agreements and insurance policies);
- In the case of claims or receivables evidenced by an acknowledgement of debt (*Schuldschein*), the original thereof must be delivered; and
- In case of the pledge of bank account claims, the pledge must be notified to the relevant account bank (if the account bank already has a lien on the bank accounts, which is regularly created by way of the account bank's general terms and conditions).

Although the requirement to notify third-party debtors is not a perfection requirement under Swiss law, it is strongly recommended to notify any parties of the assignment for security purposes, as prior to such notification third-party debtors can validly discharge their obligations by paying the security provider. However, whereas intercompany debtors, account banks and insurance companies are usually notified of the assignment, the parties usually agree not to disclose the assignment to any customer or major trade debtors until the occurrence of an event of default or enforcement event.

## 5. 6. Can security be taken over company shares in your jurisdiction? If so, how?

Switzerland  
Walder Wyss Ltd.

Security interest over shares of a Swiss company (in the form of either a corporation limited by shares or a

limited liability company) can be taken by means of a pledge, which requires:

- a written agreement; and
- delivery of the share certificates to the pledgee, if the shares are in the form of physical certificates, whereby it is customary to have the share certificates endorsed (for a corporation limited by shares) or assigned (for a limited liability company) in blank by the pledgor for purposes of the enforcement of the pledge.

Should the Swiss company's shares exist in the form of book-entry securities within the meaning of the Federal Act on Intermediated Securities, security can be created by way of a written agreement and effected by way of either transfer or a control agreement.

The transfer of a book-entry security is effected based on:

- a transfer order of the account holder to the depositary institution; and
- a credit entry of the book-entry security to the acquirer's securities account.

The credit entry in the acquirer's securities account is of constitutive effect for the transfer of book-entry securities.

In case of a control agreement, the granting of security interests is effected by 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 cooperation of the security provider. The book-entry securities remain in the securities account of the security provider.

The Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology came into force as of 1 February 2021, pursuant to which Swiss companies limited by shares may issue their shares in the form of uncertificated register securities – that is, fully ledger-based securities that are represented in a blockchain. The rules related to the above-mentioned pledge of certificated securities are applicable to such uncertificated register securities, except that the transfer of the ledger-based security is not required (provided that the pledge is visible in the securities ledger and it is ensured that only the beneficiary of the pledge can dispose of the ledger-based security in an event of default).

## 5. 7. Can security be taken over inventory/moveables in your jurisdiction? If so, how?

Switzerland  
Walder Wyss Ltd.

Please refer to the principles set forth under question 5.4 with respect to tangible movable property.

## 5. 8. What charges, fees and taxes (including notary and similar fees) arise from the perfection of a security interest? Do these vary depending on the type of assets used as collateral?

Switzerland  
Walder Wyss Ltd.

Besides notarial fees, land register registration fees and, depending on the canton and commune, cantonal

and communal stamp duties in relation to security interests over real estate, no significant charges, fees or taxes apply to the perfection of a security interest. Certain fees may also apply for the registration of security interests in IP registers, aircraft registers and ship registers.

However, with respect to the proceeds of enforcing security or claiming under a guarantee which has been granted by a Swiss obligor for obligations of its (direct or indirect) parent (upstream) or sister (cross-stream) company, to the extent that it is not granted on terms which are at arm's length, Swiss withholding tax may be triggered on dividend payments (currently at 35%) which must be deducted from the gross payment made (see question 7.1). Swiss withholding tax can be recovered (with some delay only) by Swiss secured parties and by secured parties that:

- are located in a jurisdiction that has a favourable double tax treaty in place with Switzerland (providing for a 0% rate); and
- qualify to benefit from treaty protection.

Thus, not all secured parties can recover the Swiss withholding tax and even lenders that can do so will be refunded potentially only with a delay.

