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Swiss Export Risk Insurance SERV, Project Finance and Capital Markets – a Challenging Combination

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I. Introduction

Insurance products of the Swiss Export Risk Insurance SERV («SERV»), the Export Credit Agency («ECA») of Switzerland, have become increasingly popular as a component of large project finance transactions. In December 2018, the significant increase of the coverage volume prompted the Swiss Federal Council to increase the coverage ceiling from CHF 14 billion to CHF 16 billion to ensure that SERV could continue to meet the needs of businesses across a wide range of sectors by protecting Swiss exporters from defaults of their clients and facilitating export financing through the provision of insurance to lenders. Moreover, large scale transactions have become more common. Outside of the exporting industry, still only a relatively narrow circle of bankers, experts and lawyers are familiar with ECA covered transactions, including SERV insured transactions. Furthermore, even though ECAs, including SERV and its predecessor organization Export Risk Guarantee («ERG») in Switzerland, have been in existence around the globe for decades, it appears – based on the number and type of as well as increasing demand for ECA covered transactions – that export businesses have not yet fully utilised their potential benefits.

In a recent large-scale transaction, a SERV insured project financing was combined with capital market financing. To reconcile the differing requirements of the two types of financing, the transaction had to be structured in a complex manner. It remains to be seen whether such an innovative combined capital market financed SERV insured project financing will become a new phenomenon and provide for an alternative way to promote export business in times of increasing regional first considerations.

This abstract revisits some of the basic principles of SERV and its product portfolio, illustrates typical structures and features of ECA covered project financing transactions and, finally, explores the challenges and potential solutions for combined capital market financed SERV insured project financing transactions.

II. Swiss Export Risk Insurance SERV

1. SERV as a Facilitator for the Swiss Export Business

SERV is an important facilitator for the Swiss export business: it issued 934 insurance policies and insurance

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commitments in 2018 and its overall insurance obligations at the end of 2018 amounted to CHF 11.4 billion. Furthermore, SERV's premium revenues reached CHF 94 million in 2018 (compared to CHF 64 million in 2017).

The insurance commitments of SERV are of vital importance to Swiss exporters. This is particularly true for large scale transactions, as the success of such business depends heavily on its (guaranteed) financing and because Swiss exporters face tough international competitors (being supported by their own local ECA agencies) as they tender for the award of international contracts.

2. From the Export Risk Guarantee (ERG) to the Swiss Export Risk Insurance SERV (SERV)

SERV is the successor organisation of the ERG, a former organisation of the Swiss federal government founded in 1934 with the objective of securing jobs and promoting the export business of Swiss companies. ERG was created by the emergency law «Resolution of 28 March 1934 on the promotion of exports by way of public risk guarantee» authorising the Swiss Federal Council to issue export guarantees as a response to the Great Depression in the 30's and the resulting high unemployment rate in Switzerland. In order to implement the resolution, the Swiss Federal Council issued an ordinance on governmental risk guarantee on 17 April 1934.[1]

The insurances provided by ERG enabled Swiss exporters to insure those export transactions associated with payment receipt risk due to politically and economically unstable circumstances that were uninsurable in the private insurance sector. ERG operated its business independently and on a self-sustaining basis *(eigenwirtschaftlich)*.

Originally, ERG was only capable of insuring risks relating to private buyers, so called private buyer risks, to a limited extent (as opposed to sovereign risks). However, changes in the prevailing global economic environment in the 20th century and, in particular, the privatisation wave in a number of importing countries led to an increase in the market share of private buyers and associated private buyer risks. This had a significant effect on the effectiveness of ERG as it faced restrictions on its ability to insure such transactions of private buyers. This in return had a negative effect on the competitiveness of Swiss exporters on global markets.

These developments led to the decision of the Swiss Federal Parliament to organise ERG differently: it passed a Federal Act on the Swiss Export Risk Insurance[2] (SERVG; «**SERV Act**») and, on this basis, the Swiss Federal Council issued an implementing ordinance, i.e. the Ordinance on the Swiss Export Risk Insurance[3] (SERV-V; «**SERV Ordinance**») which both entered into force on 1 January 2007. The enactment of the SERV Act was also the «hour of birth» of SERV as an independent public law institution replacing ERG, which was organised as a legally dependent public fund. Due to the robust financial situation of ERG at the time of the conversion, the creation of SERV did not require any seed capital by the Swiss federal government.

Currently, SERV is an institution under public law of the Swiss Confederation *(öffentlich-rechtliche Anstalt des Bundes)* domiciled in the Canton of Zurich having its legal foundation in the SERV Act and the SERV Ordinance, both as amended as of 1 January 2016. As an institution under public law, it does not have any shareholders or members. SERV is part of the decentralised Swiss federal government and is within the scope of the administrative oversight competence of the Swiss Federal Department of Economic Affairs, Education and Research («**EAER**»). However, the management of SERV is independent from the Swiss Confederation. SERV is subject to supervision by the Swiss Federal Council and ultimately overseen by the Swiss Federal Parliament, but it is independently organised and maintains its own accounts (art. 3 SERV Act).

SERV's primary objective is the promotion of Swiss exporting industries by offering insurance coverage for losses that are not reasonably insurable in the private insurance sector in Switzerland (art. 5 SERV Act). It does so by providing export risk insurances (see Section II.4. below on offered insurance products), thereby facilitating export financing and protecting jobs in Switzerland. The ultimate aim of SERV insurances is to promote the international competitiveness of the Swiss economy and to strengthen Switzerland's exports. However, as a public institution, it should not compete with the private insurance market (see Section II.4 below).

3. Organisation

On an organisational level, SERV is kept independent from the Swiss Confederation and has its own corporate bodies (i.e. board of directors, management and auditor; art. 22 SERV Act).

The Swiss Federal Council acts as the supervisory body of SERV and appoints the members of the board of directors and the auditor. The members of the board of directors are elected for a term of four years. SERV's corporate bodies are liable for their actions according to the general principles of director's liability pursuant to Swiss

1 AS 50, 304.

2 SR 946.10.

3 SR 946.101.

corporate law (cf. art. 752–760 Swiss Code of Obligations («CO»); art. 23 para. 1 SERV Act).

The Swiss Federal Council further decides on the strategic objectives of SERV for the medium and long term. These targets have to be implemented by the board of directors and the management team of SERV. Furthermore, the Swiss Federal Council determines the maximum limit of SERV's insurance commitments *(Versicherungsverpflichtungen)* so to limit the risk exposure of SERV. It increased the maximum insurance commitments of SERV by CHF 2 billion to CHF 16 billion in December 2018 (after an increase by CHF 2 billion to CHF 14 billion in 2016).[4]

By law, the board of directors of SERV shall consist of seven to nine members and has responsibility for the overall management and control of the institution (art. 24 para. 1 SERV Act). Currently, the board of directors consists of nine members.

The competences of the board of directors include, e.g., (i) fixing insurance tariffs; (ii) underwriting insurances; (iii) implementation of the strategic targets determined by the Swiss Federal Council; (iv) determination of the rules of procedure *(Geschäftsordnung);* and (v) personnel regulations (art. 24 para. 3 SERV Act). The board of directors has established an insurance committee and a finance and organisation committee from among its members that directly report to the board of directors.

The chief executive officer of SERV («CEO»; *Direktor*) heads SERV's management team which comprises three members. The CEO's competences include (i) the management of the business relating to non-strategic decisions; (ii) the organisation of SERV; and (iii) employment of personnel (art. 25 SERV Act). In addition, the CEO represents SERV externally.

