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LSTA ADVANCING THE CORPORATE LOAN MARKET

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Contributing Editor:
Thomas Mellor
Morgan, Lewis & Bockius LLP

glg Global Legal Group

Editorial Chapters

Expert Analysis Chapters

Q&A Chapters

Switzerland


Frédéric Bétrisey


Taulant Dervishaj


Lukas Roesler


Micha Schilling

Bär & Karrer Ltd.

1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

Despite the challenging macro-environment marked by global conflicts and China's economic slowdown, Switzerland remains a desirable lending market due to its economic and political stability. The Swiss economy is robust, supported by high levels of consumption. Household spending is expected to keep growing, showing the country's economic resilience. However, as in other jurisdictions, the lending market may not be as vigorous as in the past years and legal practitioners have observed a slight shift towards recovery. Moreover, it is relevant to mention the collapse of Credit Suisse, a major player in the Swiss financial market, which has been acquired by UBS. The merger into UBS has ignited a trend to propose stricter regulations of regulatory capital requirements. On the positive side, the Swiss National Bank has recently cut its key policy rate by 25 basis points to 1.5%. This move makes Switzerland the first major western economy to loosen monetary policy in the current global economic situation.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Many transactions and, in particular, deal values remain confidential. Transactions that made headlines in 2023 were the emergency liquidity assistance loans, in a total amount of several dozens of billions of Swiss francs, granted to Credit Suisse shortly before its merger with UBS in March 2023, with the support of the Swiss Confederation and based upon an ordinance adopted by the Swiss government specifically for that purpose.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can guarantee borrowings of one or more other members of its corporate group. In case such other member of its corporate group is a direct or indirect shareholder of the guarantor or a subsidiary of such shareholder (i.e. a sister company of the security provider), the financial assistance restrictions described under question 4.1 apply.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

If the guarantee/security is not at arm's length, the financial assistance restrictions described under question 4.1 apply unless the guarantee/security is granted to a fully owned (direct or indirect) subsidiary of the guarantor/security provider. If such restrictions are not incorporated into the guarantee/security agreement, directors are exposed to liability risks. The law is not settled and there is only a limited set of precedents in relation to the enforceability of such a guarantee/security.

2.3 Is lack of corporate power an issue?

Yes, the law is not settled and there is only a limited set of precedents in this regard (see questions 2.2 and 4.1).

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

No governmental or other consents or filings, or other formalities, are required except that, in practice, shareholder approval is sought in case of guarantees that require financial assistance restrictions because they are granted for the benefit of other members of the guarantor's corporate group that are either (direct or indirect) shareholders of the guarantor or subsidiaries of such shareholder.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

Except for the financial assistance restrictions described under question 4.1, no such limitations are imposed on the amount of a guarantee. However, the directors of a Swiss company risk liability if a company prefers some creditors over others in case of a near insolvency or bankruptcy situation. This has the factual consequence that a company will not pay a guarantee if its directors determine that insolvency/bankruptcy cannot be avoided. In such scenario, guarantee claims will have to be filed with the bankruptcy or similar administration.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Currently, there are no exchange control or similar obstacles in Switzerland.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Typical collateral to secure lending obligations are pledges or transfer of ownership (for security purposes) of certain assets such as shares, cash, intellectual property or real estate, as well as security assignments of certain receivables.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Certain types of security interests (e.g. pledges or security transfers) may only apply to a specific class of asset and, therefore, it is rarely possible under Swiss law to cover all the types of assets that an entity may hold under one single security agreement. In theory, this would be possible if a company only held assets over which a single security interest can be taken. However, even in this case the general security agreement must cover different perfection requirements that may apply to various types of assets, which would defeat the purpose of facilitating the procedure of taking security over multiple assets in a single agreement. Consequently, it is standard practice in Switzerland to use separate agreements for each type of asset.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral over land is possible under Swiss law. For the purpose of securing lending obligations, the common forms used to create such collateral are either a security transfer of mortgage notes (*Schuldbriefe*) or a land charge (*Grundpfandverschreibung*).

Security transfer of mortgage notes

Mortgage notes are financial instruments representing a personal claim against the debtor that is secured by a pledge on real property. Mortgage notes exist in the form of bearer or registered certificates or in paperless forms.

Instead of a security transfer, it is also possible to pledge mortgage notes. However, practitioners generally prefer a security transfer of legal title over the creation of a pledge. The advantage of the former is the transfer of legal title of the mortgage notes will not become part of the debtor's bankruptcy estate.

In order to create a real estate security based on mortgage notes, such notes – if not already issued – must first be created, which requires a notarial deed. The parties then enter into a written security transfer or pledge agreement and transfer the legal title of the mortgage notes, either by transfer of possession in the case of paper mortgage notes, or registration of the transfer in the land register in the case of paperless (registered) notes.

