



The
LEGAL
500

**COUNTRY
COMPARATIVE
GUIDES 2021**

The Legal 500 Country Comparative Guides

Switzerland

LENDING & SECURED FINANCE

Contributing firm

Walder Wyss Ltd

The logo for Walder Wyss, consisting of the word "walderwyss" in a lowercase, sans-serif font, positioned to the right of a white square.

Theodor Härtsch

Partner | theodore.haertch@walderwyss.com

Tervel Stoyanov

Counsel | tervel.stoyanov@walderwyss.com

This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Switzerland.

For a full list of jurisdictional Q&As visit legal500.com/guides

SWITZERLAND

LENDING & SECURED FINANCE



1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Except in the area of consumer credit (subject to the Swiss Consumer Credit Act (SCCA) (*Bundesgesetz über den Konsumkredit, KKG*)), lending activities are generally unregulated in Switzerland, provided the lender does not accept deposits from the public or refinance itself via a number of other banks.

Currently, foreign regulated entities operating on a strict cross-border basis (without having a business presence in Switzerland) are not subject to authorisation by the FINMA. However, should these activities involve a physical presence (such as manpower or physical infrastructures) in Switzerland on a permanent basis, the cross-border exemption will generally not be available.

Although in principle there is no restriction or prohibition related to foreign lenders taking the benefit of security interest in Switzerland, specific enforcement restrictions may apply depending on considerations such as the type of security interest or 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 Swiss Act on the Acquisition of Real Estate by Persons Abroad (*Bundesgesetz über den Erwerb von Grundstücken durch Personen im Ausland*), also known as the Lex Koller), which is particularly relevant in an enforcement scenario as those restrictions apply to (i) direct acquisition of real estate (residential or, to a lesser extent, commercial) properties – relevant in case of security interest in the form of or over mortgages or mortgage notes or (ii) acquisition of pledged shares in real estate companies.

Finally, restrictions may also apply in relation to security

interests related to companies active in regulated industries, such as the financial sector (in particular in the banking and insurance sectors), telecommunications, energy, radio/TV and aviation and the like.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

There is no specific Swiss legislation limiting the amount of interest that can be charged by lenders, save for (i) consumer credits (i.e. credits granted to individuals for purposes other than business or commercial activities, regulated by the Swiss Consumer Credit Act (*Bundesgesetz über den Konsumkredit, KKG*)), (ii) general principles on usury (assessed on a case-by-case basis in light of the terms and circumstances of the loan, in the absence of clear threshold).

Also, compound interests are prohibited under Swiss law so that default interests cannot be charged on default interests.

Exceptions may apply in case of intra-group financing which may trigger certain restrictions (i) on the maximum interest rates (so-called safe harbour rates) chargeable on loans granted to or by Swiss group entities and (ii) in light of thin capitalisation rules, the breach of which could trigger Swiss withholding tax.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

There are no such laws or regulations in Switzerland.

4. Can security be taken over the following types of asset: i. real property (land), plant

and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.

Although Swiss conflict of laws rules generally allow for the parties to choose the law to govern an agreement, including a security document, such choice of law may not be enforced against third parties, or under certain conditions only. 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.

(a) real property (land), plant and machinery

Under Swiss law, real estate is defined as immovable property (*Grundstücke*) which includes in particular (i) land and the buildings thereon (if any), (ii) distinct and permanent rights recorded in the land register (e.g. rights to build (*Baurecht*)) and (iii) co-ownership shares in immovable properties (condominiums).

Security interest over real estate located in Switzerland usually takes the form of (i) a mortgage (*Grundpfandverschreibung*) or (ii) a mortgage note (*Schuldbrief*).

A mortgage (*Grundpfandverschreibung*) 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.

A mortgage note (*Schuldbrief*) 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 bankruptcy of the security provider and 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 pledge or transfer for security purposes requires a written agreement only. Mortgage notes exist either in the form of bearer notes (*Inhaberschuldbriefe*) (delivery of which is a perfection requirement), registered notes (*Namenschuldbriefe*) (delivery and endorsement by the secured party are perfection requirements) or paperless mortgage notes (*Registerschuldbriefe*) note (the registration of the secured parties in the land register is a perfection requirement).

With regard to plants and machinery (being tangible moveable property), the principles set forth under 4(b) below apply.