Also, with respect to security interest over real estate, special real estate withholding taxes may become due whenever a security interest is granted over real estate located in Switzerland; and depending on the jurisdiction of the relevant secured parties, applicable double tax treaties may provide for a 0% rate or reduced rates. Accordingly, if the secured parties are located in jurisdictions with which there is no double tax treaty, or if the applicable double tax treaty does not provide for a 0% rate, the security provider may request these secured parties to be excluded from the benefit of such security interest in order to avoid both such tax being incurred and the corresponding usually expected gross-up undertaking, as such tax will be borne by the security provider.

## 5. 9. What are the respective obligations and liabilities of the parties under the security documents?

Switzerland  
Walder Wyss Ltd.

It is market practice to have Swiss security documents aligned with the main finance documents (ie, credit agreement and, if applicable, intercreditor agreement), in particular in terms of representations, warranties and covenants, unless Swiss specific items are required in addition to ensure validity and enforceability of the security interest under Swiss law.

## 5. 10. What other considerations should be borne in mind by all counterparties when perfecting a security interest in your jurisdiction?

Switzerland  
Walder Wyss Ltd.

To the extent that certain types of security interests require the delivery of original documents (eg, share certificates with respect to pledge of shares and mortgage certificates with respect to mortgage note security), specific care must be taken with respect to organising the timely delivery and storage of the relevant

documents.

Also, specific limitations related to financial assistance (see question 7.1) must generally be considered when assessing the scope of Swiss security interests.

## 6. Guarantees

6. 1. What types of guarantees are available in your jurisdiction? Which are most commonly used and which are recommended (if different)?

Switzerland  
Walder Wyss Ltd.

Under Swiss law, a party to a contractual relationship may undertake to perform certain obligations or pay a certain amount of money due by a third party (ie, the principal) to its counterparty (ie, the beneficiary) by using two main different types of guarantee: the ‘guarantee’ and the ‘suretyship’.

Guarantees are often used in Switzerland – especially by banks, in the form of bank guarantees or, in relation to certain transactions involving groups of companies, parent guarantees or otherwise intra-group guarantees. Suretyships are also used in Switzerland, albeit to a lesser extent.

Guarantees are recommended to the extent they create a primary, so-called ‘standalone’ obligation; as opposed to a suretyship, which creates a secondary (ie, accessory) obligation. Accordingly, a guarantee does not depend on the underlying obligation for its existence and enforcement, whereas a suretyship does. If the underlying obligation is void or unenforceable, a guarantee remains valid and enforceable in principle, as opposed to a suretyship.

6. 2. What are the formal, documentary and procedural requirements to perfect a guarantee?

Switzerland  
Walder Wyss Ltd.

There is no form requirement for guarantees. However, the validity of a suretyship is subject to a specific form, which depends on the person of the surety and the maximum amount for which it is liable.

Also, a guarantee must state both its duration and its maximum amount.

6. 3. What charges, fees and taxes (including notary and similar fees) arise from the perfection of a guarantee?

Switzerland  
Walder Wyss Ltd.

No specific fees, charges or taxes apply in relation to the perfection of a guarantee. In the case of suretyships, notarial fees may apply if a natural person will be providing the surety.

6. 4. What are the respective obligations and liabilities of the parties under the



guarantee?

Switzerland

Walder Wyss Ltd.

A Swiss law-governed guarantee creates a primary, 'standalone' contractual obligation pursuant to which the guarantor guarantees the payment of a specified sum of money upon the occurrence (or non-occurrence) of a specified event (including mere demand by the beneficiary). If the guarantee is 'on first demand', the guarantor will need to perform upon the first demand of the secured party in general without having the right to raise any defences of the third party whose obligations had been guaranteed.

6. 5. What other considerations should be borne in mind by all counterparties when taking the benefit of a guarantee in your jurisdiction?

Switzerland

Walder Wyss Ltd.

Financial assistance and corresponding limitations must be taken into account (see question 7.1).

## 7. Financial assistance

7. 1. What requirements and restrictions apply with regard to the provision of financial assistance in your jurisdiction? What specific implications do these have for secured finance transactions?

Switzerland

Walder Wyss Ltd.