Land charge

A land charge is a mortgage that is entered into the land register and secures any kind of claim, whether actual, future or contingent. Other than in the case of mortgage notes, the secured claim is not entered into the land register and neither the land charge nor the secured claim is evidenced in the form of a negotiable instrument. For certain reasons, the land charge is less commonly used than mortgage notes. To grant security in the form of a land charge, the parties must enter into an agreement regarding the creation of the land charge in the form of a notarial deed and file this deed with the land register. Once the land register has registered the land charge, the security is created.

Real property – plant

As a matter of principle under Swiss property law, structures become part of the land on which they are built. An exemption from this principle is an independent building right with a duration of at least 30 years, which can be established on land for the purpose of building a structure such as a plant. In this case, Swiss law recognises the building right as a real property in its own right. In either case, a mortgage security over a land or building right where the plant has or will be built is possible, and follows the same principles and procedures as laid out above (see "Real property – land" section above).

Machinery and equipment

It is possible to grant a pledge over movable assets such as machinery and equipment. However, since Swiss law does not recognise the concept of a floating charge, taking security over machinery or equipment is impractical and rarely pursued in a lending transaction.

A security over machinery or equipment can be created by a pledge or a security transfer of legal title in the machinery or equipment. These security interests entitle the pledgee or transferee to liquidate the machinery or equipment in case of enforcement. Unless specific rules apply in relation to certain types of movable assets, perfection of a pledge over movable assets requires the transfer of physical possession of such asset. The security is only established once the pledgor gives up its possession over the relevant assets and is no longer in the position to exercise independent possession rights. This makes it impossible to grant security over machinery and equipment while allowing the pledgor to make use of such assets.

An exception applies to certain types of movable assets, which are subject to specific laws. Most importantly, security over aircraft, ships and railroads is perfected by the entry of the security in the respective public register (such registration replaces the requirement to transfer possession).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can generally be taken in the form of a pledge or assignment. However, in either case, the prerequisite for creating such security is the assignability of the receivables. This means that the assignability of the receivables must not be prohibited by applicable laws or excluded by contract or by the personal nature of the receivable (e.g. family law claims; however, according to Swiss case law there are also receivables where the personal nature is less evident). If the assignability is restricted in an underlying contract, it is common to request the assignor to seek a waiver of such restriction from the debtor.

The steps to perfect a pledge or assignment of receivables are as follows:

- The pledge or assignment of receivables requires a valid security agreement in written form, and in the case of assignment, a written declaration of assignment by the assignor (which in practice is part of the security agreement).
- Existing written acknowledgments of debts representing the pledged or assigned claim must be handed over to the pledgee or assignee.

The notification of debtors is generally not a requirement to perfect the pledge or assignment except where a waiver of a restriction of the assignability in an underlying contract must be obtained or where a second-ranking pledge over receivables is created. However, provided a notification to a debtor has not been made, a debtor may in good faith pay its debt to the assignor without becoming liable to the assignee. Therefore, it is market standard in Swiss security assignment agreements to include an obligation to notify debtors at the time of signing of the assignment agreement or as soon as possible thereafter. Debtors of trade receivables, however, are generally only notified after the occurrence of an event of default in order not to prejudice the legitimate business interests of the security provider.

Even though the notification of the debtor is in most cases not a requirement to perfect a security over receivables, a pledgee or assignee must be entitled to notify debtors at any time, i.e. even before an enforcement event. If such right is not granted to the assignee, the pledge or assignment for security purposes may be qualified as a conditional security interest that only arises once the secured party has notified the debtor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security over cash accounts can be taken in the form of a pledge or a security assignment. Cash deposits held in bank accounts are treated as claims of the beneficiary against the bank. Therefore, the creation of security over cash deposits is based on the same principles and procedures that apply to security over claims and receivables. In case of a pledge over a cash account, the bank should always be notified. The Swiss bank's general business terms usually provide for a first-ranking security interest over the bank account. A third party therefore obtains a second-ranking security interest over a Swiss bank account only unless the bank waives its priority rights. To create and perfect such second-ranking security interest, the bank as first-ranking pledgee must be given notice.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law-governed document? Briefly, what is the procedure?

It is possible to create a security interest over shares of a Swiss company, the most common form to take such security being a pledge (even though a security transfer of title or security assignment may also be possible in certain cases). Swiss law does not mandatorily require a Swiss company to issue share certificates. Thus, shares of Swiss stock corporations may or may not be in certificated form, which may affect the procedure to perfect a share pledge:

- Irrespective of whether share certificates have been issued, creation of a valid security interest over shares requires a valid written security agreement.
- If shares are certificated, the share pledge must be perfected by transferring the original share certificates to the pledgor. In case of registered shares (*Namenaktien*), which have become the common form of shares in Swiss stock corporations, the share certificates must be endorsed in blank.
- Uncertificated shares must be pledged, transferred or assigned in writing.