(b) equipment

Equipment and inventory being qualified as tangible moveable property (i.e. as opposed to immovable property such as real estate property), security interest thereover could in theory be granted in the form of a pledge. However, in reality such security interest is generally rare. Indeed, floating charges are neither available nor recognised under Swiss law. A Swiss law governed pledge requires the transfer of possession of the pledged assets to the secured parties, which would not only deprive the security provider from its ability to operate its business but also be too burdensome (including in terms of costs for the mere transfer of possession and the maintenance and management of the equipment inventory or tangible moveable property). There are exceptions where there are specific assets (such as raw materials with substantial value, larger car fleets, aircraft parts, or the like).

(c) inventory

See 4(b) above.

(d) receivables

Security interest is commonly granted in the form of either a pledge or an assignment for security purposes over existing and future trade receivables, intercompany receivables, bank account claims and insurance claims.

Both forms of security interests require written security agreement and, with respect to:

1. the assignment of claims and receivables, such claims and receivables must be assignable (therefore, during the pre-signing phase the parties must ensure that all relevant documents do not contain any restrictions on assignments (e.g. share purchase agreement, insurance policies, etc.));
2. claims or receivables evidenced by an acknowledgement of debt (*Schuldschein*), the delivery of the original thereof;
3. insurance claims, the delivery of the original insurance policies and notification of the security interest to the insurance company; and
4. the pledge of bank account claims, the notification of such pledge to the relevant account bank.

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 since prior to such notification third party debtors can validly discharge their obligations by paying to the security provider.

(e) shares in companies incorporated in your jurisdiction

Security interest over shares of a Swiss company (either in the form of a corporation limited by shares or a limited liability company) can be taken by means of a pledge, which requires (i) a written agreement and (ii) delivery of the share certificates to the pledgee. Furthermore, 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 (*Bucheffekten*) within the meaning of the Swiss Federal Act on Intermediated Securities (*Bucheffektengesetz, BEG*), a pledge would require the bank holding the pledged shares in custody to enter into a written control agreement with the pledgor and the pledgee, whereby the bank is irrevocably instructed to act for the benefit and upon instruction of the pledgee solely (i.e. without instruction or confirmation of instruction by the pledgor).

Pending expected entry into force in full as of 1 August 2021, parts of the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (*Bundesgesetz zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register*) have come into force as of 1 February 2021, pursuant to which Swiss companies limited by shares (*Aktiengesellschaft*) may issue their shares in the form of uncertificated register securities (*Registerwertrechte*), i.e. 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. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Yes, provided that the relevant security agreement allows for the future assets to be identified or identifiable and the future secured obligations to be specific enough.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

It is standard practice in Switzerland to have separate security documents for the different types of assets.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

Except for the creation of a mortgage (*Grundpfandverschreibung*) or a mortgage note (*Schuldbrief*) (see 4(a) above), which require a notarial deed, there is no notarisation or legalisation requirement in Switzerland.

8. Are there any security registration requirements in your jurisdiction?

Except for security interests granted over real estate (see 4(a) above), aircraft, ships and cattle, which need to be registered with the relevant register, there is no security interest registration requirement in Switzerland.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?

The following are the main material costs to be taken into account:

a. 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 securities' face value and the location of the real estate. The rates for fees vary widely from canton to canton.

b. 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.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?

Although there is no limitation under Swiss law in relation to a Swiss company guaranteeing or securing obligations of any of its (direct or indirect) subsidiaries (downstream), the granting of a guarantee, indemnity or security interest for obligations of a Swiss company's (direct or indirect) shareholder (upstream) or affiliate or subsidiary of such (direct or indirect) shareholder (cross-stream) is subject to certain limitations (see question 11 below).

11. Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?

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

- a. it must be allowed by the Swiss company's articles of incorporation which shall include in its purpose group support and financial assistance;
- b. it must be in the interest of the Swiss company (i.e. 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, etc.);
- c. it shall not constitute a repayment of the restricted equity (i.e. share capital and statutory reserves) of the Swiss company or an unjustifiable payment of benefits or contributions; and
- d. otherwise, in case of any doubt, the amount of the guarantee, indemnity or security interest shall be limited to the freely distributable equity (i.e. equity available for distribution as dividends) of the Swiss company and the granting of such guarantee, indemnity or security interest shall be approved by the Swiss company's shareholders' meeting.

12. Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any

company which directly/indirectly owns shares in the company; or (iii) in a related company?

Except for the restrictions related to the granting of up-/cross-stream guarantees or security interests (see 11 above), there is no restriction under Swiss law. Accordingly, a company's ability to secure the purchase of its own shares is limited.

13. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Generally this is possible and such arrangements are recognised in Switzerland. The role of the security trustee or agent and its appointment by the secured parties depend on the type of security interests at stake:

- a. 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, hold and enforce the security interest in its own name for the benefit of the secured parties;
- b. for security interests in the form of pledges, all secured parties must – because of the so called accessory nature (*Akzessorietät*) of the security interest – be identical to the creditors of the secured claims and thus must be a party to the relevant security agreement, which is achieved by having the security trustee or agent entering 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 with 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.

14. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect

and avoid individual lenders having to enforce their security separately?

See 13 above.

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

15. Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?

With respect to **payments 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**). Furthermore, Swiss withholding tax would 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 that Swiss withholding tax will be incurred.

Accordingly, should the credit agreement be drafted to reflect that there are or could be Swiss Borrowers, it has to be ensured that there will be not more than 10 non-bank lenders thereunder. Hence, the transfer provisions shall impose restrictions to non-bank lenders, which, as standard, shall not be applicable anymore 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.

In the event that there is a Swiss guarantor in the structure (but no Swiss borrower), the issue needs to be addressed nevertheless, since tax concerns might arise where part of the financing is to be on-lent to a Swiss guarantor. Therefore, a structure involving (i) foreign fund raising, (ii) on-lending to a Swiss guarantor and (iii) security interest/guarantees provided by a Swiss guarantor could be regarded by the SFTA as circumvention of the 10 Non-Bank Rule, which potentially triggers Swiss withholding tax. The options to structure around this are to provide that:

a. there will be no flow of funds from the facilities to the Swiss guarantor and such ban on flow of funds to the Swiss guarantor is to be duly reflected by respective language in the credit agreement – which might be critical in light of potential cash pooling arrangements within the borrowing group;

b. there will be a flow of funds to the Swiss guarantor, subject to prior tax ruling clearance (usually obtainable in case the guarantee/security interest is granted up-/cross-stream only but not in case of down-stream guarantee/security interest); or

c. there will be a flow of funds to the Swiss guarantor and the number of non-bank lenders under the credit agreement is limited to ten – which is typically not accepted by lenders in the absence of Swiss borrower.

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

Furthermore, in 2019, the Swiss Federal Tax Administration has relaxed its practice under which bonds that are issued by foreign issuers, but guaranteed by their Swiss parent company, may be requalified as domestic issuances, thus triggering Swiss withholding tax on interest payments. Such requalification may occur in particular, when bond proceeds or a party thereof are directly or indirectly on-lent to Swiss group companies and such on-lending exceeds (i) the combined equity of all non-Swiss subsidiaries directly or indirectly controlled by the Swiss parent (if a non-Swiss subsidiary is not fully owned, its equity is taken into account on a pro-rata basis) (so-called “equity method”) and (ii) the aggregate amount of loans provided by the Swiss group companies to non-Swiss group companies (so-called “offsetting method”). It is worth noting that the former practice of the Swiss Federal Tax Administration was to consider such on-lending to Switzerland in light of the equity of the foreign issuer at the end of the financial year, so that this revised practice significantly increases the permissible use of proceeds in Switzerland, in particular since it is possible to combine the two methods.

With respect to **proceeds of enforcing security or claiming under a guarantee**, other than the granting of a guarantee, indemnity or security interest for obligations of a Swiss company’s (direct or indirect) shareholder (upstream) or affiliate or subsidiary of such (direct or indirect) shareholder (cross-stream), which, if not granted on terms other than at arm’s length may trigger Swiss withholding tax on dividend payments (currently at 35%) which must be deducted from the

gross payment made (see question 11 above). The Swiss withholding tax can be recovered (with some delay only) by Swiss secured parties and by secured parties that (i) are located in a jurisdiction that has as favorable double tax treaty in place with Switzerland (providing for a zero rate) and (ii) are qualifying to benefit from treaty protection. Thus, not all secured parties are able to recover the Swiss withholding tax and even lenders that are able to do so will be refunded potentially only with a delay.

Also, with respect to security interest over real, cantonal real estate withholding taxes (*Hypothekenquellensteuern*) are due whenever a security interest is granted over real estate located in Switzerland and (ii) 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 to be incurred and the corresponding usually expected gross-up undertaking, as such tax would be borne by the security provider.