In principle, the board of directors is responsible for any decision to enter into an insurance contract (art. 24 para. 3 lit. f SERV Act). However, the Swiss Federal Council can, at the request of the EAER, issue instructions to SERV relating to insurance policies of particular importance *(Versicherungen von besonderer Tragweite).* This provides the Swiss Federal Council with a (limited) veto right in relation to the issuance of policies in (politically or economically) sensitive transactions (art. 34 SERV Act). Insurance policies are deemed substantial insurance policies if they relate to export transactions with substantial economic, social, ecological, development or other foreign policy related consequences (art. 28 para. 2 SERV Ordinance). In this context, SERV is required to inform the EAER at an early stage so that the Swiss Federal Council may instruct SERV accordingly (art. 28 para. 1 SERV Ordinance). There is little guidance as to what is deemed an insurance policy of particular importance. However, it is in practice understood that the decisive criteria for a qualification as particularly important relate to reputational risks for SERV and Switzerland in general rather than simply to a high insurance coverage amount (resulting in a high exposure for SERV). However, this question is, to our knowledge, not yet conclusively clarified. The consequences of a failure by SERV to report a prospective transaction to the EAER are also not specified in the law. In our view, such a failure should in the absence of bad faith, in principle, not result in any detrimental effects on the policyholder and/or insured (as it is a mere internal procedure within the Swiss federal government). Consequently, an insurance policy of particular importance that has not been reported to the EAER prior to its conclusion should, in our view, not be null and void as this would leave a policyholder and the insured in a state of permanent uncertainty about whether its SERV insurance policy has been validly concluded.

4. Wide Scope of SERV Products

Services and type of coverage to be offered by SERV are defined by law. SERV's core business is providing insurance coverage for export risks that are defined in the SERV Act as del credere risks (*Delkredererisiko*, meaning the risk that an insured claim is not paid at maturity due to the debtor's unwillingness or inability to pay), political risks (*Politische Risiken*), transfer risks and payment moratorium *(Transferschwierigkeiten und Zahlungsmoratorien),* force majeure *(Höhere Gewalt),* risks resulting from security guarantees *(Risiken aus Sicherungsgarantien)* and foreign currency contingency risks *(Fremdwährungseventualrisiko)* (see art. 11 and 12 SERV Act and description in the «General Terms and Conditions» of the respective SERV insurance product). SERV offers a comprehensive range of insurance and guarantee products for individual transactions in relation to the export of goods and services over the entire life cycle of an export business, including buyer credit insurance, confiscation risk insurance, contract bond insurance, counter guarantee, letter of credit confirmation insurance, multi-buyer insurance, pre-shipment risk insurance, refinancing guarantee, supplier credit insurance, working capital insurance and working capital insurance for loans to subcontractors. The various products offered by SERV may be distinguished: a) with regard to the type of debtor (private or government debtor), b) the risk to be covered and c) the point of time the risk is insured (during manufacturing and/or during the payment or credit period). A policyholder may choose and combine those insurance and guarantee products depending on its individual needs.

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[4] The board of directors of SERV has to timely inform the Swiss Federal Council regarding the need to change the limit of SERV's insurance commitments (art. 26 para. 2 SERV Ordinance).

SERV is generally not allowed to interfere with the free economy of the private insurance market and, therefore, may offer its services only where no adequate insurance offerings for a respective export transaction are available in the private insurance sector in Switzerland (art. 5 para. 2 SERV Ordinance; *Subsidiarität*). Taking into consideration that almost everything is insurable in the private market at a certain price, this criterion might need to be put into perspective, but the spirit applies. SERV underwrites insurances by means of a decree *(Verfügung)*, being the customary form or, if required to safeguard SERV's interests, by public law contract *(öffentlich rechtlicher Vertrag)* (art. 15 para. 1 SERV Act). An insurance policy usually takes the form of a public law contract only in complex transactions or when the policyholder or beneficiary of the guarantee is domiciled abroad.[5] This also corresponds with the general principle of Swiss public law that the decree is the primary form of action of the Swiss federal administration (rather than concluding public law contracts)[6] and the limited power to issue decrees *vis-à-vis* foreign persons.

In principle, SERV provides insurance coverage for export transactions all over the world. However, in practice, its main activities relate to export business with Eastern Europe and Central Asia, Western Europe, the Middle East and North Africa. SERV insures all industries with its main focus on transactions by exporting companies in the rolling stock and railway sector, the machinery sector, as well as in the electrical and metal industry. As an example, by way of buyer credit insurance, financial institutions or providers of financing can insure their claims for payment against a foreign borrower in connection with finance transactions that are tied to Swiss export transactions (i.e. if the funds of the financing are intended to be used by the foreign borrower to pay a Swiss exporter).

5. SERV Funding and its Government Guarantee Protection

SERV is required by law to operate its business independently and on an economically viable basis *(Prinzip der Eigenwirtschaftlichkeit)*. SERV's main sources of funding include premium payments, interest payments and repayments of claims (e.g. as liquidation proceeds out of bankruptcy estates). Income from these sources has to cover incurred indemnity payments and operational costs. Minimum premiums are determined in accordance with the OECD Arrangement on Officially Supported Export Credits to ensure that Switzerland does not grant hidden subsidies in the form of reduced insurance premiums. While SERV is expected to cover its costs in each accounting period without requesting subsidies from the Swiss federal government, pursuant to art. 28 SERV Act, the Swiss federal government may grant SERV loans (so called treasury loans; *Darlehen*) at market rates to ensure SERV's ability to fulfil its tasks (including, if necessary, payment of proven insurance claims in the ordinary course of business).

As a result of the possibility of funding SERV with debt capital in the form of treasury loans, the Dispatch to the SERV Act[7] recognises that SERV benefits from an implicit government guarantee.[8] However, the Dispatch in this context also holds that any kind of contributions (in the form of equity) in order to restructure SERV in case SERV were to miss its goal of operating its business on an economically viable basis *(eigenwirtschaflich)* would require a *to-be-created* legal basis.[9] Such legal basis has never been adopted in law, at least not expressly. Against this background, while the legal basis to assume an implicit government guarantee in a going concern scenario is comprehensible, it is less obvious at least from a technical perspective with regard to a gone concern scenario.

Still, there are arguments supporting the concept of a de facto guarantee, including the fact that the Swiss Financial Market Supervisory Authority FINMA («FINMA») noted that SERV benefits from an implicit government guarantee, and that for the purpose of calculating capital requirements for a credit position insured by SERV, a Swiss regulated bank is exempt from the asset requirements and is eligible for sovereign risk substitution with up to 0% risk weight (cf. FINMA Circular 2017/07 «Credit risk – banks», N 298).

As indicated above, although SERV is active in a wide range of industries with a great variety of scale, large scale transactions still account for a significant share of SERV's overall exposure. From a risk diversification perspective, such large exposure on a few single transactions might also be challenging in terms of funding/liquidity requirements, if one (or more) of those large-scale projects were to run into financial difficulties.

6. Risks for ECAs Associated with ECA Financed Transactions

A significant portion of ECA supported transactions relate to large industrial and infrastructure projects in developing countries. Many of these projects may have serious environmental and social impact (including projects related to greenhouse gas-emitting power plants,

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5 Cf. Dispatch to the revision of the SERV Act (BBl 14.040), p. 4084.

6 Cf. TSCHANNEN/ZIMMERLI/MÜLLER, Allg. Verwaltungsrecht, Section 27 N 12.

7 Dispatch to the SERV Act (BBl 04.065), p. 5795 et seq.

8 Cf. Dispatch to the SERV Act, p. 5805: «Die implizite Staatsgarantie ist ohne Ausnahme ein Wesensmerkmal der staatlichen Exportkreditversicherer».

