SWITZERLAND

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

Contributed by Bär & Karrer AG

Bär & Karrer AG has a finance team that advises banks and other financial institutions and companies on domestic and cross-border financing transactions across a wide range of industries. The firm's experience of acting not only for arranging banks and lenders but also for borrowers, issuers and private equity sponsors enables it to provide professional, efficient and timely advice to all parties of a financing transaction regarding acquisition finance (including equity and debt capital market transactions), leveraged finance, syndicated finance, real estate finance, convertible and high-yield bonds, financial structuring and asset finance.

Author

Frédéric Bétrisey is a partner and the head of the financing practice in Geneva, with extensive experience in banking regulations, project and acquisition financing, syndicated lending, real estate finance, funds, financial products and derivatives, and securitisation. He is a member of the Geneva Business Law Association and a visiting lecturer at the University of Fribourg, where he gives a course on acquisition financing, and at the Swiss Training Centre for Investment Professionals (AZEK) in Geneva, where he teaches on market abuse regulations.

There is currently no dedicated legislative framework for structured finance in Switzerland. Contractual and collateral aspects are governed by the relevant provisions of the Swiss Code of Obligations or of the Swiss Civil Code and specific laws will apply depending on the features of the transactions, the products offered and the underlying assets. Recent developments relate to the new assessment of the written form requirement applicable to certain types of contracts, the impact of the recognition of trusts in Switzerland and legislative developments affecting the regulation of structured products and derivatives, as well as prospectus rules.

Written or Not Written Form

Most relevant for structured finance transactions is the written form requirement applicable to the assignment of receivables, transfer of contracts and certain security arrangements, which implies (Article 14 of the Swiss Code of Obligations) that the assignor, transferor or security provider must execute the assignment, transfer or security document, respectively, or any related amendment, by way of manuscript signature or using a qualified electronic signature, which is an electronic process that requires certification by a recognised external provider pursuant to the Swiss Electronic Signature Act of 19 December 2003 and that is rarely – if at all - used in transactional matters. It is usually admitted that the acceptance of the assignment, transfer or security may be effected by the counterparty via conclusive means, such as the payment of the purchase price by an assignee under a receivables assignment. The written form aims to provide certainty on the intention of the parties and object of the contract; for instance, a written list of receivables, enclosed with the assignment and acknowledged by the assignor, should constitute evidence of the transferred receivables.

This requirement of written form is rather negatively affecting the structuring and closing of financing transactions, in an otherwise increasingly digitalised legal environment. The first question that arises in such context is whether the written form can be fulfilled electronically, by emailing scanned copies of signed documents. According to the view prevailing amongst scholars, such delivery method would be equivalent to the traditional communication of originals by post or courier, as the written form applies to the document and its signature, not to the delivery, and there is no evidence that a delivery by post would nowadays prove more secure than electronic delivery. However, in the absence of relevant case law, it remains uncertain whether Swiss courts would uphold such view.

Recent developments in Swiss legislation confirm, however, the move towards the use of electronic delivery as a way to

achieve the mandatory written form. For instance, under the new Swiss Financial Services Act (FinSA), adopted by the Swiss Parliament on 15 June 2018, the execution of certain legally relevant statements in – traditional – writing is explicitly considered as equivalent to any other form that provides evidence that such statements have been executed. The Swiss government has also indicated in a recent official statement that it intends to pursue its efforts towards an amendment to Swiss laws allowing for the equal treatment of electronic and original documents, thus acknowledging the global trend towards the adaptation of Swiss legislation to new technologies.

These recent developments do not, however, mean that any form of electronic communication will be deemed to fulfil the written form requirement. Even the scholars who give their blessing to electronic delivery methods consider that the delivered documents must still be signed by the relevant party. This excludes a mere confirmation by email from the scope of eligible written form equivalents, save where a scan of the signed document is attached to the email. An approval by way of a simple online click – eg, on an electronic platform set up for a factoring or securitisation scheme – would not meet the written form standards, unless a qualified electronic signature is used. Similarly, receivable purchase transactions that grant to an assignee or an operating agent the ability to select the assigned receivables from a basket of eligible receivables are not acceptable, unless the assignor subsequently acknowledges the selection in writing.

Trusts and Trustees

Trust structures are commonly used in structured financings – eg, through the appointment of a security agent to hold on trust certain assets provided as collateral for a borrower's obligations – or in the context of the creation of notes, whether privately placed or publicly offered, under a trust deed. Security trustees are also appointed to act on behalf of noteholders and other secured parties with respect to securitised assets.

Switzerland has been a member of the Hague Convention on the Law Applicable to Trust and its Recognition since 2007. Consequently, assets held by a Swiss person as trustee of a foreign law trust are segregated from the bankruptcy estate in the case of insolvency of the Swiss trustee. This segregation warrants the continuance of the security arrangement if a Swiss trustee becomes insolvent. The trust structure may be particularly helpful for certain types of Swiss law transactions involving non-accessory security, such as security assignments or transfers of title for security purposes, where the security agent must act in its own name but for the benefit of all creditors (such as noteholders or the members of a lending syndicate). Trust structures have also been widely adopted in Swiss securitisations, both as an appropriate structural feature for the holding of security on behalf of foreign secured parties and by way of alignment with market standards.