16. If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?

Should Swiss withholding tax be due on interest payments (see question 15 above), the current rate is 35% (or 53.8% if grossed up). The Swiss withholding tax can be recovered (with some delay only) by Swiss lenders and by lenders that (i) are located in a jurisdiction that has as favourable double tax treaty in place with Switzerland (providing for a zero rate) and (ii) are qualifying to benefit from treaty protection. Thus, not all lenders are able to recover the Swiss withholding tax and even lenders that are able to do so will be refunded potentially only with a delay.

17. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

Safe for Swiss withholding tax which may be due in relation to (i) granting a loan to a Swiss borrower or a loan guaranteed or secured by a Swiss entity (see question 15 above), (ii) the enforcement of up-/cross-

stream guarantees or security interests (see question 11 above) and (iii) in relation to security interest over real estate located in Switzerland (see question 15 above), there are no other material tax issues. For the sake of completeness, note that cantonal stamp duties may apply as a result of entering into financing and security agreements.

18. Are there any tax incentives available for foreign lenders lending into your jurisdiction?

There is no such tax incentive available in Switzerland.

19. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.

Although not challenged *per se*, certain financing structures are to be closely looked at from a Swiss tax perspective, such as:

1. a financing granted to, or bonds issued by, a non-Swiss borrower and secured/guaranteed by its Swiss subsidiary (up-stream) or Swiss sister-company (cross-stream), with proceeds of the financing/bond issuance being made available to such Swiss entity or otherwise used in Switzerland may be considered to be a circumvention of the Swiss Non-Bank Rules and trigger Swiss withholding tax on interest payments (see question 15 above);
2. the issuing of bonds by a non-Swiss borrower and secured/guaranteed by its Swiss parent (down-stream), with bond proceeds being on-lent to Swiss group companies in excess of the permissible amount according to the equity method and the offsetting method would trigger Swiss withholding tax on interest payments (see question 15 above); and
3. intra-group financing may be subject to restrictions (i) on the maximum interest rates (so-called safe harbour rates) chargeable on loans granted to or by Swiss group entities and (ii) in light of thin capitalisation rules, the breach of which could trigger Swiss withholding tax.

20. Do the courts in your jurisdiction generally give effect to the choice of other

laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

In any action brought before a court of competent jurisdiction in Switzerland related to a given agreement entered into by a Swiss company, the law chosen by the parties thereto would be recognised and applied by such court to all issues which under the conflict of laws rules of Switzerland are to be determined in accordance with the proper or governing law of a contract.

Notwithstanding a valid choice of law by the parties to an agreement, a Swiss court or other authority (i) will not apply a provision of foreign law if and to the extent that this would, in the court's or authority's view, lead to a result violating Swiss public policy (*ordre public*) or similar general principles, (ii) will apply, notwithstanding a valid choice of law by the parties, any provisions of Swiss law (and, subject to further conditions, of another foreign law) which in their view imperatively demand application in view of their specific purpose (*lois d'application immédiate*), (iii) can find that provisions of a law other than the law 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 (iv) will apply Swiss procedural rules. Finally, a choice of law may not extend to non-contractual obligations.

21. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Subject to the limitations set forth in (i) the relevant international treaty (in particular the Lugano Convention with respect to foreign judgements, and the New York Arbitration Convention with respect to foreign arbitral awards), (ii) the Swiss International Private Law Act (e.g. general respect of the principles of due process and Swiss *ordre public*), the courts of Switzerland 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 (including English and US courts) or from the competent arbitral tribunal, respectively.

22. What (briefly) is the insolvency process in your jurisdiction?

In the event of a Swiss obligor's insolvency, insolvency proceedings may be initiated in Switzerland and Swiss insolvency laws will then govern these proceedings. In addition, Swiss debt enforcement and insolvency laws may be applicable in case of an enforcement of assets located in Switzerland. The enforcement of claims, security interests and questions relating to insolvency and bankruptcy in general are dealt with by the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**).

