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LOANS & SECURED FINANCING

Switzerland

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Loans & Secured Financing

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Switzerland

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GENERAL FRAMEWORK

Jurisdictional pros and cons

What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The bank loan market in Switzerland is a well-developed and stable market with sophisticated market participants.

It is typically possible to put in place a bank loan financing quickly and on a non-public (namely, confidential) basis.

The bank debt market generally allows for transactions ranging from low to large volumes, including volumes that are too large for the debt capital markets. Also, the bank debt market is generally available without much volatility (namely, is not subject to the window characteristics of debt capital markets).

Bank loans are not subject to prospectus requirements, filing requirements, registration requirements and other requirements applicable to debt securities, especially listed debt securities (eg, listing procedure, minimum-offering size, track record of issuer, capitalisation requirements and reporting obligations).

Also, unlike interest payable under debt securities, interest payable on bank loans is, as a rule, not subject to Swiss withholding tax.

Law stated - 15 Mai 2024

Market snapshot

How do borrowers approach the different options of debt products and sources available to them, including debt securities? With respect to bank loans, how is the debt market split between direct lenders and private credit funds on the one hand, and banks and institutional investors on the other?

The Swiss loan market is larger in volume than the Swiss debt capital market. Large companies often tap both markets. As regards the Swiss loan market, the banks' market share is significantly larger than the market share of alternative lenders (such as debt funds) but an uptick of alternative lenders has been observed over the past few years in certain segments of the market, such as for leveraged loans.

Law stated - 15 Mai 2024

Forms

What are the most common forms of loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the loan facilities.

The most common forms of bank loan facilities in Switzerland are revolving credit facilities and term loan facilities. Bank guarantee instrument facilities are also seen frequently in Switzerland. Swingline facilities are seen less frequently in the Swiss market.

Law stated - 15 Mai 2024

Investors

Describe the types of investors that typically participate in loan financings and the types of investors that participate in various other types of debt products.

The bank loan market in Switzerland is largely in the hands of banks (Swiss and non-Swiss). Certain other professional investors (eg, insurance companies and pension funds) are also, on occasion, involved in the loan market in Switzerland. An increase has been observed in the participation of other alternative lenders, such as debt funds, in particular in leveraged finance transactions.

As far as debt securities transactions in Switzerland are concerned, those transactions are typically coordinated by banks, but the investor base in those financings is broader than in the bank loan market.

Law stated - 15 Mai 2024

Investors

How are the terms of a loan facility affected by the type of investors participating in such facility?

It is predominantly banks that are active in the loan markets in Switzerland. There are a number of reasons for this, one being that the Swiss tax law rules are commonly referred to as the 'Swiss non-bank rules'; however, this does not mean that alternative lenders would face significant legal or tax obstacles in the Swiss loan markets.

The background to the Swiss non-bank rules is that under Swiss domestic tax laws payments by a Swiss borrower under a bilateral or syndicated financing are, as a rule, not subject to Swiss withholding tax; whereas interest payments under debt capital market instruments (such as bonds) are, as a rule, subject to Swiss withholding tax. In a nutshell, the Swiss non-bank rules require that:

- a syndicate does not comprise more than 10 lenders that are not licensed as banks if there is a Swiss obligor (the 10 non-bank rule);
- a Swiss obligor does not, in the aggregate, have more than 20 non-bank creditors as its lenders (the 20 non-bank rule); and
- a Swiss obligor does not, in the aggregate, have more than 100 non-bank creditors under financings that qualify as deposits within the meaning of the relevant rules (the 100 non-bank rule).

To ensure compliance with the Swiss non-bank rules, a number of provisions are included in facility agreements with Swiss borrowers, guarantors or security providers, including, depending upon the structure, restrictions that limit the ability of the lenders to sell down their position in the facility to more than 10 non-bank lenders (or a lower number, if so negotiated).