While foreign law trusts are recognised in Switzerland, no trust can be created pursuant to current Swiss law. This implies that, where a trust structure is contemplated under a transaction in a mostly Swiss context, foreign law advice will still be required, thereby increasing the legal work and costs. To remedy this gap, a parliamentary initiative was filed in December 2016 to initiate a legislative process aiming at the introduction of a Swiss law form of trust. That initiative has received the support of the Commission of Legal Matters of each of the two houses of the Swiss Parliament. Although the process is expected to take time, the possibility to create trusts under Swiss law would be extremely helpful to the setting up and implementation of structured finance transactions in the future.

Another interesting recent development is the introduction of a new regulatory framework for professional trustees pursuant to the Swiss Financial Institutions Act adopted by the Swiss Parliament on 15 June 2018, which is expected to come into force, together with the FinSA, on 1 January 2020. After that date, subject to certain transitional provisions, Swiss trustees will be required to obtain a licence from the Swiss Financial Market Supervisory Authority (FINMA). This new regulation of trustees should increase the level of confidence provided by the Swiss legislative framework from a foreign investor's perspective in the context of structured finance transactions involving Swiss trustees, particularly securitisations.

Structured Products

Under Swiss law a structured product is a note relating to an investment with fixed or unlimited term, which generally combines at least two financial instruments (including a derivative component) and the redemption of which depends on the evolution of the value of one or more underlying assets. Certificates, which replicate the performance of one or more underlying investments, are also generally considered as structured products.

Since 2007, structured products have been specifically addressed in the Swiss Collective Investments Scheme Act. They are not strictly speaking regulated, but their issuance and offering on the Swiss market to investors other than qualified investors are, inter alia, subject to certain disclosure requirements, including the obligation for the distributor to use a so-called simplified prospectus as a marketing document, when the product is not listed on a recognised stock exchange nor subject to equivalent foreign disclosure requirements. With the coming into force of the FinSA, the producers of financial instruments, such as structured products, will be required to make available a key information document when offering certain financial instruments to retail investors. This key information document is compa-

rable to the key investor document required under the EU rules on packaged retail investment products (PRIPs) and will thus replace the current requirement to make available a simplified prospectus to retail investors when distributing structured products.

Derivative Products

Switzerland adopted the Swiss Financial Market Infrastructures Act (FMIA), which came into force on 1 January 2016. The FMIA aims to regulate financial market infrastructures (including stock exchanges, multilateral trading facilities and central clearing counterparties) and to bring Swiss derivative regulations up to a level of equivalence with EU standards, in particular, the European Market Infrastructure Regulation (EMIR). In line with international standards, the FMIA requires the clearing of certain OTC transactions over central counterparties, prescribes risk mitigation duties for non-cleared OTC derivatives and imposes a platform trading obligation for certain transactions made between large counterparties. Some of these obligations have not come into force yet. Extensive phasing-in periods are set out in the FMIA and its implementing regulations, and some of the applicable deadlines have been extended.

The FMIA confirms the general approach of Swiss authorities, and constant trend, to ensure that Swiss financial legislation remains in line with EU and international standards.

Prospectuses

The FinSA also provides for a fully new set of prospectus requirements. Until now, the duty to prepare a prospectus has been set out in the Swiss Code of Obligations; it does not give rise to any surveillance by a public authority. Except for issuers listed on Swiss stock exchanges, there is no obligation to file a prospectus with, or obtain approval from, any authority.

Bär & Karrer AG
12, quai de la Poste
CH-1211 Genève 11
Switzerland

Tel: +41 58 261 57 00
Fax: +41 58 261 57 01
Email: geneva@baerkarrer.ch
Web: www.baerkarrer.ch

The new law reflects the EU-Prospectus Regulation and introduces into Swiss law a regulatory obligation to prepare a prospectus in connection with any public offering of securities or the admission to trading of securities on a trading venue. The obligation to prepare the prospectus will be triggered by a public offering if the securities are not traded on a Swiss exchange. It will cover primary and secondary market offerings, and will apply not only to the issuer, but to any person who makes a public offering or seeks the admission to trading of securities. Again in line with EU Standards, exemptions will apply in connection with offers limited to professional investors, to fewer than 500 investors, to investors who acquire securities for a consideration in excess of CHF100,000, to securities with a denomination of more than CHF100,000, or that aim to raise less than CHF8 million in aggregate over a period of twelve months. Other exemptions may apply depending on the types of transactions.

The new rules will obviously affect transactions entailing public offerings. Transitional periods will apply after the coming into force of the FinSA on 1 January 2020.

Evolution of the Swiss Market

Combined with certain changes in the general tax frameworks that were enacted a few years ago, the recent legislative changes should generally facilitate the implementation of structured financing transactions, including securitisations, or make them more attractive to foreign investors by bringing the level of Swiss legislation up to international standards.

The growing number of new public securitisation transactions with Swiss originators over the past years also sheds an optimistic light on the Swiss market. In addition, privately placed transactions or other transactions involving foreign SPVs have become quite common in Switzerland, whether they relate to residential mortgage-backed securities or trade receivables. Investors also show a growing appetite for mortgage bond programmes, demonstrating the robust nature and solid development trend of the Swiss structured finance market.