Under Swiss insolvency laws, insolvency proceedings are not initiated by the competent insolvency court *ex officio*, but rather require that the debtor or a creditor files a petition for the opening of insolvency proceedings based on an application for commencement of enforcement proceedings and the threat of insolvency (as discussed in the paragraphs below). Moreover, insolvency proceedings must be initiated by the debtor itself according to Swiss corporate law in the event of over-indebtedness (*Überschuldung*) or can be initiated by a creditor according to Swiss insolvency laws in the event that the debtor has obviously and permanently discontinued to pay its debts as and when they fall due or has acted fraudulently, or is attempting to act fraudulently to the detriment of its creditors. Furthermore, a debtor may also initiate insolvency proceedings if it declares itself insolvent (*zahlungsunfähig*) before court. Generally, pursuant to the Swiss corporate law, a debtor is over-indebted when its liabilities exceed the value of its assets, which must be assessed pursuant to the accounting standards of the Swiss Code of Obligations and on the basis of a balance sheet to be drawn up (i) on the basis of the liquidation value of the debtor's assets and (ii) - to the extent there is still a going concern scenario - based upon the going concern value. If the interim balance sheet shows that the creditors' claims are neither covered by assets valued at liquidation values nor at going concern values, the debtor's board of directors has to notify the bankruptcy court, provided that creditors of the debtor do not agree to subordinate their claims in the amount necessary to cover the over-indebtedness (article 725 of the Swiss Code of Obligations). The debtor's board of directors is obliged to file for insolvency without delay and non-compliance with this obligation exposes the board of directors to damage claims and, in extreme cases, to sanctions under criminal law. Under certain circumstances, the auditors of an over-indebted company are obliged to file for insolvency.

If a creditor wants to initiate insolvency proceedings, it has to file an application for commencement of enforcement proceedings (*Betriebsbegehren*) with the competent debt collection office (*Betriebsamt*). With respect to unsecured claims, the competent debt collection office is located where the debtor is registered

or resident. The debt collection office will then serve the debtor with the writ of payment (*Zahlungsbefehl*). There is no material assessment of the claim at this stage. The debtor may within ten days upon having been served with the writ of payment, file an objection (*Rechtsvorschlag*) to bring the procedure to a halt and obtain an individual stay of proceedings. No reasons need to be given for such objection. The debt collection office notifies the creditor of the objection.

For claims based on an enforceable judgment, the creditor can without any further delay file an application to lift this stay with the court (*Rechtsöffnungsbegehren*). For claims not based on an enforceable judgment, but on a certified and/or signed document evidencing the claim, provisional lifting of such stay can be applied for in summary proceedings (*provisorische Rechtsöffnung*). In the event the objection is set aside in these summary proceedings, the debtor may bring an action in ordinary court proceedings for negative declaration that the creditor's claim does not exist (*Aberkennungsklage*).

The creditor may then ask the debt collection office to continue the enforcement proceedings (*Fortsetzungsbegehren*) in relation to an existing writ of payment having full force and effect. The competent debt collection office delivers a bankruptcy warning (*Konkursandrohung*) to the debtor. The insolvency court may take preliminary measures to secure property of the debtor in case this is requested by a creditor and required to secure the creditor's rights. After receipt of the bankruptcy warning (*Konkursandrohung*), the creditor may petition the opening of insolvency proceedings. The competent insolvency court decides upon the insolvency without any delay, provided that there are no reasons which would lead to a suspension of the insolvency court's decision. In addition, the debtor has the right to file a request for a moratorium. The parties may file an appeal against any decision taken by the insolvency court.

The insolvency court orders the continuation of insolvency proceedings if certain requirements are met, in particular if there are sufficient assets to cover at least the costs of the insolvency proceedings. If the assets of the debtor are not expected to be sufficient, the insolvency court will only order to continue insolvency proceedings if third parties, for instance creditors, advance the costs of the insolvency proceedings themselves. In the absence of such advancement, the insolvency proceedings will be closed for insufficiency of assets (*Einstellung des Konkursverfahrens mangels Aktiven*). Alternatively, the insolvency office may request the insolvency court to resolve upon summary insolvency proceedings (*summarisches Konkursverfahren*), if the assets are not sufficient to

cover the cost of ordinary insolvency proceedings and the actual facts of the case are not complicated. Also, in such case, creditors have the right to request ordinary insolvency proceedings.

Upon the opening of formal insolvency proceedings (*Konkurseröffnung*), the right to administer and dispose over the business and the assets of the debtor passes to the insolvency office (Konkursamt). Assets which are subject to a pledge and similar security rights are considered to be part of the debtor's estate (*Konkursmasse*). The insolvency office has full administrative and disposal authority over the debtor's estate, provided that certain acts require the approval of the insolvency court. The creditors' meeting may appoint a private insolvency administration (private Konkursverwaltung) and, in addition, a creditors' committee (*Gläubigerausschuss*). In such case, the private insolvency administration will be competent to maintain and liquidate the debtor's estate. The creditors' committee has additional competences.