A security over shares over a Swiss company governed by New York or English law is possible but not recommended. Such security would give rise to conflict of law issues and may not be valid *vis-à-vis* a third party, which may impede an effective enforcement in Switzerland.

The Federal Intermediated Security Act ("**FISA**") sets out rules on how intermediated securities are granted. Under the FISA, a security interest over intermediated security can be created by either transferring or crediting such securities to the securities account of the secured party. Alternatively, the security over intermediated security can be granted by an agreement between the security provider and the intermediary (a so-called control agreement) setting forth an irrevocable requirement for the intermediary to comply with instructions from the secured party only.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Security over inventory can be taken in the same manner as in the case for security over movable assets or machinery or equipment (please see question 3.3 above). In the absence of a floating charge concept in Switzerland, a security over inventory is possible but impractical.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

A company can grant a security interest to secure its own obligations under a credit facility as well as obligations of a third party, such as another borrower or guarantor. In case such third party is a direct or indirect shareholder of the security provider or a subsidiary of such shareholder (i.e. a sister company of the security provider), the financial assistance restrictions described under question 4.1 apply.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Most common forms of Swiss collateral, such as share or bank account pledges or security assignments, are not subject to notarisation or registration requirements. Therefore, no notarisation or registration fees apply to these types of collateral. If security is granted over real property, notaries' fees, registration fees (for the land register) as well as cantonal and communal stamp duties may be payable depending on the location of the real estate and the transaction value.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

In the limited cases where a notification or registration is advisable, it is not time consuming and can be achieved within a couple of days. In case of a mortgage over real property, however, the notarisation and entry into the land register may take longer.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Except for security granted over certain assets of regulated entities, there are generally no regulatory consents required with respect to the creation of security.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There are no special priority or other concerns due to the fact that borrowings under a revolving credit facility are secured.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

In case of a mortgage, the issuance of mortgage notes or the entry or establishment of a land charge must be notarised.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company that directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

In general, the provision of a guarantee or other security by a Swiss company for the benefit of a direct or indirect shareholder of the guarantor/security provider ("up-stream") or a subsidiary of such shareholder (i.e. a sister company of the security provider, "cross-stream"), is subject to financial assistance restrictions. The law is not settled in this regard and there is only a limited set of precedents in relation to this matter. In practice, the company's articles of association are amended to explicitly allow such guarantees/securities and the guarantor's/security provider's liability is limited contractually to its freely distributable reserves, i.e. to an amount that could also be distributed as a dividend to its shareholders. Further, board and shareholders' resolutions are sought in relation to the entry into such a guarantee/security arrangement.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

To enforce lenders' rights under loan documents, the concept of an agent is recognised in Switzerland. The appointment of an agent is frequently used in syndicated facilities governed by foreign law where Swiss parties are involved.

It is not possible to set up trusts under Swiss law in the absence of a substantive trust law. Foreign trusts, however, are recognised in Switzerland since the Swiss Private International Law Act ("**PILA**") transposes certain provisions of the Hague Convention on the Law Applicable to Trusts and on their Recognition ("**Hague Trust Convention**"), which is applicable in Switzerland. Subject to the conditions of PILA and the Hague Trust Convention, a decision by a foreign court on trust-related matters is recognised.

Whether a security agent or security trustee can enforce its rights in respect of a Swiss law-governed security interest depends on the nature of such security interest:

- Swiss law pledges are subject to the principle of accessority (*Akzessorietätsprinzip*), which means that the creditor of the secured claims and the pledgee must be identical. Consequently, the pledge cannot be granted to a third party as pledge holder. The pledge can be granted to numerous creditors, i.e. to lenders as a group under a syndicated financing. However, due to frequent changes of lenders and since involvement of all lenders in the procedure of perfecting or enforcing a pledge is not practical, it is possible that a lender as a secured party is represented by a third party acting as a security agent and as a direct representative in the name and on account of each lender.
- Accessority does not apply to security assignments or security transfers. For these types of collateral, the security agent or security trustee can hold the assigned claims or transferred rights in its own name and on account of itself and the other secured parties.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above, which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The concepts of agents and foreign trustees are recognised in Switzerland.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

There are no special requirements. The transfer is possible and can be effected by way of assignment (to which the guarantor usually gives consent in advance under the loan documents).