The granting of a guarantee, indemnity or security interest for the obligations of a Swiss company's (direct or indirect) shareholder (upstream), or of the affiliate or subsidiary of such (direct or indirect) shareholder (cross-stream), is subject to the following limitations:

- It must be permitted by the Swiss company's articles of incorporation, which will customarily include in its purpose clause respective group support and financial assistance provisions;
- It must be in the interests of the Swiss company (ie, dealing at arm's length, service against adequate consideration, significance of the security interest compared to the other assets of the subsidiary, financial capacity of the parent company or the affiliates to repay the loan);
- It must not constitute a repayment of the restricted equity (ie, share capital and restricted statutory reserves not available for distribution as dividends) of the Swiss company or an unjustifiable payment of benefits or contributions; and
- Otherwise, in case of any doubt:
  - the amount of the guarantee, indemnity or security interest must be limited to the freely distributable equity (ie, equity available for distribution as dividends) of the Swiss company; and
  - the granting of such guarantee, indemnity or security interest must be approved by the Swiss company's shareholders' meeting.

## 8. Syndicated lending

8. 1. Is the concept of an agent or trustee recognised in your jurisdiction? If not, how is security taken for multiple lenders?

Switzerland

Walder Wyss Ltd.

The concept of an agent or trustee is recognised and used in all syndicated transaction. The role of the security trustee or agent and its appointment by the secured parties depend on the type of security interests at stake, as follows:

- For security interests in the form of assignments or transfers for security purposes, the security trustee or agent can enter into the relevant security agreement, and hold and enforce the security interest in its own name for the benefit of the secured parties;
- For security interests in the form of pledges, all secured parties must – because of the so-called ‘accessory’ nature of the security interest – be identical to the creditors of the secured claims and thus must be a party to the relevant security agreement. This is achieved by having the security trustee or agent enter into the security agreement in the name and on behalf of all secured parties as a direct representative. For this purpose, all secured parties must effectively appoint and give power to the security trustee or agent to act in their name and on their behalf. This is addressed through specific provisions in the credit agreement or the intercreditor agreement.
- It is standard practice to have the relevant Swiss law-governed security agreements drafted to allow them to survive (without amendment) any changes to the secured parties and, to a certain extent, the security trustee or agent.

In this context, it is noteworthy that parallel debt structures have not been tested under Swiss law or in the Swiss courts; thus, there is no certainty that a security interest based on parallel debt obligations will be held enforceable in Switzerland.

8. 2. What requirements and restrictions apply with regard to syndicated lending in your jurisdiction?

Switzerland

Walder Wyss Ltd.

Except for the Swiss non-bank rules, which limit the number of non-bank lenders that may participate in the syndicate (whether directly or by way of sub-participation), no particular requirements or restrictions apply with regard to syndicated lending in Switzerland as opposed to bilateral lending (see question 9.1).

8. 3. What other considerations should be borne in mind by all counterparties when engaging in syndicated lending in your jurisdiction?

Switzerland

Walder Wyss Ltd.

N/A.

## 9. Taxes, charges and fees

9. 1. What taxes and similar charges are levied in the secured finance context in your jurisdiction? Do these vary depending on whether the lender is a domestic or foreign entity?

### Switzerland

Walder Wyss Ltd.

With respect to the payment of interest, under Swiss law, interest payments by Swiss borrowers under collective fundraising transactions are generally subject to Swiss withholding tax (currently at the rate of 35%).

Syndicated facilities agreements qualify as collective fundraising if there are more than 10 non-bank lenders in the syndicate (the '10 non-bank rule'). Swiss withholding tax will also be triggered if the Swiss borrower would have an aggregate of more than 20 non-bank lenders (the '20 non-bank rule' and, together with the 10 non-bank rule, the Swiss non-bank rules). Thus, it is market standard to structure a transaction to avoid Swiss withholding tax being incurred.