9 Cf. Dispatch to the SERV Act, p. 5843–5844.

large scale dams, mining projects, oil pipelines and road development in protected areas). Because such projects usually have a high risk profile due to their environmental, political, social and cultural impact, most would not be delivered without the support and financial backing of ECAs. However, such projects also entail certain risks for the involved ECA, especially including political and reputational risks. In addition, ECAs are also increasingly subject to public scrutiny for example through NGOs closely observing their activities.

It is for these reasons amongst others that SERV not only complies with applicable sanctions regulations in the same manner as other financial institutions, but has traditionally also taken an extremely cautious view of potential reputational risks, such as bribery and corruption, as well as possible environmental and social consequences of covered export transactions. In particular, the requirements of SERV, in terms of due diligence for a transaction and ongoing documentation deliveries, are strict and include social and environmental impact analyses and regular sustainability reports.

7. Excursus: Exemption of ECAs from Supervision by FINMA as Insurance Undertakings

ECAs are, in principle, pursuing an insurance activity in the meaning of the long standing jurisprudence of the Swiss Federal Supreme Court which defines a contract of insurance as a contract under which an insurer promises an economic performance to an insured (or a third person) in case of the realization of a risk in exchange for payment of a premium (see e.g. Swiss Federal Supreme Court decision 124 III 382, p. 397). Therefore, if (Swiss or foreign) ECAs are pursuing such activities in or out of Switzerland, they would theoretically, from a strictly formal perspective, be subject to authorization requirements and supervision by FINMA.

Under EU law, governmental or government guaranteed ECAs are explicitly excluded from the scope of application of insurance supervisory law (art. 5(iv) Solvency II Directive).

In Switzerland, SERV is exempt from the licence requirements under the Swiss Federal Insurance Supervisory Act[10] («ISA») because of the general exemption for insurance companies subject to special supervision pursuant to another Swiss federal law, in respect of activities covered by said special supervision (art. 2 para. 2 ISA).

For foreign ECAs, however, no similar explicit exemption exists under the current ISA. Therefore, if they are insuring a risk located in Switzerland, they would, in principle, be subject to authorization requirements and supervision by FINMA. However, in practice FINMA does not, to our knowledge, in line with many foreign regulations require foreign ECAs to subject themselves to FINMA supervision. The Swiss federal government also identified this gap in the law and introduced an explicit exemption for foreign ECAs as part of the partial revision of the ISA whose initial preliminary draft was in a consultation process until the end of February 2019.[11]

III. Typical Set-up of a SERV Insured Project Finance Transaction

1. Project Finance Transactions in General

Usually, project finance refers to the long-term financing of infrastructure and industrial projects. Traditionally, project financing has been common in the extractive (mining), transportation, telecommunications and electric power industries. In a project finance transaction, a special purpose entity («SPV») would usually be set up by the sponsors solely for the purpose of implementing (and usually also running) the project. The rationale of creating an SPV for each project stems from the attempt to shield other assets owned by a project sponsor (usually being global infrastructure companies) from potential detrimental effects of a project failure. As a special purpose entity, the SPV has no assets other than the project. Therefore, the financing (and repayment) conditions are usually based upon the projected future cash flows of the project rather than the balance sheets of the SPV (or its sponsors).

The SPV is typically debt funded by a «syndicate» of banks or other lending institutions that grant loans to the operation (usually referred to as «senior debt») forming the largest but not the sole source of funding for the SPV. The remaining portion of the required financing will be provided by the sponsors in the form of equity (or junior debt) to ensure that the project is financially sound and to assure the lenders of the sponsors' commitment towards the project.

Furthermore, the SPV will act as borrower under the underlying financing agreements (e.g. loan facilities) and will be a party to a number of other project-related agreements. The contractual framework of a typical project finance transaction regularly comprises the following documents and agreements (see the chart in figure 1 below):

1) **Sponsor Agreement (or Shareholder Agreement):** The sponsors are those companies, agencies or indi-

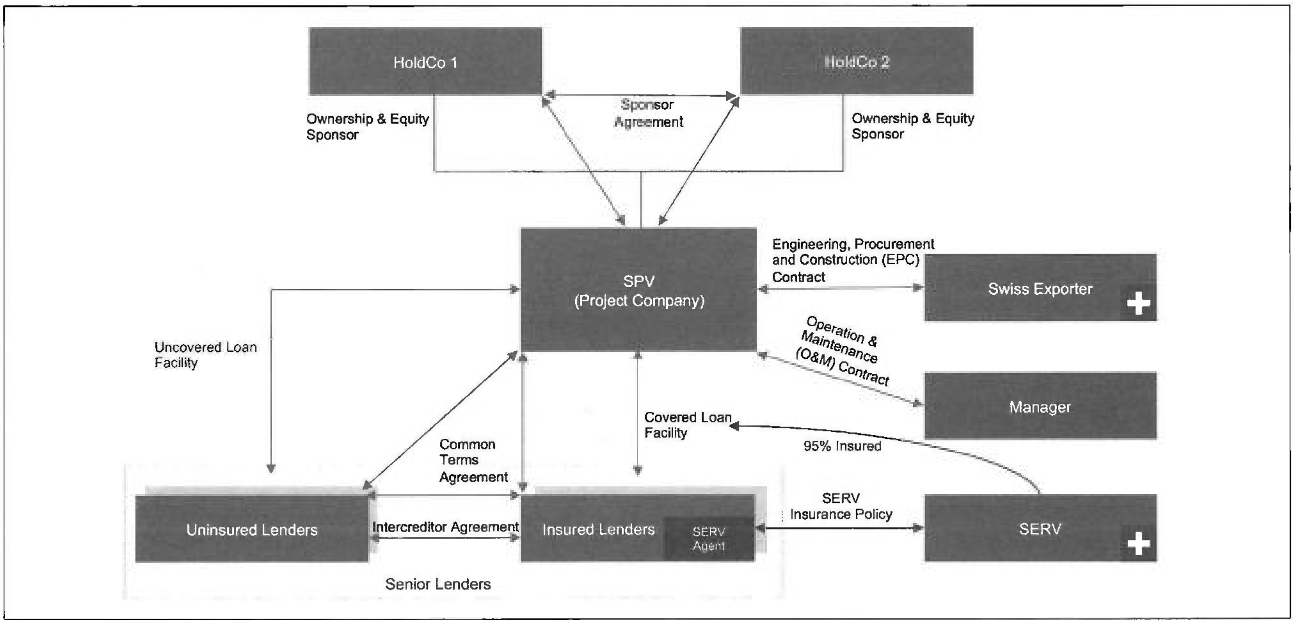
10 SR 961.01.

11 Cf. Explanatory Report on the Partial Revision of the ISA dated 14 November 2018, p. 13–14.

viduals who promote a project, bring together the various parties and obtain the necessary permits and consents necessary to initiate and run the project. They are invariably investors in the equity of the project company (but may in addition be debt providers or guarantors of the project company's performance). The support provided by project sponsors varies among projects but often includes the issuance of comfort letters, cash injection commitments, provision of completion support through guarantees and may also extend to providing management and technical assistance to the project company. The basic agreement on the support and commitment by each sponsor is usually included in the Sponsor (or Shareholder) Agreement as one of the key documents at the inception of the SPV.