The type of facility also has an impact on the spectrum and number of potential lenders. For instance, the spectrum of potential lenders is different where a borrower seeks a working capital facility than where a borrower seeks a highly structured and highly leveraged financing or where a specific financing is sought (eg, rail stock or aircraft financing).

Law stated - 15 Mai 2024

Bridge facilities

Are loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical loan facility?

Bridge-to-bond facilities (and other types of bridge facilities) are seen frequently in the Swiss market, particularly in the context of acquisition financings. In line with international practice, bridge facilities have certain characteristics that are different from other facilities, for example, a shorter term and a margin step-up (namely, pricing increases upon the lapse of certain periods of time). Also, the number of lenders under a specific bridge loan is typically low, even in high-volume financings.

Law stated - 15 Mai 2024

Role of agents and trustees

What role do agents or trustees play in administering loan facilities with multiple investors?

The role of the agent is typically assumed by one of the large banks in the Swiss bank loan market. Swiss law does not address such activities specifically. However, facility agreements will typically address these aspects in quite some detail such that the relationship between the agent and the other lenders on one hand, and the relationship between the agent or the lenders and the obligors on the other hand, is governed by a set of contractual provisions.

Contractually agreed indemnifications and reimbursements are typical examples for this in the sense that facility agreements will typically provide for an indemnification regime and a reimbursement regime for the benefit of the agent. To cover the time period prior to the signing date of the facility agreement, indemnification and reimbursement aspects (and certain other important aspects) are often governed by a mandate letter or a similar document entered into at an early stage of the transaction.

Law stated - 15 Mai 2024

Role of lenders

Describe the primary roles of, and typical fees charged by, the financial institutions that arrange and syndicate bank loan facilities, as well as lenders that participate in the private credit market.

Arrangers will typically advise the borrower in connection with the structuring of a particular facility, will typically also be in charge of documentation (sometimes referred to as a documentation agent) and will be responsible for syndication matters (whereas arrangers will often underwrite the facility on a firm basis in a first step, namely, prior to syndicating the loan to a larger group of lenders).

One or several types of fees will typically be associated with those services. Typically, such fees are referred to as arrangement fees or structuring fees. In addition, agency and, where applicable, security agency fees are charged. Other fees may apply as well (eg, participation fee). In addition, the typical fees owed to each lender will also be owed to the arrangers in their capacity as lenders (eg, commitment fees).

In the private debt market, deals are often entered into on a bilateral basis or, if a multi-lender transaction, it is typically one of the well-known specialised third-party providers acting as agent of the lenders.

Law stated - 15 Mai 2024

Governing law
1.8.1. In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the loan and intercreditor documentation?

Several factors are relevant in this context. As far as the governing law of facilities agreements is concerned, in practice, one most often sees Swiss law (on transactions where the main borrower is a Swiss entity and where the arrangers act from Switzerland, and also on transactions where the arrangers act from abroad but where the Swiss borrower expresses a preference for Swiss law), English law (eg, where the arrangers act from the United Kingdom or another European jurisdiction) or New York law (eg, where the arrangers act from the United States). Other laws (eg, German law) are also seen in practice but less often.

As far as the governing law of security documents is concerned, this depends primarily upon the jurisdiction of the security provider and the law or laws governing the relevant security assets. For instance, it is typical to have a pledge over shares in a Swiss entity governed by Swiss law, to have a receivables security assignment by a Swiss security provider governed by Swiss law, or to have a bank account pledge governed by the laws of the jurisdiction of the relevant account bank.

Law stated - 15 Mai 2024

REGULATION

Capital and liquidity requirements

Describe how capital and liquidity requirements impact the structure of loan facilities, including the availability of related facilities and the differing impact of such requirements on different types of investors.

Capital and liquidity requirements have an impact on the availability and pricing of bank loan financings. It is, in particular, the leverage ratio (with which Swiss banks have to comply) that has the effect of limiting the overall volume of credit.