Accordingly, should the credit agreement be drafted to reflect that there are or could be Swiss borrowers, it must be ensured that there will be not more than 10 non-bank lenders thereunder. Hence, the transfer provisions will impose restrictions on non-bank lenders, which, as standard, will no longer be applicable after the occurrence of an event of default.

The respective transfer restrictions for lenders are rather unproblematic under revolving facilities, given that only banks will typically act as revolving lenders.

If there is a Swiss guarantor in the structure (but no Swiss borrower), the issue still needs to be addressed, since tax concerns might arise where part of the financing is to be on-lent to a Swiss guarantor. Therefore, a structure involving foreign fundraising, on-lending to a Swiss guarantor and security interest/guarantees provided by a Swiss guarantor could be regarded by the Swiss Federal Tax Administration as circumvention of the 10 non-bank rule, which potentially triggers Swiss withholding tax, and particular care must be given when structuring. In April 2021 the Swiss Federal Council has proposed the abolition of the withholding tax on bond interest without any replacement and initiated a respective parliamentary process. If this proposal will come into force, the Swiss non-bank rules as outlined above will be abolished and restrictions in this respect will no longer apply from a Swiss tax law perspective, making it easier for Swiss companies not only to issue bonds, but also to obtain funding in cross-border syndicated lendings.

Also, intra-group financings may trigger certain restrictions:

- on the maximum interest rates (so-called safe harbour rates), chargeable on loans granted to or by Swiss group entities; and
- in light of thin capitalisation rules, the breach of which could trigger Swiss withholding tax.

With respect to the proceeds of enforcing security or claiming under a guarantee which has been granted by a Swiss obligor for obligations of its (direct or indirect) parent (upstream) or sister (cross-stream) company, to the extent that it is not granted on terms which are at arm's length, Swiss withholding tax may be triggered on dividend payments (currently at 35%) which must be deducted from the gross payment made (see question 7.1). Swiss withholding tax can be recovered (with some delay only) by Swiss secured parties and

by secured parties that:

- are located in a jurisdiction that has a favourable double tax treaty in place with Switzerland (providing for a 0% rate); and
- qualify to benefit from treaty protection.

Thus, not all secured parties can recover the Swiss withholding tax and even lenders that can do so will be refunded potentially only with a delay.

Also, with respect to security interest over real estate:

- special real estate withholding taxes may become due whenever a security interest is granted over real estate located in Switzerland; and
- depending on the jurisdiction of the relevant secured parties, applicable double tax treaties may provide for a 0% rate or reduced rates.

Accordingly, should the secured parties be located in jurisdictions with which there is no double tax treaty or the applicable double tax treaty does not provide for a 0% rate, the security provider may request these very secured parties to be excluded from the benefit of such security interest in order to avoid both such tax being incurred and the corresponding usually expected gross-up undertaking, as such tax will be borne by the security provider

Finally, securities transfer stamp tax may be triggered under certain circumstances in relation to the enforcement or transfer of ownership of bonds, notes or other securities.

In its proposal of April 2021, the Swiss Federal Council also proposed to abolish the transfer stamp duty on domestic bonds, without replacement.

## 9. 2. Are any exemptions or incentives available?

Switzerland  
Walder Wyss Ltd.

Please see question 9.1.

## 9. 3. What other significant costs will be incurred by the counterparties in entering into a secured finance transaction? Do these vary depending on whether the lender is a domestic or foreign entity?

Switzerland  
Walder Wyss Ltd.

The main material costs to be taken into account are as follows:

- If loans are secured over real estate, the following fees may be payable, depending on the transaction:
  - notaries' fees;
  - registration fees (land register); and
  - cantonal and communal stamp duties.

The rates depend on the face value of the securities and the location of the real estate. The rates for fees vary widely depending on the canton; and

- Stamp duty may be triggered in relation to the transfer of ownership of shares, bonds, notes or other securities, 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.

#### 9. 4. What strategies might the counterparties consider to mitigate their tax and other liabilities in the secured finance context?

Switzerland  
Walder Wyss Ltd.