2) **Engineering, Procurement and Construction (EPC) Contract:** Engineering, procurement and construction (EPC) contracts are a common form of contract to undertake construction work for large-scale and complex infrastructure projects. Under an EPC contract, a contractor undertakes to construct and deliver a complete project facility to an operator, often for a guaranteed price and by a fixed date, with a list of detailed specifications and certain performance warranties.
3) **Operation & Maintenance (O&M) Contract:** Operation & Maintenance or O&M Contracts are project finance documents that establish a contractual relationship between the project company (i.e. the SPV) and a qualified management company as the operator of the project facilities. In principle, O&M Contracts have the same purpose in the operations phase of the project as EPC Contracts do in the construction phase to the extent that both contracts relate to the outsourcing of certain activities from the SPV to a third party service provider. However, in contrast to an EPC which is required for every project, an O&M Contract may not be necessary for every project because an SPV may elect to operate the project itself instead of mandating a third party operator by entering into an O&M Contract.
4) **Loan Facility Agreement:** The Loan Facility Agreement is the main document between the lenders and SPV and contains the terms of the project funding including the repayment schedule based on the projected cash flow of the project. The lenders will also require a security package and guarantees to protect their funds.
5) **Intercreditor Agreement:** The Intercreditor Agreement is entered into among the creditors (i.e. the insured and uninsured lenders) of the SPV and regulates the relationship between the different types of creditors providing finance to the project, including ranking of the various classes of creditors' entitlement to proceeds. It also sets out details of any agency relationships. The Intercreditor Agreement shall, in particular, ensure that in the event of a problem emerging, basic rules and principles are in place.
6) **Common Terms Agreement:** The Common Terms Agreement is entered into between the creditors (i.e. the insured and uninsured lenders) and the SPV setting out the terms that are common to all the financing instruments and the relationship between them (including definitions, conditions, order of drawdowns, project accounts, and voting powers for waivers and amendments). It shall, in particular, ensure that the parties have a common understanding of key definitions and critical events.

In summary, a typical structure of a SERV insured project financing transaction may be illustrated as follows:



This simplified chart reflects a typical structure of a SERV insured project financing transaction (including a buyer credit insurance issued by SERV). However, in practice a structure might also include additional structuring elements, including in particular further agency relationships and other elements to address project specific topics, resulting in further layers of complexity.

2. SERV Insurance in the Context of a Project Financing Transaction

2.1 General Set-up

A buyer credit insurance may insure (Swiss or foreign) financial institutions in relation to their claims for repayment against the debtor (i.e. the SPV) based on the loan agreement for loans that have been explicitly granted for the purpose of the purchase of certain goods and/or services from a Swiss exporter up to the maximum amount set forth in the insurance policy. The buyer credit insurance coverage may include payment default of the SPV due to political, *del credere*[12], transfer or force majeure risks. As a typical SERV product in the context of project financing transactions, SERV's buyer credit insurance («**SERV Insurance Policy**») is the focus of the discussion here.

Usually, a Swiss exporter acts as an EPC contractor in connection with the EPC Contract related to the construction, design and engineering of the infrastructure project. Considering that the SPV typically (i) has no or hardly any liquid assets during the construction phase and (ii) the financial means of the sponsors are limited, it is a common approach for such SPVs to take up a loan from Swiss or foreign financial institutions in order to pay the Swiss exporter. Such loan amounts, which are explicitly reserved for payments of sums owed by the SPV to the Swiss exporter under an EPC Contract in consideration for goods supplied and/or services rendered by the Swiss exporter under such EPC Contract (including ancillary financing costs and breakage costs) are eligible costs under the SERV Insurance Policy if such amounts are, at a later stage, not repaid under the loan facilities to the lending financial institutions. As SERV's primary objective is the promotion of Swiss exporting industries, it needs to be set out and agreed in the SERV Insurance Policy that the net proceeds from such covered loans are solely used to pay eligible costs, i.e. amounts owed by the SPV to the Swiss exporter under the EPC Contract. The maximum insurance coverage is limited to 95 % of the EPC contract value relating to the Swiss exporter (art. 17 para. 2 SERV Act) for the SPV's inability or unwillingness to repay the loan facility, or other failure to satisfy its payment obligations *vis-à-vis* the lending financial institutions, or due to political risks (i.e. unforeseeable, extraordinary measures of foreign states, war or warlike events, revolution, annexation, or civil unrest abroad), transfer risks (such as the SPV's inability to pay due to its inability to convert certain foreign currencies or due to payment moratoriums in a country), or force majeure events (such as, hurricanes, floods, earthquakes, volcanic eruptions, flood tides and nuclear accidents outside Switzerland). Claims for, in particular, damages, penalties, compound interest and currency losses as primary risks of insured foreign currency claims may not be covered by the insurance (section 1.5 of the GTC).

SERV also insures local costs incurred in the country of the importing party/buyer (i.e. the SPV) that are directly associated with the Swiss exporter's export transaction and are part of the receivables owed by the buyer to the Swiss exporter, such as the costs of constructing a building locally to store equipment supplied by the Swiss exporter. If the export financing has a term of more than 23 months, such local costs may be insured for up to 30 % of the respective EPC contract value.[13]

The policyholders of a SERV Insurance Policy are, in such a transaction, in principle the lending financial institutions. If several lending financial institutions are policyholders of a SERV Insurance Policy one of them is usually appointed as SERV Agent, representing all policyholders vis-à-vis SERV, with respect to the exercise of all of the policyholders' rights under the SERV Insurance Policy and making all applications, notifications and acts in relation to SERV.

2.2 Liability of SERV under a SERV Insurance Policy

A SERV Insurance Policy document consists of: (i) a main body text, (ii) the General Terms and Conditions («GTC») (one for each type of insurance/guarantee product offered by SERV)[14] and (iii) the special conditions. The GTC apply to the SERV Insurance Policy as an integral part of it, unless the special conditions provide for other provisions to address project-specific circumstances. The SERV insurance coverage only becomes effective upon the full receipt of the insurance premium by SERV. Prior to then, any indemnification is excluded (section 14.3.1 GTC) as SERV would otherwise need to collect its insurance premium by way of debt enforcement, but has already had to pay the insured amount to the policyholder. The SERV insurance coverage usually expires upon the full discharge by the SPV of its payment obligations under the loan facility agreement (section 2.6.2 GTC). The SERV Insurance Policy is subject

12 SERV in its general terms and conditions defines a *del credere* risk as the risk of the lenders that an insured claim is not paid at maturity due to the debtor's unwillingness or inability to pay.

13 See also https://www.serv-ch.com/en/products/financing-options/.

14 The discussion in this essay focuses on the GTC for SERV's buyer credit insurance, see GTC B, version 3.0 (valid as of 01.01.2016), available under https://www.serv-ch.com/fileadmin/Files/PDF/online-schalter/agb_ab_1.1.16/AGB_Kaeuferkreditversicherung_e.pdf.

to Swiss federal administrative law (section 20.2 GTC). The Federal Administrative Court of Switzerland has sole jurisdiction over disputes in connection with the SERV Insurance Policy, with a potential right of appeal to the Swiss Federal Supreme Court. If the policyholder has a registered office abroad, SERV is, however, also entitled to bring actions at any other foreign court having jurisdiction (section 20.2 GTC).

If the SPV fails to pay any amounts under the loan facility agreement covered by the SERV Insurance Policy, the SERV agent on behalf of the policyholders is entitled to submit a request for indemnification to SERV for the benefit of the insured lending financial institutions. A claim must be submitted at the earliest one month after non-payment by the SPV but within the forfeiture period of two years after non-payment (section 5.1.5 GTC) and submission requires evidence of such non-payment and delivery of documents related to such claim to SERV.