Such regulatory requirements are important factors but not necessarily key drivers for the structuring of bank loans. Increased attention is paid, on occasion, to collateral aspects to ensure that the particular transaction can be treated as a secured transaction for regulatory capital purposes.

Law stated - 15 Mai 2024

Disclosure requirements

For public company debtors, are there disclosure requirements applicable to loan facilities?

Swiss listing rules require public companies to provide an overview in their annual reports in relation to their debt positions (but there is no need to disclose details in this respect).

Law stated - 15 Mai 2024

Use of loan proceeds

How is the use of loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

Parties will almost always agree upon the permitted use of funds in the facility agreement. Swiss law does not provide for a specific set of rules dealing with the use of bank loan proceeds. However, anti-money laundering rules, anti-corruption rules and sanctions regimes are applicable and must be complied with.

In this area, there has been a clear and strong trend for a number of years to include (often fairly detailed) sanctions and anti-corruption provisions in facility agreements. The concern of lenders in this area is typically reputational. It cannot be excluded that, in addition to reputational issues, legal liability could arise in this area under certain circumstances, depending, among other things, upon what regimes are not complied with and the scope and level of involvement or deemed involvement, if any, of lenders.

The areas of sanctions and anti-corruption are areas where foreign rules can become applicable to Swiss parties. In practice, it is sometimes challenging to find the right balance between the lenders' requirements and the borrowers' operational requirements when it comes to agreeing the details of sanctions provisions and anti-corruption provisions.

Law stated - 15 Mai 2024

Cross-border lending

Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Sanctions rules can have this effect, an example being the sanctions rules in connection with the Ukraine war. Under these rules, it is not permitted, for instance, to extend credit to certain Russian persons.

Also, regulatory cross-border considerations or tax law considerations can have the effect that Swiss investors will not extend credit to debtors organised in certain jurisdictions.

Law stated - 15 Mai 2024

Debtors' leverage profile

Are there limitations on an investors' ability to extend credit to debtors based on the debtors' leverage profile?

There are no such limitations under Swiss law for corporate loans.

Law stated - 15 Mai 2024

Interest rates

Do regulations limit the rate of interest that can be charged on loans?

Other than in the area of consumer credit, there is no specific legislation in Switzerland on the maximum rate of interest. However, rates of interest are subject to the general Swiss law principles on usury. Under those principles, the maximum permissible rate of interest depends upon a number of factors and the specific circumstances (such as, for instance, the currency in which the loan is extended and the inflation associated with such currency at the time, the duration of the particular financing and the risk profile of the particular financing). There is no clear test or limit, but practitioners generally believe that the limit would, in many circumstances, be in the range of approximately 15per cent to 18 per cent per year.

Law stated - 15 Mai 2024

Currency restrictions

What limitations are there on investors funding loans in a currency other than the local currency?

There are no such limitations under Swiss law.

Law stated - 15 Mai 2024

Other regulations

Describe any other regulatory requirements that have an impact on the structuring or the availability of loan facilities.

There are no other key regulatory requirements that have a general impact on the structuring or the availability of bank-loan facilities.

Law stated - 15 Mai 2024

SECURITY INTERESTS AND GUARANTEES

Collateral and guarantee support

Which entities in the organisational structure typically provide collateral and guarantee support for loan financings? Are there certain types of entity that typically do not provide, or are restricted in their ability to provide, collateral and guarantee support for such financings?

In guaranteed financings it is not uncommon in the Swiss market to see a guarantee by the parent company of the borrower (often referred to as downstream guarantees), guarantees by subsidiaries of the borrower (often referred to as upstream guarantees) and guarantees by sister companies of the borrower (often referred to as cross-stream guarantees). The same holds true for security interests, where a financing is secured.

Generally, the provision of downstream guarantees (and, equally, of downstream security interests) does not come with specific limitations or requirements under Swiss law. Exceptions are possible under certain circumstances; for instance, if the subsidiary (namely, the borrower under the guaranteed or secured obligations) is not a wholly-owned subsidiary of the Swiss guarantor or security provider or if the subsidiary is in significant financial distress.