In order to mitigate potential tax risks, parties should involve tax counsel in the structuring of the transaction and adhere to the state-of-the-art market practice in relation to addressing potential tax risks, including the implementation of the Swiss non-bank rules, tax gross-up provisions and the obtaining of advance tax ruling confirmation on a case-by-case basis.

### 10. Judicial enforcement

10. 1. In the event of default, what options are available to enforce a security interest or guarantee? Is self-help available in your jurisdiction in connection with the enforcement of security (if so, in what circumstances) or must enforcement action be pursued through the courts?

Switzerland  
Walder Wyss Ltd.

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

The parties usually agree on the right of the secured party to choose between private enforcement or official debt and bankruptcy proceedings. Private enforcement is in most cases faster and less cumbersome. However, the secured party is obliged to execute the enforcement in a way that allows it to obtain the best price for the assets under the circumstances, whether by way of private sale or public auction. Therefore, the secured party must organise and document the private enforcement process appropriately. Assets with a market value that can be determined objectively (eg, listed securities) can also be purchased by the secured party itself at market value. The secured party will thereafter offset the purchase price against the debt. Any surplus must be returned to the debtor.

Once official enforcement proceedings have been initiated or bankruptcy has been declared against the debtor, private enforcement against certain types of security, such as pledges (but not security executed by way of assignment or title transfer), is no longer possible and requires cooperation with the bankruptcy and enforcement administrators.

10. 2. How long does the enforcement process generally take and what steps does this



typically involve? Do these vary depending on any applicable requirements or restrictions (eg, requirement for public auction or regulatory consents)? Do these vary depending on whether the lender is a domestic or foreign entity?

Switzerland  
Walder Wyss Ltd.

While the enforcement of security interests through private realisation is generally considered to be quicker than enforcement through debt enforcement officials, no statistics are available on this topic. The length of an enforcement process will largely depend on the types of security interests, the complexity of the security structure and the number of parties involved.

10. 3. What other considerations should be borne in mind when enforcing a security interest or guarantee in your jurisdiction?

Switzerland  
Walder Wyss Ltd.

With respect to up-stream and cross-stream security interests and guarantees, financial assistance limitations may apply (see question 7.1).

10. 4. Are direct agreements with contractual counterparties well understood in your jurisdiction?

Switzerland  
Walder Wyss Ltd.

No answer submitted for this question.

10. 5. What other avenues are available to a lender to safeguard its position in connection with security or guarantees?

Switzerland  
Walder Wyss Ltd.

N/A.

## 11. Bankruptcy

11. 1. How (if at all) do bankruptcy proceedings impact on the enforcement of security by a creditor?

Switzerland  
Walder Wyss Ltd.

Once bankruptcy has been declared, assets which are subject to a pledge and similar security rights are considered to be part of the debtor's estate and will be realised by the insolvency administration (except for securities held by an intermediary). Realisation proceedings are governed by Swiss insolvency laws, which

provide for a public auction or, subject to certain conditions, a private sale. The proceeds from enforcement are used to cover:

- enforcement costs;
- the claims of the secured creditors; and
- in the case of any excess proceeds, the claims of unsecured creditors.

Future claims and rights which have been assigned for security purposes or pledged, but have come into existence only after the commencement of bankruptcy proceedings against the Swiss assignor or pledgor, respectively, will fall into the Swiss assignor's or pledgor's estate and will not pass over to the secured parties. Similarly, there is uncertainty as to whether, in the case of the insolvency of a security provider, a secured creditor may apply or use collateral received in the discharge of secured obligations which qualify, pursuant to the evolving (and not always consistent) jurisprudence of the courts, as future claims.

## 11. 2. In what circumstances can antecedent transactions be unwound for preference? What other similar measures apply in this regard?

Switzerland  
Walder Wyss Ltd.