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

With regard to a deduction or withholding taxes on interest payments, interest paid on loans extended to a Swiss borrower are generally not subject to Swiss withholding tax. However, withholding tax applies to interest payments on bonds (at a rate of 35%). According to guidelines of the Swiss tax authorities, a loan is considered a bond if either the aggregate number of non-bank lenders (including sub-participations) exceeds 10 under financing arrangements with identical terms, or if the aggregate number of non-bank lenders of a Swiss borrower exceeds 20. Against this background, transfer restrictions and other Swiss 10/20 non-bank rules-related language must be incorporated into the relevant loan document.

The restrictions may under certain circumstances also apply if a Swiss company does not act as borrower but solely as guarantor or security provider. A guarantee or security for the benefit of a foreign borrowing subsidiary – i.e. a guarantee by a Swiss company of a downstream nature – may trigger Swiss interest withholding tax on bonds or debentures in respect of interest payments by the foreign borrowing subsidiary. This may be the case if a Swiss guarantor uses the proceeds directly or indirectly in Switzerland and has more than 10 non-bank lenders in a facility with identical terms or more than 20 non-bank lenders under all its credit facilities in total.

The granting or taking of security between related parties can be seen at arm's length if the security provider is paid an appropriate guarantee fee. If an up- or cross-stream guarantee that is not granted on arm's-length terms is enforced, the difference between the consideration granted by the affiliate to the Swiss security provider (if any) and an arm's-length consideration may constitute a hidden dividend distribution on which Swiss withholding tax (currently 35%) is payable. Further, in case such up- or cross-stream guarantee is enforced, any amount recovered may be considered a distribution and as such will also be subject to Swiss withholding tax. While this is generally recoverable if the recipient or beneficiary is a Swiss resident entity, a non-resident may be entitled to a refund only if there is an applicable double taxation treaty. If no double tax treaty applies, the dividend withholding tax may become the final burden for the recipient.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no particular tax incentives or other incentives provided preferentially to foreign lenders.

The Swiss Confederation and the cantons or communes levy a withholding (source) tax on interest paid to foreign lenders that benefit from mortgage security on Swiss real estate. The combined rate of the tax is between 13% and 33%, depending on the canton and commune in which the real estate is located. This interest withholding tax is reduced (to zero) under a number of double taxation treaties, including those with France, Germany, Luxembourg, the United Kingdom and the United States.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to, or guarantee and/or grant of, security from a company in your jurisdiction?

No income tax will apply to foreign lenders in these scenarios.

6.4 Will there be any other significant costs that would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Please see question 3.9.

6.5 Are there any adverse consequences for a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for the purposes of this question.

There are no adverse consequences in addition to those addressed in question 6.1.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The recognition of foreign governing law in contracts is subject to the PILA. Subject to the below limitations, Swiss courts will generally recognise a foreign governing law in a contract, provided that the relevant foreign law provisions are not contrary to Swiss public policy and they can be established by the parties.

The recognition of a choice of foreign law is limited to contractual matters. For security documents, Swiss law distinguishes the agreement to create the security (*Verpflichtungsgeschäft/titre d'acquisition*) from the creation of the security interest (*Verfügungsgeschäft/acte de disposition*). While the agreement can be governed by the law chosen by the parties, the law governing the creation of the security is not left to the parties' discretion.

In the context of pledges over movable assets (limited rights *in rem*), the acquisition or loss of such rights *in rem* is governed by the country where such assets are located at the time of the event giving rise to such acquisition or loss. The parties can, however, subject the acquisition and loss of such rights to the law governing the agreement to create the security (art. 104(1) PILA). Such choice of law cannot, however, be asserted against third parties, who can rely on the law of the location of the assets at the time of the acquisition or loss of such rights.

The acquisition or loss of rights *in rem* over real estate are subject to the law of the place where the property is located. Choice of law is not permitted (art. 99 PILA).

The pledge of claims or securities (with the exception of intermediated securities) is governed by the law of the country of the habitual residence of the pledgee, and in case of the pledge of other rights, by the law applicable to such rights. The parties can choose the applicable law to such pledge; such choice of law can, however, not be asserted against third parties (art. 105(1) PILA). In addition, irrespective of the law applicable between the pledgor and the pledgee, such law cannot be enforced against the debtor of the claim who may thus still rely on the law applicable to the actual claim, security or right.

As for the assignment by way of security of claims and uncertificated securities, such assignments are subject to the law governing the claim or the law chosen by the parties. The choice of law cannot be asserted against the debtor of the claim without the debtor's prior consent (art. 145(1) PILA).