The provision of upstream guarantees (and, equally, of upstream security interests) and of cross-stream guarantees (and, equally, of cross-stream security interests) comes with a number of limitations and requirements, according to the prevailing view under Swiss law. Essentially, it is held that such guarantees and security interests should be treated as the equivalent of a dividend distribution as far as formal and substantive requirements and limitations are concerned. This has several implications: the key implication is that such guarantees and security interests are, in practice, limited to the amount that the Swiss guarantor or security provider could distribute to its shareholders as a dividend. This limitation is sometimes referred to as the 'free equity limitation'. Also, payments under upstream and cross-stream guarantees (and, equally, the enforcement of upstream and cross-stream security interests) can be subject to Swiss tax implications, in particular Swiss withholding tax.

Specific issues can be faced, for instance, in an acquisition financing context, where a Swiss entity with minority shareholders is required to grant a guarantee or provide security interests for the obligations of the borrower. Such issues must be analysed and addressed on a case-by-case basis.

The Swiss non-bank rules are also applicable, as a rule, where a Swiss entity acts as guarantor and security provider.

Finally, as far as foreign entities are concerned, there are no specific Swiss law limitations on the ability of those entities to provide guarantees for the obligations of Swiss entities.

Law stated - 15 Mai 2024

Collateral and guarantee support

What types of obligations typically share with the loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

This depends upon the specifics of the transaction. Where a hedging is put in place in connection with a secured bank loan facility, it is not uncommon for the hedging to also be secured and to be covered equally and ratably with the obligations under the facility agreement.

Law stated - 15 Mai 2024

Commonly pledged assets

Which categories of assets are commonly pledged to secure loan financings? Describe any categories of asset that are typically not thus pledged, or are restricted from being so.

The scope of a Swiss security package depends on the specifics of the transaction and on what the meaningful assets are of the relevant security provider.

It is not uncommon for a Swiss security package to comprise share pledges, receivables security assignments and bank account pledges. It may also include security over intellectual property rights or over real estate assets. Other security assets may be relevant, depending upon the specifics of the transaction and the relevant entity.

Movable assets located in Switzerland are not typically taken as security, the main reason being that, under Swiss law, it would be required to transfer possession of such assets to the security party (or a third-party pledge holder), which is not typically operationally feasible.

Law stated - 15 Mai 2024

Creating and perfecting a security interest

Describe the method of creating and perfecting a security interest on the main categories of assets. What are the consequences of failing to perfect a security interest?

In Switzerland, the two most commonly used types of security interests are a right of pledge and a security assignment or security transfer. Swiss law does not recognise the concept of a floating charge or the concept of a blanket lien (or similar concepts).

Law stated - 15 Mai 2024

Future-acquired assets

Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Both are generally possible under Swiss law. As far as future assets as security are concerned, the relevant assets must be specified or specifiable. Similarly, as far as future obligations are concerned, the documents must be drafted in a way that the scope of the secured obligations is sufficiently specific.

Law stated - 15 Mai 2024

Maintenance

Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

There are no such maintenance requirements under Swiss law.

Where amendment transactions are concerned (namely, amendments or other modifications to the underlying facility agreement), it is market practice in Switzerland, especially where the amendment or modification is material in nature (such as, for instance, the increase or extension of the underlying financing), to put in place a security confirmation or to amend and restate the Swiss security documents. Also, Swiss security providers are typically requested to pass confirmatory corporate resolutions in such transactions.

Law stated - 15 Mai 2024

Release

What are typical steps to release security interests on assets? Is such a release automatic under any circumstances?

Under Swiss law, a security release is typically documented by means of a security release agreement and the necessary security release action (such as return of original share certificates from the security agent to the pledgor).