Where the Swiss obligor is adjudicated bankrupt or liquidated (except on a voluntary basis), or where Swiss assets of a foreign security provider (eg, pledged shares of a Swiss entity) are subject to ancillary bankruptcy proceedings in Switzerland, the insolvency official or, under certain conditions, creditors of the Swiss obligor or security provider may challenge the entering into of the relevant agreements and the performance of any obligation thereunder by the Swiss obligor or security provider, subject to the conditions of Articles 285 and following of the Debt Enforcement and Bankruptcy Act ('DEBA') being satisfied. Articles 285 DEBA provide that a transaction may be subject to challenge if:

- no or no equivalent consideration is given ('transaction at an undervalue', as described in Article 286 DEBA);
- the party granting security or discharging a debt was over-indebted ('voidability for over-indebtedness', as described in Article 287 DEBA); or
- A party had the intention to disfavour or favour certain of its creditors or should reasonably have foreseen such result, and this intention was or must have been known to the receiving party ('preference' as described in Article 288 DEBA).

In case of such a challenge, any arbitration or jurisdiction clause could be ignored and be found to be not binding by Swiss courts. With respect to the first and second points above, in the case of transactions with related parties, such as group companies, the burden of proof is reversed and the challenged parties must prove the adequacy of the challenged transaction.

## 11. 3. Are any types of entities excluded from the bankruptcy regime in your jurisdiction? If so, what alternative regimes apply?

Switzerland  
Walder Wyss Ltd.

Under Swiss law, certain restrictions apply to enforcement proceedings involving public entities. As a general rule, the rights and assets of public entities are split into administrative assets and financial assets. Whereas administrative assets are necessary for public law entities to fulfil their public duties, financial assets serve this purpose only indirectly. Typically, financial assets consist of liquidity, equity, real estate and other seizable assets. Swiss cantonal law may exclude financial assets from constituting seizable assets. Except as otherwise provided, contracts between a private party and a public entity over financial assets are governed not by public law, but by civil law. Therefore, disputes between a public entity and a private party must be brought before a civil court. Further, financial assets may be pledged and seized in debt enforcement proceedings against a public entity. As administrative assets may not be realised, they can be neither pledged nor seized (ie, enforced). While, as a general rule, public entities are subject to debt enforcement proceedings in general, claims against most Swiss public entities may not be pursued in enforcement proceedings leading to a declaration of bankruptcy. In addition, administrative assets may not be enforced at all.

## 12. Governing law and jurisdiction

12. 1. What law typically governs secured finance agreements in your jurisdiction? Do any specific requirements apply in this regard?

Switzerland  
Walder Wyss Ltd.

The law governing the main finance documents – such as the credit agreement and, if applicable, the intercreditor agreement – is usually related to the place of incorporation of the arrangers, the agent and/or, to a certain extent, the majority lenders. However, for the purposes of syndication, it is common to see these main documents being governed by English law, with which international lenders may be more familiar than Swiss law, except in financings involving multiple Swiss lenders in particular.

With respect to security interest over Swiss assets, although Swiss conflict of laws rules generally allow for the parties to choose the governing law of the agreement, including a security document, this choice of law may not be enforced against third parties, or may be enforced only under certain conditions. Accordingly, in order to limit obstacles to the enforcement of a security interest over Swiss assets, it is market practice for such security interest to be governed by Swiss law.

12. 2. Is a choice of foreign law or jurisdiction valid and enforceable? In the case of a choice of foreign law of jurisdiction, will any provisions of local law have mandatory application? Are submission to jurisdiction provisions that operate in favour of one party only enforceable?

Switzerland  
Walder Wyss Ltd.

Choices of foreign law or jurisdiction are usually valid and enforceable. Notwithstanding a valid choice of law, however, a Swiss court or other authority:

- will not apply a provision of foreign law if and to the extent that, in the view of the court or authority, it would lead to a result that would violate Swiss public policy (*ordre public*) or similar general principles;
- notwithstanding a valid choice of law by the parties, will apply any provisions of Swiss law (and,

- subject to further conditions, of another foreign law) which, in the view of the court or authority, imperatively demand application in view of their specific purpose (*lois d'application immédiate*);
- can find that provisions of a law other than that chosen by the parties is applicable if important reasons call for such applicability and if the facts are closely linked to such other law; and
  - will apply Swiss procedural rules.