The transfer of intermediated securities is governed by the Hague Convention on Securities Held with an Intermediary, which determines that the applicable law chosen by the parties to the relevant account agreement also applies to the disposal or encumbrance of securities held in that account. Such law can, however, only apply if the relevant intermediary has an office in the relevant jurisdiction at the time of the agreement. If that is not the case, the applicable law is the law of the jurisdiction of such intermediary's office.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

The courts of Switzerland will recognise as valid and will enforce a final and conclusive civil law judgment given against a company rendered by New York courts or by English courts

without re-examination of the merits of the case, subject to the conditions set forth in the PILA. A foreign judgment will generally be recognised under the PILA provided that the following conditions are cumulatively met: (i) the foreign court had jurisdiction in accordance with the rules of the PILA; (ii) the foreign judgment does not violate the Swiss public order (for example, the general principle of fairness of proceedings); (iii) the foreign judgment is final and non-appealable; (iv) the dispute was not pending first in Switzerland or has not been already determined in a third jurisdiction (provided that the relevant judgment can be recognised under the PILA); and (v) the proceedings leading to the foreign judgment did not violate basic principles, such as, in particular, the defendant being properly served or accepting the foreign jurisdiction or the defendant being able to exercise its right to be heard.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Swiss law allows for the direct enforcement of payment claims if the creditor holds a written acknowledgment of debt or an executory title or is the beneficiary of a security interest on assets of the debtor. In the absence of such a document or pledge, the creditor generally must file a suit by way of ordinary proceedings on the merits of the claim. If the action is determined in favour of the creditor, it may enforce the judgment by way of initiating ordinary debt enforcement proceedings.

The enforcement of pecuniary claims, whether arising directly from a contract or from a foreign judgment, is subject to the Swiss Act on Debt Enforcement and Bankruptcy ("**DEBA**"). In such cases, the creditor will commence collection proceedings to seize the debtor's assets in order to enforce its claim. For this purpose, the creditor will file a request with the competent debt collection office, upon which the debt collection office will serve a summons for payment upon the debtor. The debtor may raise an objection against such summons for payment, in which case the creditor will apply to the competent court to have the debtor's objection lifted. This first phase of debt enforcement may generally take a few weeks or months. There are certain minor formal differences in case of proceedings aiming at the realisation of pledged assets. Overall, however, the time for this first part remains the same.

If the objection is set aside and the matter has not yet been determined on the merits of the claim, the creditor may file suit by ordinary proceedings.

In relation to part (a) of the question, the length of the proceedings will depend on whether the creditor is in possession of a written recognition of a debt by the debtor or the guarantor (as defined in the DEBA). A loan agreement or a guarantee duly signed by the debtor is generally considered a recognition of a debt, provided that the creditor can provide proof of disbursement. In such cases, the creditor's rights will be subject to summary proceedings, which may take a few months before obtaining a first instance decision. If no recognition of debt is available, the creditor will be subject to standard proceedings, which may take about a year before the first instance renders a decision. The rendered judgments are generally subject to appeal before higher cantonal instances and, as the case may be, the Swiss Federal Court, which may considerably extend such time estimates.

In relation to part (b) of the question, a foreign judgment first needs to be recognised (this can be confirmed by a court at the same time). The enforcement proceedings are, in principle, summary proceedings, which are quicker than ordinary proceedings and may take a few months. Again, the decisions are subject to the above-mentioned means of appeal.

If the debtor does not raise an objection, or, if it does, when the objection has been set aside, the debt enforcement proceedings continue by realisation of the pledged assets themselves or by bankruptcy (if the debtor may, under the DEBA, be subject to bankruptcy, which is generally the case for Swiss companies). The length of the proceedings will in part depend on the type of pledged assets (movable/immovable) and can take from several months to more than a year. In the latter case, the assets of the company are liquidated and distributed amongst the company's creditors. The length of the debt enforcement proceedings will strongly depend on the type of enforcement (seizure or bankruptcy) and, in case of the bankruptcy, on the size of the company. Given the large number of possible scenarios, the time estimate can range from months to years.

7.4 With respect to enforcing collateral security, are there any significant restrictions that may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

There is no mandatory requirement for a public auction or regulatory consent in case of enforcement of collateral security. The parties can agree that the enforcement is effected by private realisation (*private Verwertung*) or appropriation (*Selbsteintritt*) and collection of the pledged assets. In addition, the parties can agree in advance that a discretionary sale (*Freihandverkauf*) is permitted. Please note, however, that the private realisation or appropriation and discretionary sale of immovable properties is generally not possible because such a permission for private sale would require the notarisation of the security agreement (which is rarely, if ever, done due to the notarisation costs). Private enforcement is in most cases faster and less formal. However, the secured party is generally required in case of a realisation of the security to obtain the best price for the relevant assets, taking into account the circumstances at the time of the sale. In addition, on bankruptcy, pledged assets will form part of the bankruptcy estate. The private enforcement of those assets is not permitted and must occur under the DEBA. As for intermediated securities which have been granted as a security, private enforcement does not have to be specifically agreed on between the parties but is only permitted if the value of the intermediated securities may be determined objectively. In case of bankruptcy, the pledged assets form part of the bankrupt estate and as a result, the private enforcement of pledged assets is no longer permitted (this restriction does not apply to intermediated securities).