Security interests on an asset are not automatically (namely, by virtue of Swiss law) released following its sale by the debtor. However, this can be, and often is, contractually agreed, especially where the facility documentation provides for the concept of permitted disposals (namely, specific types of disposals that are permissible without the need for lenders' consent, which is a fairly common concept especially in leveraged financings).

Law stated - 15 Mai 2024

Non-fulfilment of guarantee obligations

What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

The scope of available defences depends upon whether the particular instrument is a Swiss law guarantee or a Swiss law surety (and, in each case, also upon the drafting of the particular instrument). Essentially, a Swiss law guarantee is an instrument that is not ancillary to the underlying guaranteed obligation. As such, only very limited defences are available to a guarantor.

A surety, on the other hand, is an instrument that is ancillary to the underlying guaranteed obligation. As such, the surety has available to it defences also from the underlying contractual relationship.

In the context of financing transactions, lenders typically request guarantees rather than sureties, and the few defences available under a guarantee are typically (largely) waived.

Law stated - 15 Mai 2024

Parallel debt requirements

Describe any parallel debt or similar requirements applicable in a secured loan financing where an agent acts for multiple investors.

Where a security package includes a Swiss law governed pledge, it is necessary to structure the security agency such that the security agent acts as a direct representative of the other secured parties (namely, it is, under those security documents, not possible to work with a security trustee concept).

As far as parallel debt is concerned, there is no requirement under Swiss law to use such concept (or similar concept), although there are certain benefits (especially from an insolvency law perspective) to using a parallel debt concept (in addition to, rather than instead of, securing the direct claims). While the concept of parallel debt is still untested in Swiss courts, practitioners and scholars tend to agree that it should be upheld by a Swiss court.

Law stated - 15 Mai 2024

Enforcement

What are the most common methods of enforcing security interests? What are typical limitations on enforcement?

Upon the opening of bankruptcy proceedings, creditors secured by means of a pledge must, as a rule, hand in the collateral to the bankruptcy administration (namely, they are at such time no longer entitled to realise the collateral privately). They will, however, still be satisfied on a priority basis out of the net enforcement proceeds of such collateral (namely, ahead of any other creditors). Exceptions to this rule (of having to hand in pledged collateral to the bankruptcy administration) exist, in particular, where the collateral comprises book-entry securities traded on a representative market. Also, creditors secured by means of a security assignment or security transfer generally remain entitled to enforce privately.

Law stated - 15 Mai 2024

Fraudulent conveyance and similar doctrines

Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of loan financings.

Swiss insolvency laws provide for clawback rules (avoidance actions). In a nutshell, these rules allow for a clawback in insolvency proceedings of certain arrangements or dispositions made by the insolvent during a suspect period preceding the declaration of bankruptcy or the grant of a moratorium. These potential challenges relate to three categories of dispositions made by the debtor:

- donations and dispositions made by the debtor with or without adequate consideration within a suspect period of one year;
- the grant of a security interest for existing debt if the security provider was not by prior agreement contractually required to provide the security interest, the payment of a claim in a manner other than by the usual means of payment and the payment of a debt that was not due at the time of payment, provided, in each case, that the debtor was over-indebted at the time of the relevant disposition and provided, furthermore, that the relevant disposition took place within a suspect period of one year; and
- dispositions made by the debtor within a suspect period of five years if the relevant disposition was made with the intent to prefer one creditor to the detriment of other creditors and if the privileged creditor knew or should have known of such intent.

Law stated - 15 Mai 2024

INTERCREDITOR MATTERS

Payment and lien subordination arrangements

What types of payment or lien subordination arrangements are common where the debtor has obligations owing to more than one class of creditors?

Payment subordination arrangements and lien subordination arrangements are seen in the Swiss bank loan market. The details depend upon the specifics of the transaction.

Generally, Swiss law recognises subordination arrangements. It remains untested, however, whether those arrangements are also binding on an insolvency official. It is, for this reason, not uncommon to see senior lenders requesting that junior lenders assign to them by way of security their claims against the obligors.

