CROSS-BORDER FINANCING REPORT

Switzerland

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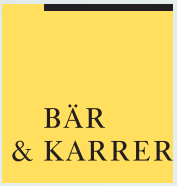
SECTION 1: MARKET OVERVIEW



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1.1 Please provide an overview of the market and environment for cross-border financing in your jurisdiction.

The cross-border financing market in Switzerland is a very dynamic market boosted, on the borrower side, by the importance of the commodity trading industry and the presence of large multinational groups that have headquarters or finance centres in Switzerland, and, on the lender side, by the financing activities of significant local players (UBS, Credit Suisse, the largest cantonal banks and the Swiss affiliates of foreign banks). Syndicated loan transactions are often documented under English law in order to widen the potential participants' base and facilitate the syndication process. The templates of the Loan Market Association (LMA) are used even in purely Swiss deals, although certain Swiss banks have developed their own documentation for the small to mid-size domestic market.

Switzerland being a primarily export-focused economy, a number of cross-border financings are supported by guarantees, counter-guarantees or insurance provided by the Swiss Export Risk Insurance (SERV), which may be relied upon by lenders in the context of financing involving foreign jurisdictions with particular political and credit risks.

1.2 Have there been interesting changes in the structure of the banking sector in your jurisdiction?

Switzerland has been increasingly moving to a borrower-friendly market. It is no longer exceptional to see borrowers impose their own documentation, which does not shorten, however, the negotiation time. With the good health of the Swiss economy and the arrival of

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Frédéric Bétrisey has over 20 years of experience as a banking lawyer. He has a long-standing practice assisting banks and borrowers on all types of banking and finance transactions, including trade and commodity finance, acquisition finance, equipment and private jet financing, financial lease and syndicated lending. His clients include Geneva's private banks, Swiss and foreign commercial banks and asset management institutions. Frédéric has also developed a strong expertise in public sector financing and advised Swiss public law institutions and state-owned entities in fund raisings by way of private placements or bond issuances on the Swiss market. He is particularly interested in sustainable finance and innovative financial technologies.

Frédéric advises financial institutions on a variety of regulatory aspects and financial intermediaries in connection with their securities lending and derivative transactions, with a particular focus on the legal issues and documentation relating to netting arrangements and the issuance and distribution of collective investment schemes and structured products. Recently, Frédéric has been assisting originators, arrangers and trustees on securitisations of Swiss law receivables, in particular in respect of commodity trades, residential mortgages (RMBS transactions), consumer credit and leasing agreements.

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Tatiana Ayranova is an associate in the banking department of Bär & Karrer's Geneva office. Her practice focuses on loans and credit facilities, regulatory aspects, financial products and securitisations. She regularly advises Swiss and foreign commercial banks on various types of banking and finance transactions and has experience in assisting public law entities in the raising of funds through the issuance of bonds. Tatiana has obtained a PhD (Dr. iur.) from the University of St. Geneva for her doctoral thesis on creditor protection in resolution proceedings of Swiss banks and has extensive knowledge in the area of bank restructuring and insolvency law.

non-bank lenders on the market, this trend is expected to continue.

Lending banks face increased competition by non-bank financing providers, such as hedge funds and private equity funds. New legislation on financial services was adopted by the Swiss Parliament in June 2018 which is expected to come into force on January 1 2020. This new legislation will create a level playing field for financial services providers, but is not expected to affect the lending licensing requirements, nor to restrict the traditionally liberal approach of Swiss law towards lending activities.

SECTION 2: FINANCING STRUCTURES

2.1 What have been the key trends or developments in your jurisdiction over the past 12 months in terms of financing structures, deal drivers and the way borrowers and creditors are participating in the market?

The structure of transactions has not been subject to any particular changes over the past months. The important recent trend is the development of borrower-friendly documentation or the increased number of transactions where first drafts are prepared by borrowers, showing some shift in the bargaining power that is probably due to increased competition amongst banks and the strength of the Swiss economy. This is not affecting the structure of the financing, but it obviously impacts on the drafting and negotiation of certain provisions, especially those having a fee component.

2.2 Briefly outline some recent notable transactions involving your jurisdiction, highlighting any interesting aspects in their structures and what they might mean for the market.

Amongst the notable transactions on which we have worked, we can mention the refinancing of a multi-million euro shareholder loan in the context of a cross-border M&A deal, in the form of a mortgage loan granted by a Swiss private bank to a Belgian borrower. This transaction was interesting from its execution point of view, as the shareholder loan that was to be refinanced had been made by the sellers of the Belgian parent of the borrower and its repayment was a condition precedent to the closing of the acquisition, which implied that the creation of the mortgage, the change of control of the borrower, the appointment of its new directors, and the drawdown all had to be completed at the same time. As a result, the closing of the transaction proved a delicate process. This deal illustrates well the growing involvement of Swiss private banks in significant cross-border lending activities and the complexity of certain acquisition finance transactions.