In case of no agreement relating to the enforcement of collateral, such enforcement will take place by public auction in accordance with the provisions of the DEBA. According to the DEBA, if enforcement proceedings are brought against a claim secured by a pledge, the enforcement proceeding shall be continued by the realisation of the pledge (*beneficium excussionis realis*). It is, however, possible for the parties to agree that the enforcement of the claims is pursued by the creditor according to regular debt enforcement proceedings without having first to enforce the creditor's rights under any particular document and/or to institute proceedings for realisation of pledged assets first.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

There are no restrictions applicable to foreign lenders in case of (a) or (b). However, if the foreign lender intends to foreclose on a collateral consisting of Swiss residential property, this is subject to restriction under the Federal Law on the Acquisition of Real Estate by Persons Abroad. Under that law, foreign lenders (or foreign-owned Swiss lenders) are subject to certain restrictions when they take security by way of mortgage over residential property in Switzerland. The validity of the mortgage could be challenged if such restrictions are not complied with. In addition, even if the mortgage has been validly granted, the law would not enable the foreign lender to acquire the property upon its forced sale unless it has received a specific authorisation from the competent authorities in the canton where the property is located.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

The DEBA provides for moratorium procedures that can be applied for before a competent court by the debtor company or, in certain cases, by its creditors. If there are prospects for a successful restructuring or a composition plan, the competent court can grant a moratorium (*Nachlassstundung/sursis condordataire*), which may result in a successful restructuring or in the confirmation of a composition agreement (*Nachlassvertrag/concordat*) that is binding on all creditors of unsecured claims. The moratorium does not directly affect the securities granted by the debtor. However, enforcement proceedings regarding securities (movable assets or claims and rights) cannot be started or continued during the period for which the moratorium is effective. As for pledges on immovable assets, they cannot be realised during that time. In addition, the composition agreement will not affect the security either so that it can be realised by the relevant creditor.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Foreign final arbitral awards obtained in the competent arbitral courts are generally recognised in Switzerland without re-examination or re-ligation of the matters provided that the conditions for the recognition and enforcement of arbitration awards set out in the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1985 ("**New York Convention**") are fulfilled, i.e. there are no refusal grounds relating in particular to incapacity of a party, violation of due process, outside of scope disputes or wrong composition of the tribunal.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

In Switzerland, the enforcement of claims and security interests is generally governed by the DEBA. Insolvency proceedings are initiated by the debtor (mandatorily in case of over-indebtedness (*Überschuldung/surendettement*) according to art. 725b CO) or a creditor filing a petition for the opening of insolvency proceedings based on an application for commencement of enforcement proceedings (*Betreibungsbegehren/requisition de poursuite*) with the competent debt collection office.

Insolvency results in the acceleration of all claims against a debtor (secured or unsecured), except for those secured by a mortgage on the debtor's real estate, and such claims become due. After an insolvency has been declared by the competent insolvency court, assets which are subject to a pledge will fall within the debtor's insolvency estate (*Konkursmasse/masse en faillite*) and will be realised by the insolvency administration. Lenders must, in principle, register their claims and their rights on the pledged assets with the bankruptcy administrator. The opening of bankruptcy proceedings prevents the bankrupt debtor from disposing of any of its assets. Interest in principle ceases to accrue on the bankrupt's debt but claims secured by a pledge enjoy preferential treatment as interest which would have accrued until the collateral is realised will be honoured provided that the proceeds of the collateral suffice to cover such interest. All creditors need to participate in the insolvency proceedings and secured creditors are generally not entitled to enforce any security interest outside the insolvency proceedings (except for security over intermediated securities). The realisation proceedings according to the DEBA are conducted by way of a public auction or, subject to certain conditions, a sale by mutual agreement.

Proceeds from enforcement are used to cover enforcement costs first, followed by the claims of creditors secured by pledge (in accordance with their rank) and, in case of any excess proceeds, unsecured creditors.

Contrary to pledged assets, assets of which the property has been legally transferred for security purposes before the opening of bankruptcy proceedings do not form part of the bankruptcy estate. They can, therefore, be subject to private enforcement during the ongoing bankruptcy proceedings. As for future claims and rights which have been assigned for security purposes or pledged but have come into existence only after the debtor has been adjudicated bankrupt, they will fall within the bankruptcy estate of the securing party.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Unsecured claims rank in the following order: (i) prioritised claims under Swiss bankruptcy laws, such as claims of employees, claims of certain social insurances and pension funds and certain family law claims; (ii) any other unsecured claims; and (iii) any subordinated claims.