Law stated - 15 Mai 2024

Creditor groups

What creditor groups are typically included as parties to intercreditor agreements? Are all creditor groups treated the same under the intercreditor agreement?

This depends upon the specifics of the transaction, but typically all levels of lenders (eg, senior lenders, mezzanine lenders and junior lenders) and any other creditors (eg, hedging counterparties) will be party to an intercreditor agreement. Those parties will agree and negotiate their respective rights (including voting rights), priorities, etc. As far as voting rights in particular are concerned, this is an area that is typically relatively heavily negotiated and, thus, tailor-made.

Law stated - 15 Mai 2024

Rights of junior creditors
Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors are generally stayed from enforcing remedies until senior creditors have been repaid (or unless the senior creditors grant their consent to enforcement steps by the junior lenders).

Law stated - 15 Mai 2024

Rights of junior creditors
What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

In the absence of a security assignment of the relevant claim by the junior creditors, junior creditors have the same statutory rights and remedies in an insolvency proceeding as senior creditors. However, this can (and often is) governed differently in the intercreditor agreement.

Law stated - 15 Mai 2024

Pari passu creditors
How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

Typically, in pari passu deals, proportional voting is seen in practice, and one would not typically see priority payment regimes or priority enforcement rights for specific creditors. One important area of negotiation is typically the definition of 'instructing group'.

Law stated - 15 Mai 2024

LOAN DOCUMENT TERMS

Standard forms and documentation

What forms or standardised terms are commonly used to prepare the loan documentation?

No Swiss-law governed form documents have been established by the Loan Market Association (LMA) or any other association. However, especially in syndicated transactions, it is quite common in the Swiss market to take the appropriate LMA form document as a starting point for the drafting of the particular facility agreement. As far as bilateral agreements are concerned, it is not uncommon for Swiss banks to work with in-house form documents, especially where the financing is (more or less) straightforward and where the facility amount is not large.

Law stated - 15 Mai 2024

Pricing and interest rate structures

What are the customary pricing or interest rate structures for loans? Do the pricing or interest rate structures change if the loan is denominated in a currency other than the domestic currency?

In the Swiss bank loan market, both fixed-rate and floating-rate pricings are seen, the latter much more frequently. The pricing on a floating rate financing is determined by reference to the applicable risk-free rates (such as, for instance, Swiss Average Rate Overnight for Swiss franc-denominated loans) or, where still applicable, the relevant interbank offered rates (IBOR) (such as, for instance, the Euro Interbank Offered Rate). The currency of a bank loan does not usually have an influence on pricing or interest structures (other than that the underlying reference rate will be different). However, on occasion, it can be observed in the market that lenders request an additional interest element where a particular currency is concerned. For instance, an additional interest element (eg, an extra 100 basis points) is sometimes charged on US dollar-denominated loans.

Law stated - 15 Mai 2024

Pricing and interest rate structures

Does loan documentation in your jurisdiction incorporate any mechanisms to replace an established, floating benchmark rate in case such benchmark rate becomes, or is expected to become, unavailable?

As far as the replacement of IBORs by risk-free rates (RFRs) is concerned, the majority of existing facility agreements have by now been switched to RFR terms and new facility agreements are generally entered into on RFR terms, if applicable to the relevant currency.

Law stated - 15 Mai 2024

Other yield determinants

What other loan yield determinants are commonly used?

In light of the current, very low levels of interest rates, it is common to see facility agreements providing for a floor-at-zero regime, meaning that if the London Inter-Bank Offered Rate is negative, it is deemed to be zero for the purposes of calculating the level of interest rate owed on the bank loan. The same holds true for RFR-based documents, where market practice develops such that the sum of the relevant RFR and the relevant credit spread adjustment is floored at zero. Original issue discount transactions are not frequently seen in the Swiss market.

Law stated - 15 Mai 2024

Yield protection provisions

Describe any yield protection provisions typically included in the loan documentation.