Insolvency results in the acceleration of all claims against a debtor (secured or unsecured), except for those secured by a mortgage on the debtor's real property, and the relevant claims become due upon insolvency. As a result of such acceleration, a creditor's bankruptcy claim consists of the principal amount of the debt, interest accrued thereon until the date of insolvency, and (limited) costs of enforcement. Upon insolvency, interest ceases to accrue. Only claims secured by a pledge enjoy a preferential treatment insofar as interest that would have accrued until the collateral is realised will be honoured if and to such extent as the proceeds of the collateral suffice to cover such interests.

All creditors, whether secured or unsecured (unless they have a segregation right (*Aussonderungsrecht*), wishing to assert claims against the debtor need to participate in the insolvency proceedings in Switzerland. Swiss insolvency proceedings are collective proceedings and creditors may generally no longer pursue their individual claims separately, but can instead only enforce them in compliance with, and subject to, the restrictions of Swiss insolvency laws. Therefore, secured creditors are generally not entitled to enforce any security interest outside the insolvency proceedings. In the insolvency proceedings, however, secured creditors have certain preferential rights (*Vorzugsrechte*). Generally, entitlement to realise such security is vested with the insolvency administration. Realisation proceedings are governed by Swiss insolvency laws which provide for a public auction, or, subject to certain conditions, a private sale. Proceeds from enforcement are used to cover (i) enforcement costs, (ii) the claims of the secured

creditors and (iii) any excess proceeds will be used to satisfy unsecured creditors.

Typically, liabilities resulting from acts of the insolvency administrator after commencement of formal insolvency proceedings constitute liabilities of the debtor's estate. Thereafter, all other claims (insolvency claims—*Konkursforderungen*), in particular claims of unsecured creditors, will be satisfied pursuant to the distribution provisions of Swiss insolvency laws, which provide for certain privileged classes of creditors, such as a debtor's employees. Certain privileges can further result for the Swiss government and its subdivisions based on specific provisions of federal law. All other creditors will be satisfied on a pro rata basis if and to the extent there are funds remaining in the debtor's estate after the security interests and privileged claims have been settled and paid in full.

Swiss insolvency laws also provide for reorganisation procedures by composition with the debtor's creditors. Reorganisation is initiated by a request with the competent court for a stay (*Nachlassstundung*) pending negotiation of one of the several statutory types of composition agreement with the creditors and confirmation of such agreement by the competent court.

As an alternative solution to insolvency, the debtor (or, under certain circumstances, a creditor) may seek a reorganisation under protection of the court or composition with creditors (*Nachlassverfahren*) by applying to the competent composition court (*Nachlassgericht*) for a moratorium (*Nachlassstundung*) and submitting, besides other documents, a tentative reorganisation plan. Such protection from the court can be sought by the debtor before over-indebtedness has materialised. The court immediately decides whether or not to grant the provisional moratorium (*provisorische Stundung*) for a maximum period of up to four months. With its decision the court appoints a provisional commissioner (*provisorischer Sachwalter*), unless circumstances would justify not to do so. In case circumstances would justify it, the competent composition court (*Nachlassgericht*) may withhold a public announcement of the granting of the provisional moratorium, provided third party interests are well protected. In such case, (i) the creditors and other authorities will not be notified, (ii) debt collection proceedings may still be initiated or further pursued (unless challenged by the debtor) and (iii) a provisional commissioner (*provisorischer Sachwalter*) must be appointed in all circumstances. In case it is obvious that there are no chances for a successful reorganisation of the company or a composition agreement (*Nachlassvertrag*), the competent composition court (*Nachlassgericht*) opens insolvency proceedings over the