The creditors of a Swiss debtor may challenge the entering into of certain agreements and the performance of the obligations thereunder subject to the conditions set out in arts 285 *et seqq.* DEBA. A transaction may be subject to challenge if (i) no adequate consideration has been given so that the transaction has been made at an undervalue in the year before the adjudication of bankruptcy (art. 286 DEBA), (ii) the debtor granted security for liabilities which it was not obliged to secure or discharged a debt before it becomes due or by an unusual means of payment in the year prior to adjudication of bankruptcy, at a time when the debtor was over-indebted and the secured party was or should have been aware of such over-indebtedness (art. 287 DEBA), or (iii) the granting of the security occurred in the five years before the adjudication of bankruptcy and the security provider had the intention to disfavour or favour certain of its creditors or should

have reasonably foreseen such result and this intention was or must have been known to the receiving party (art. 288 DEBA). As for cases (i) and (iii) for transactions with related parties, such as group companies, the burden of proof is reversed so that the challenged parties will have to prove that, in case of (i), there was no disproportion in the transaction and, in case of (iii), it could not recognise the intention to harm creditors.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Persons that are not registered in the register of commerce are not subject to bankruptcy proceedings.

Insolvencies of banks, fund management companies, insurance companies, securities firms and collective investment schemes are subject to special insolvency rules and their insolvency will be handled by the Swiss Financial Markets Authority.

Municipalities and other public bodies are not subject to debt enforcement proceedings resulting in bankruptcy. Only enforcement proceedings on seizing of assets and the enforcement of collateral are possible against Swiss municipalities.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

There is no possibility for a creditor to seize assets of a company in an enforcement other than through proceedings under the DEBA, which will always involve a court at a certain stage in order to verify the merits of a claim.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Overall, Swiss courts recognise the choice of foreign jurisdiction in civil law matters, subject to the limitations of the PILA and applicable international treaties such as the Lugano Convention. However, in certain cases, such as, for example, in matters relating to property, the jurisdiction is subject to exclusive mandatory rules so that it is not possible to freely choose the competent courts.

As for one-sided jurisdiction clauses favouring one contractual party, the French supreme court, applying the Lugano Convention, has decided that such clauses can only be accepted if they are both drafted based on objective criteria and sufficiently precise, so that they meet the predictability requirement for such clauses. This ruling has been criticised by a large number of scholars. It cannot, however, be entirely ruled out that a Swiss court may take a similar view.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Persons and assets relating to a diplomatic mission are protected by immunity in accordance with the Vienna Convention on Diplomatic Relations. Switzerland does, however, recognise and enforce waivers of sovereign immunity.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e., a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There are no licensing or other eligibility requirements in Switzerland for lenders to a company. However, under certain circumstances, the granting of credits on a professional basis by entities in Switzerland or from Switzerland may be subject to anti-money laundering rules, in which case the relevant entity needs to become a member of a self-regulatory organisation. In addition, lending activity may also give rise to a qualification as a bank if the entity refinances itself to a considerable extent with several banks and the relevant refinancing transactions exceed CHF 500 million. In such cases, a banking licence issued by the Swiss Financial Markets Authority is required. These requirements only apply if the lending activities are conducted in Switzerland. The establishment of a physical presence of a foreign bank in Switzerland is also potentially subject to licensing requirements. Foreign entities are considered foreign banks if they (a) hold a foreign banking licence, (b) use the term bank or banker in their trade name, or (c) conduct banking activities as assessed from a Swiss law perspective. A foreign bank authorisation is necessary if such entity employs persons in Switzerland who, permanently and in a professional capacity in or from Switzerland enter into transactions, maintain customer accounts, legally bind the foreign bank or forward client orders to a foreign bank by representing it for advertising or other purposes. Entities exercising relevant activities that do not have a licence are subject to a large range of measures ranging from specific orders, industry bans and confiscation of profits to liquidation.

11 LIBOR Replacement

11.1 Please provide a short summary of any regulatory rules and market practice in your jurisdiction with respect to transitioning loans from LIBOR pricing.

In December 2020, the Swiss Financial Market Supervisory Authority issued regulatory guidance according to which supervised institutions should transition from IBOR rates to alternative reference rates ("**ARR**"), by amending existing contracts to include appropriate fallback clauses and base any new credit agreements on such ARR.

In Switzerland, the National Working Group on Swiss Franc Reference Rates ("**NWG**") has recommended the use of Swiss Average Rate Overnight ("**SARON**") calculated in arrears as a replacement rate for CHF LIBOR.

In line with such recommendations, banking institutions have amended existing contracts and template loan documentation

to include interest rate provisions which are generally based on risk-free rates such as SARON (plus, as the case may be, credit adjustment spreads) as reference rates for the calculation of interests due. The applicable interest rate is generally calculated in arrears with the lookback period for the relevant reference rate ending around two to five business days before the actual interest is due and the relevant reference rate being generally floored at zero. A certain number of market participants have based the calculation of their interest rates on their respective cost of funds.