Upon submission of the claim and receipt of the information required under the SERV Insurance Policy, SERV will make a determination on payment of the claim within one month (section 9.1 GTC). Such one month period under the GTC is *de facto* expandable, as it only starts to run «upon receipt of all documentation required» which is subject to interpretation. In addition, the one month deadline is considered to be an administrative deadline period (*Ordnungsfrist*). Therefore, if SERV does not comply with such a period, the policyholder in fact only has a claim based on delay or denial of justice *(Rechtsverzögerung/Rechtsverweigerung)* against SERV which is subject to substantial legal hurdles. Therefore, this remedy is of a rather theoretical nature (as the lapse of the deadline itself would usually not constitute delay or denial of justice).

Conditions for indemnification include, among others, that: (i) the insured claim and related transaction documents are legally valid, due and free of any defences or objections; (ii) a risk covered by the SERV Insurance Policy materialises resulting in a loss; (iii) there are no legal obstacles to the assertion or enforcement of the insured claim in the country of the debtor (i.e. the SPV) that were known (or should have been known) at the time of conclusion of the SERV Insurance Policy; (iv) there are no reasons for exclusion of indemnification (see below); and (v) the one month waiting period has expired and the request for indemnification is submitted to SERV within two years from the event of loss (section 5 GTC).

2.3 Termination Rights of SERV and the Duties of a Policyholder under a SERV Insurance Policy

Under the GTC of the SERV Insurance Policy, SERV may terminate the SERV Insurance Policy and terminate or reduce the insurance coverage if any of the following occurs: (i) the policyholder breaches any of its obligations under the SERV Insurance Policy (see below) if SERV concludes that either it would not have issued the SERV Insurance Policy at all or not to the same extent had the policyholder fulfilled its obligations or such breach has caused or threatens to cause a loss to SERV, unless the policyholder establishes that the breach of obligations was not its fault (section 14.1 and 14.2 GTC); (ii) infringement of Swiss or applicable foreign law when the loan facility agreement was executed or is performed (section 14.3.2 GTC); and (iii) the SERV Insurance Policy was underwritten based on false information (art. 18 lit. a SERV Act).

The policyholders (i.e. the insured financial institutions) must in particular comply with several requirements and covenants throughout the term of the SERV Insurance Policy (section 13 of the GTC) to be entitled to receive indemnification in the event of a non-payment by the borrower. In particular, the policyholder:

- has to fully and correctly disclose all circumstances material to the acceptance of the insurance and entitlement to indemnity.
- must not violate any Swiss or foreign legal provisions in connection with the conclusion or performance of the loan agreement (which applies, in principle, to a violation of Swiss or foreign law by any person being involved in the granting of the loan, not only the policyholder).
- upon carrying out the credit transaction, may not substantially deviate from the facts documented in the insurance policy unless it obtained consent from SERV. In addition, the policyholder may waive any existing collateral only with the consent of SERV, even if the collateral is not documented in the insurance policy.
- has to inform SERV without delay of any material breaches of obligations by the debtor as well as of the occurrence of any risk aggravating factors and of an event of loss. The occurrence of risk aggravating factors is assumed, in particular, if the debtor submits a request for extension or if other information about a general deterioration in the financial situation of the debtor or any jointly liable third party is available.
- must not make any further disbursements of the loan without the consent of SERV if risk aggravating factors have occurred since the insurance was accepted.
- may only terminate the loan agreement or suspend disbursement of the loan for goods and services that the exporter had provided with the consent of SERV if SERV agrees.
- has to take all appropriate and necessary measures to avoid an event of loss or to mitigate any loss, with all due care required by sound banking practice. The policyholder shall follow any instructions from SERV in this regard without delay.

- upon occurrence of an event of loss, must inform SERV of any defences and objections that the debtor or any jointly liable third party raises against the debt in default.
- must inform SERV at any time upon request of the particulars and the execution status of the export transaction, and of any other circumstances that could be material to the insurance.
- has to grant SERV or its authorised representative access to books, records, and other documents that could be material to the insurance.

In addition, SERV may terminate the insurance policy if: (i) the policyholder violates the SERV Insurance Policy to such a degree that SERV can in good faith no longer be expected to continue the insurance, or (ii) the policyholder breaches its obligations under the SERV Insurance Policy in any other way and SERV has requested that the breach be remedied within a set deadline and notified that it will terminate the insurance if the breach is not remedied by the time the deadline expires (section 18.1 GTC). Both provisions provide SERV with considerable discretion as to whether it chooses to terminate an insurance policy or not. Such discretion shall enable SERV to decide on a case by case basis. In practice, we would expect that SERV will probably be rather reluctant to make use of such provisions in order to avoid the reputation of being overly restrictive, in particular when it comes to an indemnification event.

In this context, it needs to be considered that SERV does not, in principle, accept the taking of any documentation risk. This means that SERV does not review the underlying transaction documents to establish whether they are consistent with the terms of the SERV Insurance Policy. Instead, any inconsistencies in the transaction documents may constitute a reason for exclusion of indemnification. Therefore, the policyholders (i.e. the financial institutions for a buyer credit insurance) must ensure that any obligation and requirement stipulated in the SERV Insurance Policy are properly reflected in the loan documentation to ensure that the borrower is also contractually obliged to comply with the said obligations and requirements (as the borrower is not a party to the SERV Insurance Policy in such a set-up). For example, the cash flow waterfall structure (see Section III.2.4 below) agreed in the SERV Insurance Policy must be mirrored in the loan documentation so that it becomes binding on the borrower as well. If this has not been ensured and the borrower fails to comply with the agreed waterfall structure, the policyholders are exposed to the potential risk that SERV might terminate the insurance policy or terminate/reduce the insurance coverage.

In addition to such SERV specific limitations, the validity, binding effect, and enforceability of rights and obligations of the SERV Insurance Policy may, at least if the SERV Insurance Policy has been concluded in the form of a public law contract, be or become limited by rules of law of general application. These include rules in respect of contracting under the influence of error, fraud, misrepresentation, threat or duress; exploitation; impossibility of performance; material alteration of relevant circumstances[15]; set-off; the exercise of rights and performance of obligations in good faith; and the prohibition of an abuse of rights[16]. Furthermore, in accordance with general principles of Swiss administrative law, the SERV Insurance Policy may be void or revocable if SERV issues the SERV Insurance Policy in breach of the SERV Act (depending on the severity and obvious nature of the breach). [17] Such risk of an insurance policy being null and void without any faults by the policyholder might, in practice, result in considerable uncertainty on the validity of the insurance policy. Therefore, such general Swiss civil and administrative law principles, should, in our view, be applied with restraint.

Similar considerations also apply in relation to the authority of certain representatives to sign insurance policies on behalf of SERV. In principle, SERV has a list of authorised signatories being entitled to represent SERV. However, as discussed in Section II.3 above, the Swiss Federal Council can issue instructions to SERV with regard to insurance policies of particular importance *(Versicherungen von besonderer Tragweite)* providing the Swiss Federal Council with (limited) veto rights in relation to the issuance of policies in (politically or economically) sensitive transactions (art. 34 SERV Act). As mentioned above, an insurance policy of particular importance that has not been reported to the EAER prior to its conclusion should, in our view, not be null and void as this would leave a policyholder and the insured in a state of permanent uncertainty about whether its SERV insurance policy has been validly concluded.

2.4 Cash Flow Waterfall Structure

The cash flow of project financing transactions is usually made subject to a waterfall structure, regulating the priority of each cash inflow and outflow. The cash flow waterfall ensures that each cash flow item occurs in line with the correct seniority to other items.

In the context of SERV insured transactions, the cash flow waterfall is especially important: (i) to ensure that the means are solely used for the intended purpose and

[15] According to the Swiss Federal Supreme Court, an especially high standard applies for the *clausula rebus sic stantibus (cf. e.g. BSK OR-Wiegand, Art. 18 N 99 ff.)*. This standard might, in our view, be even higher if the contracting party is a governmental authority in order to protect the good faith in governmental actions.