SECTION 3: LEGISLATION AND POLICY

3.1 Describe the key legislation and regulatory bodies that govern cross-border financing in your jurisdiction.

There is no specific piece of legislation or regulation that governs cross-border financing. Loan transactions are governed by the loan-related provisions of the Swiss Code of Obligations, which are neither particularly restrictive nor very numerous. As there are few legal provisions and relatively little case law, this may give rise to interpretation issues, such as in relation to Libor-based loans, in circumstances where interest rates have remained negative. These interpretation issues may result in disputes from time to time, and new and interesting case law is expected to be available soon.

The most relevant pieces of legislation in the context of loans to Swiss entities are those provisions relating to the 35% withholding tax potentially applicable on interest payments, when some or all of the lending entities do not have a banking status (the so-called 10/20 Non-Bank Rules), and the restrictions applicable to the grant of guarantees and securities by Swiss subsidiaries in favour of parent or sister companies (upstream/cross-stream guarantee issues).

The Swiss banking sector is also known for the strength of its wealth management expertise. Private banks also carry out cross-border lending activity, either to attract new clients (by offering them mortgage loans or private jet financings), or to increase leverage, via the grant of traditional Lombard loans (ie credits secured by a pledge on deposited portfolio). As the clientele is mostly foreign residing, Swiss banks must particularly consider foreign regulations, which may restrict their ability to offer in parallel private banking services to the relevant borrowers or even create obstacles to the loans themselves. Pursuant to a regulation of the Swiss Financial Market Supervisory Authority (Finma) (expressed in a position paper in 2010), Swiss private banks are required to carefully monitor the legal risks inherent in cross-border business and assess and reassess such risks on an ongoing basis.

Finally, banks active on cross-border financings from Switzerland pay strong attention to the effects of international sanctions, particularly US sanctions. Finma expects Swiss banks to carefully assess the risks arising from the extraterritorial effects of economic sanctions adopted by foreign countries.

3.2 Have there been any recent changes to legislation or regulations that may impact the cross-border financing market or availability of funding in your jurisdiction?

There have been no recent change to regulations or to the regulators that may impact the cross-border financing market over the past months. Recent changes to Swiss legislation may have some impact on certain aspects, though, such as those relating to margin exchange and reporting requirements for hedging transactions and, especially in the context of private bank financing, those implied by the new financial services act, which is expected to come into force in 2020.

3.3 Are there any rules, legislation or policy frameworks under discussion that may impact lenders or borrowers involved in cross-border financing in your jurisdiction? How can market participants prepare?

There are currently no advanced discussions on such rules.

SECTION 4: LOCAL MARKET NORMS

4.1 Are there frequently asked questions from new market entrants or often overlooked areas from parties involved in cross-border financings in your jurisdiction?

The most frequently questions or overlooked areas relate to the 10/20 Non-Bank Rules and the limitation applicable to upstream/cross-stream securities. Foreign banks generally active on the Swiss market have become familiar with these issues and the number of questions and discussions on legal opinions have significantly dropped. These questions are, by contrast, still raised by new entrants, which are not yet familiar with these issues.

A commonly raised point relates to the type of securities that can be provided. Swiss law is relatively flexible with respect to assignments or pledges of traditional assets, such as commercial receivables, bank accounts, shares and intellectual property rights. By contrast, when it comes to taking security over inventories, movables or fixed assets, Swiss law restricts the taking of security over a company's business (see answer to question 4.3). This is where structuring issues are often raised.

4.2 Please describe any common mistakes or misconceptions that exist about the financing market in your jurisdiction.

Perhaps the most common mistake with respect to Swiss law is to expect that it will be perfectly neutral, because of the neutrality of Switzerland. However, lenders active on the Swiss bank market have now become familiar with the usual limitations implied by the Swiss withholding tax legislation and the restriction to the grant of upstream/cross-stream guarantees or securities.

The withholding tax regime implies a limitation in syndicated lending to the number of non-banks taking participations in the transactions. The restriction to the grant of upstream/cross-stream guarantees may affect the structure of the transaction and particularly reduce the value of the securities provided by Swiss entities. This requires an assessment of both factual and legal issues by lenders (see answer to question 4.4 below).

4.3 Are there any classes of assets over which security cannot be taken or regulations specific to your jurisdiction governing the taking of security over certain classes of assets that lenders should be aware of?

Under Swiss law, security interests over movable assets can only be effective if the secured creditor (directly or through a security or collateral agent) takes exclusive control over the relevant movables. This requirement is depriving Swiss borrowers from the ability to improve the economic terms of the financing by providing securities over their business generally. For the same reason, the security package provided by Swiss entities will often differ from the package granted in other jurisdictions.