debtor. In case the moratorium has been granted provisionally (*provisorische Stundung*) and in case during the period of the provisional moratorium a reorganisation of the company or a composition agreement (*Nachlassvertrag*) appear to be achievable, at a time before the provisional moratorium has expired, the court approves the definitive moratorium usually for further four to six months (*definitive Stundung*) and appoints a commissioner (*Sachwalter*). The court may, where deemed necessary, also appoint a creditors' committee (*Gläubigerausschuss*) for the purpose of supervising the commissioner. The commissioner calls a meeting of creditors (*Gläubigerversammlung*) which has to approve the draft composition agreement according to specific majority rules. The composition agreement (*Nachlassvertrag*) is subject to the approval of the composition court. The DEBA essentially provides for three different types of composition agreements: The ordinary composition agreement (*ordentlicher Nachlassvertrag*), the composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) and the composition agreement in insolvency proceedings (*Nachlassvertrag im Konkurs*). During a definitive moratorium, debt collection proceedings cannot be initiated and pending proceedings are stayed. Furthermore, the debtor's power to dispose of its assets and to manage its affairs is restricted. In case of a pledge, the secured party is not entitled to proceed with a private liquidation until the confirmation of the settlement by the competent court. A secured creditor participates in the settlement only for the amount of its claim not covered by the collateral. The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). However, a debtor may, subject to consent by the commissioner (*Sachwalter*), terminate long-term agreements (*Dauerschuldverhältnisse*) (other than employment agreements) without notice (even if the agreements notice periods provide for), provided (i) the continuation of the long-term agreement (*Dauerschuldverhältniss*) would impede or at least seriously challenge the intended financial recovery and (ii) provided the counterparty to such long-term agreement (*Dauerschuldverhältniss*) is held harmless (it being understood that the respective claim would be a claim in the composition proceeding (*Nachlassforderung*)). Interest payments will be stopped for unsecured claims during the moratorium (unless otherwise explicitly provided for in the composition agreement). The moratorium aims at facilitating a rehabilitation of the debtor under the protection of the court or the conclusion of one of the above composition agreements. Any composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition

agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent of a shortfall of enforcement proceeds. Privileged claims must be paid in full.

Finally pursuant to article 219 DEBA all non-secured creditors of a Swiss obligor would be part of the same (third) class of creditors in an insolvency. As regards agreements or clauses of agreements governing the relevant priority of payments amongst creditors belonging to the same (third) class of creditors (the **Priority of Payments**), it cannot be excluded that any insolvency official would treat all such creditors belonging to the same class indiscriminately and consider the Priority of Payments as a mere arrangement amongst creditors of the estate in relation to their respective claims vis-à-vis the estate and pay them out on a pro rata and *pari passu* basis, in which case the relevant creditors may have to rely on the redistribution by the creditors, which, however, would be enforceable under Swiss law.

23. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

After an insolvency has been declared assets which are subject to a pledge and similar security rights are considered to be part of the debtor's estate (**Konkursmasse**) and will be realised by the insolvency administration (except for intermediary-held securities). Realisation proceedings are governed by Swiss insolvency laws which provide for a public auction, or, subject to certain conditions, a private sale. Proceeds from enforcement are used to cover (i) enforcement costs, (ii) the claims of the secured creditors and (iii) any excess proceeds will be used to satisfy unsecured creditors.

Future claims and rights, which have been assigned for security purposes or pledged but have come into existence only after opening 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 party/ies. Similarly, there is uncertainty as to whether, in case of an insolvency of a security provider, a secured creditor may apply or use collateral received in discharge of secured obligations which qualify, pursuant to the evolving (and not always consistent) jurisprudence of the courts, as future claims.

24. Please comment on transactions

voidable upon insolvency.

In case of a Swiss obligor being adjudicated bankrupt or being liquidated (except on voluntary basis), the insolvency official or, under certain conditions, creditors of the Swiss obligor may challenge the entering into of the a given agreement and the performance of any obligation thereunder by the Swiss obligor subject to the conditions of articles 285 et seqq. of the Swiss Debt Enforcement and Bankruptcy Act (**DEBA**) being satisfied. Articles 285 et seqq. DEBA provide that a transaction may be subject to challenge (i) if no or no equivalent consideration is given ("transaction at an undervalue" as described in article 286 DEBA), (ii) if the party granting security or discharging a debt was over-indebted ("voidability for over-indebtedness" as described in article 287 DEBA) or (iii) if 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 ("voidance for preference" as described in article 288 DEBA). In this context, any arbitration or jurisdiction clause could be ignored and be found to be not binding upon Swiss courts. With respect to (i) and (iii) for transactions with related parties, such as group companies, the burden of proof is reversed and the challenged parties have to prove the adequacy of the challenged transaction.

25. Is set off recognised on insolvency?

In principle, a creditor can exercise a right of set-off with respect to a claim a bankrupt debtor has against it. The right of set-off is, however, excluded in the following cases:

- a. if a debtor of the bankrupt became a creditor only after the opening of the bankruptcy proceeding (except if such a debtor only fulfils an obligation which was pre-existing at the time of the opening of the bankruptcy or if debts of the bankrupt are satisfied by using collateral made available by such a third-party debtor);
- b. if a creditor of the bankrupt became a debtor of the bankrupt debtor or the bankrupt estate only after the declaration of bankruptcy; or
- c. if the claim to be set off results from unpaid capital contributions.