[16] In analogy to Swiss civil law; cf. Tschannen/Zimmerli/Müller, Allg. Verwaltungsrecht, Section 34 N 9 and N 10.

[17] Cf. Tschannen/Zimmerli/Müller, Allg. Verwaltungsrecht, Section 35 N 8 and N 9.

(ii) when determining the debt repayment order of various debt tranches with different seniority.

Usually, an account-holding bank will be instructed to apply the money during the project phase in a specific pre-defined order that might look as follows (illustrative example):

1. Firstly, the funds shall be used for payment of the operating expenses and taxes relating to the project (including any agents' fees and bank charges then due and payable);
2. Secondly, the means are used for funding of the debt service payments, including principal and interest then due and payable;
3. At the lowest priority, certain limited funds might be used for distributions to the sponsors and shareholders of the project.

Furthermore, the cash flow waterfall usually also provides for a specific order of payment of any proceeds from enforcement actions against the SPV in case of instances like a bankruptcy proceeding:

1. As the first priority, such proceeds are usually used to pay the costs, charges and indemnities of the involved agents and banks;
2. In second priority, the proceeds are usually used for payment of interest and principal due and payable to senior creditors, followed by payment of potential breakage costs;
3. Finally, the remaining amounts are paid to junior creditors (and, if any proceeds are still left, to the sponsors).

2.5 Payment Procedure under the SERV Insurance Policy

If SERV accepts a claim, it pays the indemnification within 30 days of such decision to the policyholders (i.e. the lending financial institutions) who are, in principle, also the beneficiaries under the SERV Insurance Policy.[18] SERV pays the indemnification usually in a single installment either in CHF or in a foreign currency, as agreed in the SERV Insurance Policy. Upon payment in full of the amounts payable under the SERV Insurance Policy, SERV by law assumes a claim and is subrogated in the claim of the lending financial institutions against the SPV, including ancillary claims and rights and liens over security, for reimbursement of an amount equal to the amount of the indemnity paid by SERV to the lending financial institutions. (However, notwithstanding any subrogation of rights, the policyholder still remains obliged to take any measures for recovering or realising assets and mitigating the loss.)

In this context, it is worth noting that the SERV Act explicitly provides for a legal basis for SERV to conclude debt rescheduling and restructuring agreements with the debtor country for insured claims and that the policyholders shall accept these agreements as if they had consented thereto (art. 31 SERV Act and section 12.1 GTC). As such country-wide government-approved debt schedule solutions are not available for private insurers, this is certainly one important factor why ECAs might sometimes be better placed to insure certain export transactions.

If, after the indemnification has been paid, it emerges that the conditions for indemnification were not fulfilled or subsequently ceased to exist, the indemnity paid must be refunded, along with any costs of legal action, including interest and any additional costs (section 15.2 and 15.3 GTC).

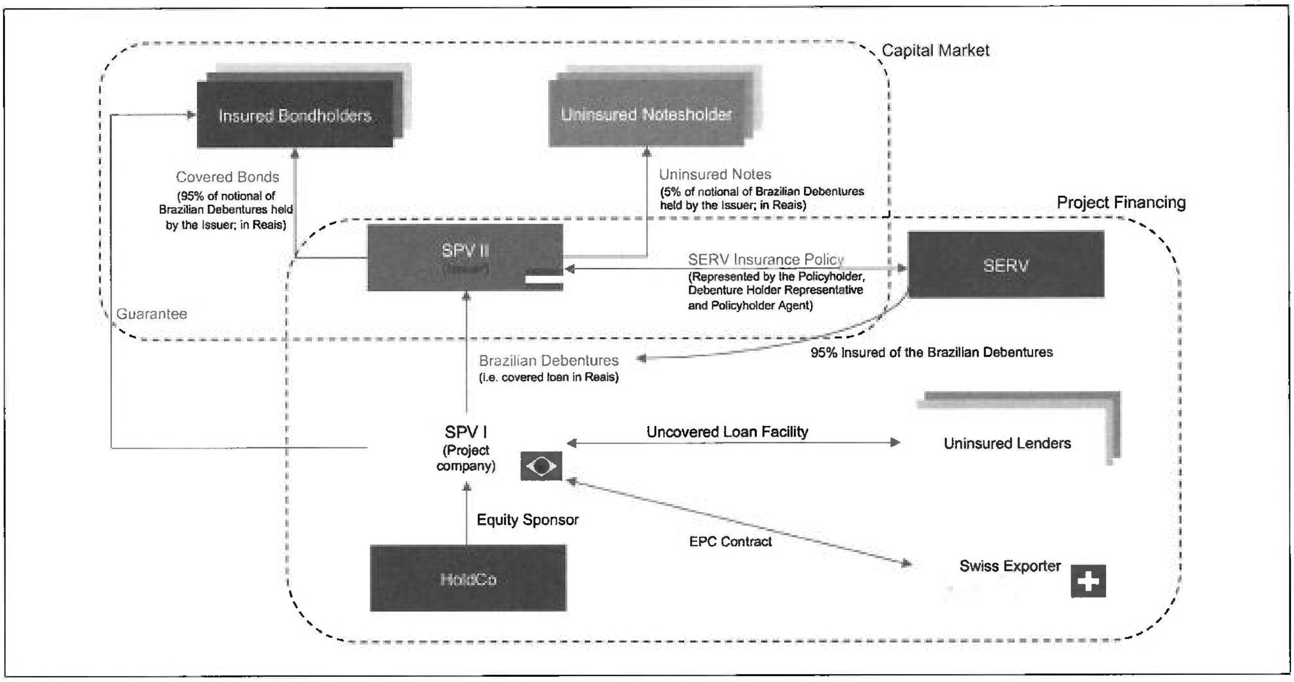
IV. Structuring of combined SERV Insured Project Financing and Capital Market Financing Transaction

1. Overview

In a recent large scale transaction, a SERV insured project financing was combined with capital market financing requiring the creation of an unprecedented legal structure to account for differing needs between financing and capital market transactions as well as to overcome regulatory hurdles in various jurisdictions. The key elements of the structure are set out in a simplified chart as follows (see the next page).

As part of its financing for the development, design, construction, financing, operation and maintenance of a thermal power plant in Latin America and the Caribbean, an SPV in Brazil («**SPV I**») issued Brazilian debentures in Brazilian Real denominated for a principal amount equivalent to approx. USD 1 billion. A separate special purpose vehicle incorporated under the Laws of Luxembourg («**Issuer**»/«**SPV II**») purchased all of the Brazilian debentures issued by the SPV I. In order to acquire these Brazilian debentures, the Issuer: (i) issued bonds denominated in Brazilian Real at a fixed, long-term rate in the international capital markets (with listing of the bonds on the Luxembourg Stock Exchange) for a notional amount equal to 95 % of the principal amount of the Brazilian debentures purchased by the Issuer from the SPV I (i.e. approx. USD 950 million) («**Bonds**») and (ii) incurred indebtedness pursuant to a notes agreement with certain noteholders for a notional amount equal to 5% of the principal amount of the Brazilian debentures

[18] The policyholders are, however, usually not those who pay the premium *(Prämienzahler)* as the amount of the premium is usually paid by the borrower (by way of a reduced loan amount that is effectively paid out to the borrower).



purchased by the Issuer from the SPV I. Apart from that, the SPV I also entered into loan facility agreements with other uninsured lenders totaling an additional loan amount of approx. USD 500 million.