The grant of security under Swiss law

generally requires a security contract made in writing. This implies that all the essential elements of the security must be set out in a written document signed by the relevant parties. In the absence of case law or relevant legislation, it is uncertain whether the exchange of pdf copies of signed documents is sufficient to meet the written form requirement. Law firms are also reluctant to authorise the circulation of signature pages only, at the time of closing of the transactions. These specificities are sometimes not easily understandable for foreign parties.

Finally, we note that the taking of security over real estate may, if certain conditions are not satisfied, be subject to prior authorisation when the real estate property includes residential parts and the lender is a foreign based or foreign-owned lender. Furthermore, mortgage granted over Swiss real estate may give rise to source income tax if the lender is not a Swiss regulated bank or not based in a country that has entered into a double tax treaty with Switzerland.

4.4 What measures should be taken to best prepare for your local market norms?

The main market idiosyncrasies faced by foreign lenders relate to the 10/20 Non-Bank Rules and the restrictions to the grant of guarantees or securities in favour of parent or sister companies. These issues are normally dealt with by way of the insertion of appropriate provisions in the loan and/or security documentation. For the 10/20 Non Bank Rules, a so-called minimum interest language would be inserted as an alternative to gross-up clauses. This would be accompanied by customised representations, warranties and covenants from borrowers, and certain adjustments to the assignment provisions. These are negotiated on a case-by-case basis, although the parties should quickly reach a consensus in this respect.

The cross-stream/upstream security issues have a factual component that cannot be fully addressed by way of a contractual provision. Parties generally nevertheless agree on the insertion of a limitation language in the loan or security documentation, which aims to emphasise the need to preserve the capital of the security or guarantee provider, in line with recent case law and prevailing scholars' opinion.

SECTION 5: PRACTICAL LEGAL CONSIDERATIONS

5.1 Briefly explain (i) the typical security package available at closing and (ii) any downstream, upstream and cross-stream guarantees available in your jurisdiction, in each case, with reference to any specific restrictions or limitations.

Guarantees can be provided in loan documentation or standalone documents. Securities, whether downstream, upstream or cross-stream, are generally documented by a Swiss law agreement providing for the terms of the acquisition of a security interest. The validity of the security interest may depend on further action (*acte de disposition*/*Verfügungsgeschäft*) by the relevant parties.

The grant of guarantees or securities is limited by provisions of corporate law governing transactions made by Swiss companies. These restrictions first relate to the scope of the corporate purpose clause set out in the constituent documents of the Swiss security provider, which should expressly cover the grant of guarantees or securities and the assistance to the financing of affiliated entities. In addition, if the guarantee or security provided by the Swiss entity for obligations of a sister or parent company is not considered to have been granted on at arm's length terms, the value of such guarantee or security should be limited to the amount of the freely available equity of that entity, ie, the portion of the shareholder's equity that is in excess of the registered capital and mandatory legal reserves. The parties would normally insert limitation language in the relevant guarantee/security provisions in order to acknowledge such corporate law restrictions and deal with their consequences.

No foreign debt quota is applied in Switzerland. Furthermore, the offshore financing by foreign lenders is generally not restricted, except if the loan is used to finance residential property. In such case, the foreign lender will need to lend on terms that are in line with the guidelines applicable to and standards applied by Swiss lenders in terms of loan to value and creditworthiness of borrowers on the residential property market. Furthermore, the foreign lender would not be entitled to acquire the property for its own account in the event of an enforcement of the mortgage.

5.2 Are there any specific issues or challenges creditors should be mindful of regarding an insolvency or restructuring situation? Have there been any major judicial changes to the insolvency system (or related judicial decisions) in your jurisdiction recently? How long does an enforcement process typically take?

As is the case in foreign jurisdictions, transactions made during the period preceding the adjudication of bankruptcy or other insolvency measure (such as the grant of a moratorium) are subject to potential avoidance in full or in part. Voidable are transactions made without proper consideration, the grant of security for a transaction that had not been previously collateralised or transactions made with the apparent intent of favouring certain creditors to the detriment of others. The hardening periods vary from one year to five years.

Swiss insolvency laws also provide for limitations to set-off provisions and, to the extent that the debtor is a bank or other regulated entity, the enforcement of loan or security contracts may be affected by the suspension of termination rights or bail-in/write-off measures taken by the regulator.

SECTION 6: OUTLOOK

6.1 What are your market outlook predictions for the next 12 months in cross-border financing in your jurisdiction?

Some legal challenges will continue to be faced by law firms in Switzerland in respect of cross-border financing. These will for instance relate to the trend of borrowers submitting first drafts to the lenders. Law firms will also need to adapt their opinions on the recognition of English judgments in Switzerland, depending on the consequences of Brexit on the applicable international treaties.