Set-off against claims generally arises where the creditor establishes that the rights were acquired bona fide prior to the adjudication of bankruptcy. The set-off is voidable where the debtor of a bankrupt debtor has acquired, prior to the opening of bankruptcy but knowing its creditor is insolvent, a claim against him or her, with a

view to procure for itself or a third person, by way of set-off, an advantage to the prejudice of the assets in bankruptcy.

The same rules apply to composition proceedings.

26. Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?

There is no statistic on the topic but subject to any voidable transactions (see question 24 above) enforcements of security interests are generally successful, without being able though to comment on the actual recovery of secured parties' outstandings in insolvencies.

27. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

With entry into force in full as of 1 August 2021, the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (Bundesgesetz zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register) is to improve legal certainty in connection with the issuance and transfer of tokenised rights and financial instruments such as bonds and shares. Although not directly impacting lending in Switzerland for foreign lenders, this will become particularly relevant in relation of taking security over tokenised assets (see question 4(e) above).

In September 2020, the Swiss Federal Council has requested the Swiss Parliament to abolish withholding tax on interest in its entirety on bonds and similar instruments (excluding bank deposits of natural persons resident in Switzerland), which would implicitly result in the abolition of the Swiss Non-Bank Rules (see question 15 above). All types of financing and refinancing activities within Switzerland such as raising capital via bond issuances, crowdfunding platforms, asset-backed security (ABS) structures and other capital market transactions will be facilitated as adverse withholding tax consequences would no longer apply. The Swiss Federal Council is expected to present its dispatch to Parliament in the second quarter of 2021. Once this has been adopted, the Swiss Federal Council will also decide on the remaining key issues of the ongoing tax reform, including the abolition of securities transfer tax on domestic bonds. This fundamental change to the Swiss

withholding tax regime is expected to come into force no earlier than 1 January 2022.

28. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

There is neither any statistics nor publicly available data in Switzerland but in our experience, we see a growing number of alternative lenders such as debt funds although without having yet gained a significant market share. In that respect, the Swiss Non-Bank Rules are particular relevance as these lenders are typically regarded as non-bank lenders (see question 15 above).

29. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as (i) Brexit (ii) LIBOR transition and/or (iii) COVID 19

(a) Brexit

Brexit does not have any Swiss-specific impact.

(b) LIBOR transition

The National Working Group on CHF Reference Rates (NWG) expects the discontinuation of CHF LIBOR by the end of 2021. The Swiss Financial Market Supervisory Authority (FINMA), based on the results of their self-assessment survey, reported that the CHF LIBOR tough legacy volume appears to be small and not a material problem. In this regard, the NWG, together with representatives of FINMA and Swiss National Bank recommended that all market participants should ensure that robust fallback language is used in all contracts. This includes signing up to ISDA's IBOR Fallbacks Protocol or similar protocols (such as the Swiss Master Agreement, SMA) as soon as possible. Furthermore, the NWG repeats the recommendations to use the "shift" methodology and to floor the compounded SARON, as long as the domestic market is in the focus. In case international consistency is important, the "lag" methodology and flooring individual SARON values are viable alternatives. SARON stands for Swiss Average Rate Overnight and represents the overnight interest rate of the secured funding market for the Swiss Franc and is an overnight interest rates average referencing the Swiss Franc CHF. It is based on transactions and quotes posted in the Swiss repo market and is

administered by the Swiss Infrastructure and Exchange (SIX). In particular in relation to cross-border financings, the recommendations of the Loan Market Association (LMA) are applied.

(c) COVID-19

Companies affected by the COVID-19 crisis were able to apply for bridging credits guaranteed by the Swiss federal government between 26 March 2020 and 31 July 2020 to ensure their liquidity (**COVID Loans**).

Since the sole purpose of such COVID Loans was to cover running costs, inter alia, the payment of dividends or the reimbursement of capital contributions are excluded until repayment of such loans, correspondingly impacting both the structuring and the documenting of financings involving Swiss obligors. Typically, borrowers will be required to repay such loans quickly by the (other) financing banks in order for the borrower to regain entrepreneurial and financial flexibility.

Contributors

Theodor Härtsch
Partner

theodore.haertch@walderwyss.com



Tervel Stoyanov
Counsel

tervel.stoyanov@walderwyss.com