The Bonds had been backed by a guarantee of SERV (in the form of a buyer credit insurance), being, to our knowledge, the first time ever an ECA was structured as a guaranteed transaction with capital market financing. Specifically, SERV issued a buyer credit insurance policy providing for payment of 95 % of the outstanding principal and accrued interest due and unpaid under the Brazilian debentures, up to a total insurance cap of an equivalent of approx. CHF 1 billion, as a result of the SPV's inability or unwillingness to pay, or other failure to satisfy its payment obligations, under the Brazilian debentures due to political risks, transfer risks (including the inability to transfer offshore and convert payments due under the Brazilian debentures (for the benefit of non-Brazilian holders of the Brazilian debentures), or *force majeure events*, subject to the conditions set forth in the SERV Insurance Policy. As the Bonds amounted to exactly this 95 % of the outstanding principal and accrued interest due and unpaid under the Brazilian debentures, the Bonds were, as a consequence, indirectly fully guaranteed by SERV. Consequently, if the SPV I was unable to repay the amounts due under the Brazilian debentures and, therefore, the Issuer could not repay the amounts due under the Bonds, SERV would pay such amounts due under the Bonds to the issuer who in return may repay the Bonds.

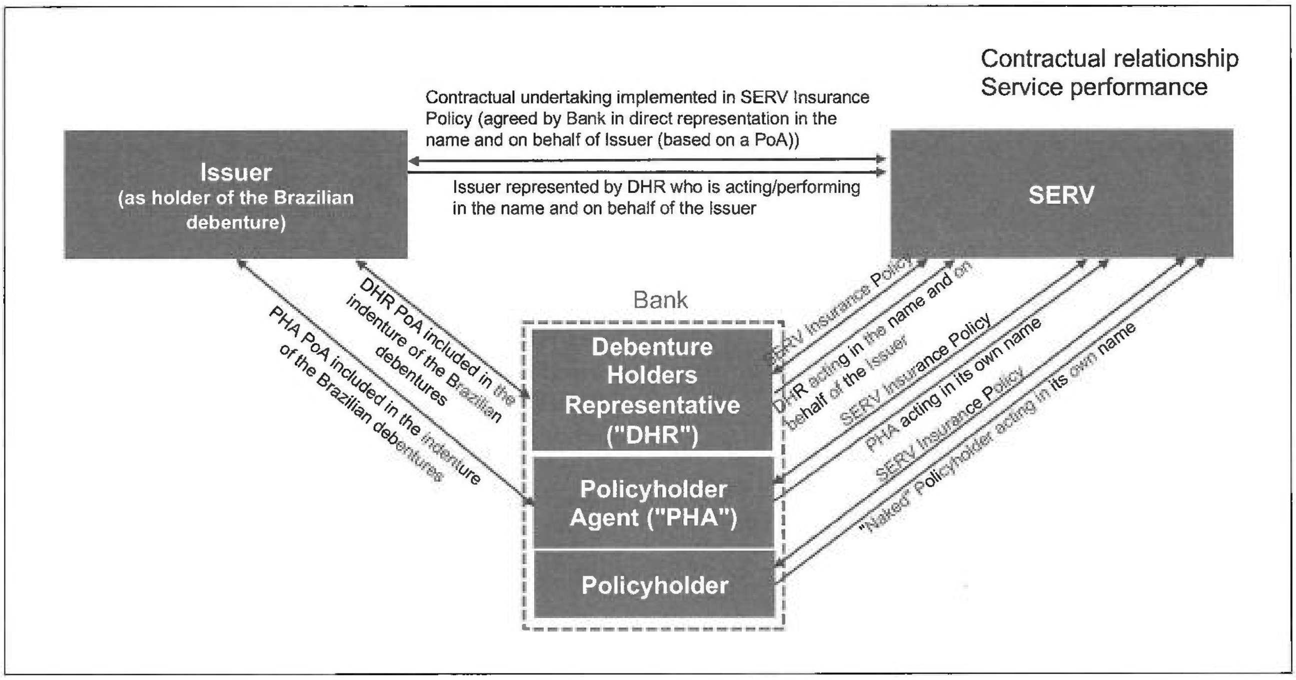
One of the EPC contractors in relation to the construction, design and engineering of the gas turbines required for the power plant was a Swiss exporter. Therefore, the borrowed amount by the SPV I was eligible for SERV insurance up to 95 % of the amount of the EPC Contract relating to the Swiss Exporter. As such, 95 % of the amounts due by the SPV I to the Swiss exporter pursuant to the EPC Contract in consideration for the turbines provided by the Swiss exporter under the EPC Contract were eligible costs under the respective SERV Insurance Policy.

Any proceeds from the issuance of the Bonds that were not directly disbursed were structured as a synthetic Brazilian Real loan to mitigate the potential negative consequences of cross-border currency controls and restrictions. Such structuring enabled the account bank to initiate payments to the Swiss exporter that were eligible for coverage by SERV on a monthly basis upon receiving from the SPV I the respective invoices issued by the Swiss exporter avoiding an exposure to currency fluctuations of the Brazilian Real.

2. Challenges and Potential Solutions

2.1 Contractual Set-up and the role of the Bank

From a Brazilian regulatory law perspective, the holders of the Brazilian debentures (i.e. the Issuer) may not itself be policyholder of the SERV Insurance Policy because this would have potentially triggered Brazilian securities law requirements for the Issuer. Instead, it had to be directly represented by an international bank (**«Bank»**) acting in the name and on behalf of the Issuer (or potential other holders of the Brazilian debentures in the future) to undertake contractual obligations *vis-à-vis* SERV under the SERV Insurance Policy. In addition to



such direct representation of the Issuer by the Bank, a policyholder agent (in the present case being also the Bank) acting in its own name but on behalf of the Issuer (i.e. in the form of an indirect representation) had to perform certain activities and obligations under the SERV Insurance Policy. To implement this set-up of legal representation properly, the contractual relationship was structured as follows (see above).

SERV is the insurer under the SERV Insurance Policy.

The Bank entered into the SERV Insurance Policy in the following roles:

(a) As policyholder and contractual counterparty of SERV in its own name, but for the benefit of the Issuer (in such capacity the «**Policyholder**») *(indirekte Stellvertretung)* thereby assuming all rights of the Policyholder under the SERV Insurance Policy in its own name, but for the benefit of the Issuer;

(b) As a direct representative (in such capacity the «**Debenture Holders Representative**») of the Issuer acting in the name and on behalf of the Issuer (based on the powers granted to the Bank under a (Brazilian law) irrevocable power of attorney under Brazilian law included in the indenture of the Brazilian debentures («**DHR PoA**»), assuming at any time the rights, obligations, liabilities and duties assigned to the Issuer under the SERV Insurance Policy for the account of the Issuer only (or for potential other holders of the Brazilian debentures in the future);

(c) As an indirect representative (in such capacity the «**Policyholder Agent**») acting in its own name (based on a (Brazilian law) irrevocable power of attorney included in the indenture of the Brazilian debentures; the «**PHA PoA**») and in such capacity assuming certain limited rights, obligations, liabilities and duties that have been specifically allocated to the Policyholder Agent in the SERV Insurance Policy.

The Issuer is the direct beneficiary under the SERV Insurance Policy. In addition, the Issuer directly represented by the Bank in its capacity as Debenture Holders Representative is a contractual counterparty to SERV under the SERV Insurance Policy. This contractual set-up was required to address Brazilian regulatory law requirements and Brazilian law limitations on legal representation but also to account for the Swiss public law requirements for SERV e.g. on the allocation of rights and obligations as well as the application of Swiss Federal Administrative law in order to be able to issue the SERV Insurance Policy.