In line with international standards, facility agreements in the Swiss law bank loan market typically provide for a tax gross-up clause (backed up, for Swiss tax law reasons, with a minimum interest clause or recalculation of interest clause), a tax indemnity clause, an increased costs regime and, in IBOR-based financings, the concept of break costs (relevant, in particular, in the context of prepayments).

Law stated - 15 Mai 2024

Accordion provisions and side-car financings

Do loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured loans?

In addition to other undertakings, facility agreements typically provide for restrictions on additional debt (with certain exceptions, negotiated on the specific deal) and for a negative pledge undertaking (again with certain exceptions, negotiated on the specific deal).

Accordion options (and similar concepts) are seen in the market on deals where these are required by the borrower and are meaningfully possible from a lender's perspective.

Law stated - 15 Mai 2024

Financial maintenance covenants

What types of financial maintenance covenants are commonly included in loan documentation, and how are such covenants calculated?

Financial covenants are negotiated on a transaction-specific basis. In the Swiss market, the most commonly used financial covenant is the leverage ratio. Sometimes, other financial covenants are also used, for instance, interest cover ratios, cash-flow ratios, equity ratios, liquidity tests or tests relating to net assets.

Financial covenants are typically tested twice a year (but this can differ).

Equity cure rights (namely, the right of the borrower to cure a financial covenant's breach by means of a capital contribution) are not standard in the Swiss market generally, but they are fairly common in leveraged transactions and, on occasion, also seen in other financing transactions.

Law stated - 15 Mai 2024

Other negative covenants

Describe any other negative covenants restricting the operation of the debtor's business commonly included in the loan documentation.

Covenants (more specifically, negative covenants, positive covenants and information covenants) are negotiated on a transaction-specific basis to fit the specific financing and borrower group. Typically, as far as negative covenants are concerned, a common core of negative covenants would include restrictions on additional financial indebtedness, a negative pledge, possibly a restriction on disposals, possibly a restriction on mergers and acquisitions and other changes to the group structure and possibly a restriction on the change of the business. Other covenants are typically seen as well, depending upon and tailored to the specific financing and borrower group.

Law stated - 15 Mai 2024

Mandatory prepayment

What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the loans? Describe other common exceptions to the mandatory prepayment requirements.

Mandatory prepayment regimes are negotiated on a transaction-specific basis. In the Swiss market, it is not uncommon to have mandatory prepayments triggered in the case of receipt of insurance or litigation proceeds or in the case of refinancing transactions. It is also not uncommon to see mandatory prepayments triggered in the case of disposals or in the case of a change of control. It is not uncommon to find provisions in facility agreements allowing for a reinvestment of the relevant proceeds (where this is agreed as a concept, it typically applies to insurance proceeds, litigation proceeds and disposal proceeds), thus doing away with the obligation to make a mandatory prepayment in the case of reinvestment. Other exceptions (such as adverse tax consequences associated with the repatriation of funds from foreign subsidiaries) are seen in leveraged transactions but not frequently otherwise.

Law stated - 15 Mai 2024

Debtor's indemnification and expense reimbursement

Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

In line with international standards, a debtor must generally indemnify its lenders for costs and expenses and for a breach of representations or covenants. Typically, there are certain negotiated exceptions to these regimes. In addition, one would typically see tax indemnities, funding indemnities, currency indemnities and increased costs and break-costs regimes.

Law stated - 15 Mai 2024

UPDATE AND TRENDS

Key developments

Are there any current developments or emerging trends that should be noted?

One noteworthy trend is the continuing trend for sustainability linked transactions. Market practice is still developing on this, but, broadly speaking, Swiss market practice is similar to the current market practice in other major European jurisdictions and it tends to follow the LMA recommendations.

In certain segments of the market, there is some increased involvement of non-traditional lenders (in particular, debt funds).

More recently, there has also been a clear uptick in financial distress situations, often resulting in a financial restructuring of some sort (and rarely only in bankruptcy).

Law stated - 15 Mai 2024