As for syndicated lending, the NWG has published a Rate Switch Amendment Agreement to facilitate the conversion of the interest rates applicable under syndicated loans.

12 ESG Trends

12.1 Do you see environmental, social and governance (ESG) or sustainability-related debt products in your jurisdiction? If yes, please describe recent documentation trends and the types of debt products (e.g., green bonds, sustainability-linked loans, etc.).

Yes, ESG or sustainability-related debt products are widely used in Switzerland. Public debt issuances that openly aim to satisfy ESG criteria generally attract increased investor appetite and the number of green and social bonds has been growing on the Swiss market. The number of sustainability linked private loans is also in progress.

The bond documentation usually reflects international standards by way of the implementation of the Green Bond and the Social Bond Principles published by the International Capital Market Association ("**ICMA**"). The sustainability components of private loans are addressed in the pricing conditions and through the insertion into the loan documentation of certain additional representations and covenants mainly relating to reporting aspects.

12.2 Are there any ESG-related disclosure or diligence requirements in connection with debt transactions in your jurisdiction? If yes, please describe recent trends and any impact on loan documentation and process.

Currently, there are no specific disclosure or diligence requirements in connection with debt transactions. However, Swiss issuers may be subject to arts 964a to 964l CO, which require that companies of public interest domiciled in Switzerland, such as listed companies and large companies supervised by the Swiss Financial Market Supervisory Authority ("**FINMA**"), publish annual reports on ESG issues. The new reporting requirements for non-financial matters, which started to apply in 2023 are in line with the corresponding EU Directive 2014/95/EU on reporting on non-financial aspects. Companies must account in their report for environmental, social and employee issues, respect for human rights and the fight against corruption.

As regulated entities, Swiss banks are expected to identify and monitor climate risks, as described in a supervisory communication of the FINMA published in January 2023. In the context of the grant of mortgages, Swiss banks may elect to apply a self-regulation issued by the Swiss bankers' association in view of the improvement of the energy efficiency of financed buildings. This self-regulation, which has effectively started to apply on 1 January 2024, does not prescribe specific disclosure or diligence requirements, but rather aims to ensure the long-term preservation of financed buildings and, thus, their energy efficiency. In order to achieve such objective, mortgage providers are required to include in their real estate financing process the provision of advice to borrowers regarding potential renovation work. This applies to both Swiss and foreign properties.

13 Other Matters

13.1 Are there any other material considerations that should be taken into account by lenders when participating in financings in your jurisdiction?

Other than the above, we have not identified other material considerations which in our view should be taken into account by lenders generally.

Frédéric Bétrisey has a long-standing practice in banking and finance. He advises banks and borrowers on all types of banking and finance transactions, including trade and commodity finance, acquisition finance, equipment financing, financial lease and syndicated lending. He also advises financial institutions on a variety of regulatory aspects and assists 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.
In recent years, Frédéric Bétrisey has also assisted originators, arrangers and trustees in connection with the securitisation of Swiss law receivables, in particular in respect of residential mortgages (RMBS transactions), consumer credits and leasing agreements.
Frédéric Bétrisey is 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.

Bär & Karrer Ltd.
12, quai de la Poste
CH-1211 Genève 3
Switzerland

Tel: +41 58 261 57 05
Email: frederic.betrisey@baerkarrer.ch
URL: www.baerkarrer.ch/en/lawyers/betrisey-frederic

Taulant Dervishaj is an associate at Bär & Karrer Ltd., where he focuses on financial regulations, financing and general banking law matters. He is also active in the areas of mergers and acquisitions, private equity, and general corporate law.

Bär & Karrer Ltd.
12, quai de la Poste
CH-1211 Genève 3
Switzerland

Tel: +41 58 261 57 91
Email: taulant.dervishaj@baerkarrer.ch
URL: www.baerkarrer.ch/en/lawyers/dervishaj-taulant

Lukas Roesler is a banking and finance practitioner. He specialises in advising lenders and borrowers on all aspects of financing and capital markets transactions and related products. He also advises on restructuring and insolvency matters.

Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8002 Zurich
Switzerland

Tel: +41 58 261 56 20
Email: lukas.roesler@baerkarrer.ch
URL: www.baerkarrer.ch/en/lawyers/roesler-lukas

Micha Schilling focuses on finance and capital market transactions and is specialised in syndicated financings, acquisition finance, leveraged finance, real estate finance, bond offerings and securitisation transactions. He also advises on M&A and general corporate matters.

Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8002 Zurich
Switzerland

Tel: +41 58 261 53 24
Email: micha.schilling@baerkarrer.ch
URL: www.baerkarrer.ch/en/lawyers/schilling-micha

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