2.2 Allocation of Rights and Obligations under the SERV Insurance Policy

The SERV Insurance Policy was drafted in a way that the Bank as «naked» Policyholder (and Debenture Holders Representative) has, in principle, no obligations, liabilities and duties.

The Issuer directly represented by the Debenture Holders Representative originally assumed all rights, obligations and duties of the «policyholder» as referred to in the GTC as well as any and all obligations under the SERV Insurance Policy, with the exception of those rights and obligations that have been specifically allocated to the Policyholder Agent as its obligations (see below). Hence, by default, the Issuer (directly represented by the Bank in its capacity as Debenture Holders Representative) assumed as a contractual counterparty of SERV any such obligations under the SERV Insurance Policy.

The Bank in its capacity as Policyholder Agent assumed in its own name only such obligations and duties which are specifically listed in the GTC and the special conditions of the SERV Insurance Policy. However, under the GTC in relation to any of the Policyholder Agent's obligations and duties, the Policyholder Agent is only required to take any action to the extent it has received or had access to the information (from the Issuer or subsequent holders of the Brazilian debentures) enabling it to comply with its obligations and duties. Further, the Policyholder Agent should only be liable vis-à-vis SERV for any and all claims and damages incurred by SERV as a result of any breach of the obligations and duties specifically assumed by the Policyholder Agent as outlined in the SERV Insurance Policy caused by the standard of negligence as defined in the SERV Insurance Policy.

However, under the SERV Insurance Policy, the Policyholder Agent is obliged to use its efforts as determined in the SERV Insurance Policy to assist SERV with respect to any reimbursement claims against the Issuer (and holders of the Bonds) at the upstream level including the process of identifying the Issuer (and the holders of the Bonds) as well as enforcing the liabilities thereof.

2.3 Application of Swiss Administrative Law and the Jurisdiction of the Swiss Administrative Court

Under the mandatory legal framework, the SERV Insurance Policy is subject to Swiss federal administrative law and to the jurisdiction of the Swiss Federal Administrative Court (see above Section III.2.2 above). In contrast, the Brazilian Debenture Indenture (including the PoAs granted by the Issuer to the Swiss Bank in its capacity as Debenture Holders Representative and the Policyholder Agent) is subject to Brazilian law and to the jurisdiction of Brazilian courts.

Swiss federal administrative law applies to the Issuer as holder of the Brazilian debentures if it is a direct contractual party to SERV under the SERV Insurance Policy. However, as a matter of Swiss public law, parties to a civil law contract such as the Brazilian debentures cannot effectively agree to the choice of Swiss federal administrative law or subject themselves to the jurisdiction of the Swiss Federal Administrative Court. For this purpose, the Issuer had to become a counterparty to SERV under a Swiss public law contract, i.e. the SERV Insurance Policy. This has been structured by direct representation of the Issuer through the Debenture Holders Representative based on the DHR PoA through which the Debenture Holders Representative entered into the SERV Insurance Policy agreement in the name and on behalf of the Issuer. By virtue of such direct representation by the Debenture Holders Representative, the Issuer has originally assumed obligations and liabilities under the SERV Insurance Policy.

Consequently, any obligations under the SERV Insurance Policy assumed by the Issuer (directly represented by the Debenture Holders Representative based on the DHR PoA) are subject to Swiss administrative law and the Swiss administrative courts have jurisdiction. Therefore, the legal requirements of having (i) Swiss administrative law as governing law and (ii) jurisdiction by the Swiss administrative courts were met in this transaction.

2.4 Payment of the SERV Insurance Premium

As a matter of principle, the SERV insurance coverage only becomes effective upon the full receipt of the insurance premium by SERV. Prior to this point, any indemnification shall be excluded (section 14.3.1 GTC; see also Section II.2.2 above).

The Bonds were structured and promoted as being guaranteed from the outset, i.e. as from the issuance of the Bonds that occurred on a Delivery versus Payment (DvP) basis against the payment of the nominal amount of the Bonds.

The payment of the SERV insurance premium, however, was intended to be made out of the proceeds received from the issuance of Bonds. This resulted in a timing gap between the issuance of the Bonds and the effectiveness of the SERV insurance coverage as the proceeds from the issuance of the Bonds had first to be transferred to an account of SERV. In order to bridge and resolve this timing gap, a reputable bank had to issue a standby letter of credit including an irrevocable undertaking to repay any amount under the Bonds until the SERV insurance coverage became effective (i.e. a risk-taking engagement and, therefore, a cost factor).

2.5 Differing Needs of (Project) Financing Transactions and Capital Market Transactions

An additional hurdle resulted from the contradicting specific requirements of financing and capital market transactions: in project financing in general and ECA financed projects in particular, the parties typically aim for a high degree of flexibility in case of a financially distressed situation of the borrower (e.g. in terms of repayment schedule) allowing a borrower to recover financially and then to structure the agreements accordingly because of the financial flexibility of the lenders and the limited number of involved parties. In contrast, capital market instruments, in principle, aim for a predetermined, fixed and inflexible repayment schedule which may not be delayed and can therefore result in an insolvency/bankruptcy proceeding in case of a delay in repayment if certain events occurred or conditions have been fulfilled (or have not been fulfilled anymore).

A typical example for such contradicting requirements is the potential payment of a claim by SERV upon an event of default. From a capital market perspective, fixed deadlines of such payments upon an event of default are required for investors. In project financing, however, such payments are structured rather flexibly in order to account for the specific situation and, if appropriate, to allow a borrower to make a financial recovery. In the present case, this contradiction has been mitigated by agreeing on a fixed deadline of one month in the SERV Insurance Policy for SERV to pay the claim, but: (i) making the beginning of the period dependent on the receipt of all documentation required (as determined by SERV) and (ii) structuring such deadline as an administrative deadline period *(Ordnungsfrist)* having usually no immediate consequences if SERV does not comply with the 30 day period (see also Section III.2.2 above). Furthermore, the role of the Policyholder Agent in the SERV Insurance Policy was strengthened to ensure the flexibility required from a project financing perspective by providing them with certain discretion. In order to limit the risk exposure of the Policyholder Agent when exercising their discretion in providing certain notifications and declarations, their liability has been limited to the extent legally permissible. Furthermore, only very limited obligations were assumed by the Policyholder Agent to further reduce any potential risk exposure.

Overall, the challenges of aligning, harmonising and reconciling the two conflicting approaches have been mitigated or resolved in the present transaction by various features to ensure the required flexibility and at the same time addressing the needs of the capital markets by implementing strict grace periods and deadlines in the SERV Insurance Policy.

V. Conclusions and Outlook

Insurance products of SERV aim to protect Swiss exporters from default of their customers, thereby facilitating export financing and protecting jobs in Switzerland. Although SERV and other ECAs have been in existence for decades, it appears that not all export businesses have yet fully utilised the potential benefits of protecting themselves with the support of SERV.

It remains to be seen whether innovative combined capital market financed SERV insured project financing will be applied in future (large-scale) transactions or even become a new phenomenon and provide for an alternative way to finance and promote Swiss export business. The success of such innovative financing transactions will heavily depend on whether a buyer is prepared to assume the costs for such complex structuring and/or whether alternative financing is available at all or at more favorable conditions. Furthermore, the suitability of such structuring will only become apparent in case of a crisis or default scenario. In particular, the real test will be whether the structuring in individual cases sufficiently balances and addresses the requirement of a SERV insured financing for flexibility in a crisis allowing a borrower to recover financially and the need of a capital market transaction for a pre-determined, fixed repayment schedule.