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

Also, Swiss courts and – despite a valid submission to the jurisdiction of a Swiss court/arbitral tribunal in a Swiss law-governed agreement – courts outside Switzerland may order preliminary measures even where they do not have jurisdiction over the substance of the matter. In addition, a jurisdiction clause might not be upheld by Swiss courts in connection with matters relating to consumer protection, insurance law or labour law. Finally, jurisdiction clauses may have no effect as regards actions relating to, or in connection with, non-contractual claims or insolvency procedures, which, as a rule, must be brought before the court at the place of such insolvency procedure.

Finally, in the absence of a precedent of the Swiss courts as to the validity of asymmetrical jurisdiction clauses allowing some, but not all parties to an agreement to elect a forum other than that jointly agreed upon and available to all parties under such agreement, it cannot be excluded that such a clause may be held invalid and unenforceable by the Swiss courts.

## 12. 3. Are waivers of immunity enforceable in your jurisdiction?

Switzerland  
Walder Wyss Ltd.

There is no specific legislation in Switzerland relating to sovereign immunity in Switzerland and waivers thereof. Questions in this regard are primarily governed by the case law of the Federal Supreme Court and international treaties to which Switzerland is a party, and must be analysed on a case-by-case basis. However, in general, under Swiss law a state may validly choose to waive its immunity from jurisdiction and consent to the exercise by the Swiss courts of jurisdiction over a dispute.

## 12. 4. Will foreign judgments or arbitral awards be enforced in your jurisdiction? If so, how?

Switzerland  
Walder Wyss Ltd.

The Swiss courts will recognise as valid, and will enforce, any final and conclusive civil judgment or arbitral award for a monetary claim obtained in the competent foreign courts or from the competent arbitral tribunal respectively, subject to the limitations set forth in:

- a relevant international treaty (in particular the Lugano Convention with respect to foreign judgments or the New York Arbitration Convention with respect to foreign arbitral awards); and
- the Swiss International Private Law Act (eg, general respect of the principles of due process and Swiss *ordre public*).

## 13. Trends and predictions

13. 1. How would you describe the current secured finance landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Switzerland

Walder Wyss Ltd.

Aside from specific new considerations (eg, state support programmes related to COVID-19, the London Interbank Offered Rate transition and the like), experience shows that secured finance landscape in Switzerland and/or for Swiss borrowers is quite dynamic.

In addition, since it took full effect on 1 August 2021, the Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology has strengthened legal certainty in connection with the issuance and transfer of tokenised rights and financial instruments such as bonds and shares. Although not directly affecting lending in Switzerland for foreign lenders, this will become particularly relevant in relation to taking security over tokenised asset.

In April 2021, the Swiss Federal Council proposed the abolition of the withholding tax on bond interest without any replacement, and initiated a respective parliamentary process in this regard. If the proposal comes into force, all types of debt financing and refinancing activities within Switzerland – such as raising capital via bond issuances, crowdfunding platforms, asset-backed security structures and other debt capital market transactions – will be facilitated, as adverse withholding tax consequences will no longer apply. Further, in its proposal of April 2021, the Swiss Federal Council also proposed the abolition of the transfer stamp duty on domestic bonds, without replacement.

## 14. Tips and traps

14. 1. What are your top tips for the smooth conclusion of a secured finance transaction in your jurisdiction and what potential sticking points would you highlight?

Switzerland

Walder Wyss Ltd.

It is recommended to conduct sufficient planning in order to identify upfront any issues which may have an impact on structuring and/or timing (eg, qualification of the lender(s) pursuant to the Swiss non-bank rules, tax ruling, ruling in relation to real estate, financial assistance limitations, collateral).





# mondaq

Connecting knowledge & people

Bristol | Essex | New York | Sydney

t: +44 (0) 20 8544 8300  
e: [enquiries@mondaq.com](mailto:enquiries@mondaq.com)

