

# Lending to a Company in Switzerland: Structuring the Transaction

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*A Practice Note looking at the key considerations involved in structuring a loan to a company incorporated or located in Switzerland (which may also involve a guarantor or security provider incorporated or located in, or assets located in, Switzerland), where the lender is incorporated in another jurisdiction.*

*It looks at considerations such as tax, costs and regulatory issues, and issues that can affect taking security and guarantees.*

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Lawyers advising a lender who is proposing to make a loan to a borrower incorporated or doing business in another jurisdiction need to be aware of a variety of issues that can affect the structure of the loan transaction. In addition, if a transaction also involves a guarantor or security provider incorporated or doing business in another jurisdiction, or the assets over which security is being taken are located in another jurisdiction, then there will be other issues to consider.

It is important to identify these issues in the early stages of structuring a transaction, as they can have an impact on key elements of the transaction structure, such as:

- Who the borrower, guarantor, and security providers will be.
- Whether taking guarantees and types of security will be feasible in light of the costs involved.
- The lender's ability to enforce security interests and guarantees.
- The lender's rights in an insolvency of the borrower or other obligors.

This Note looks at the following issues which may affect the structure of a transaction:

- Tax considerations and implications, including withholding taxes, documentary taxes, and other types of taxes that may affect a lender or borrower.
- Costs affecting the transaction, including registration fees, notaries' fees, and any other similar costs imposed on the transaction.
- Issues involved in taking a guarantee or security.
- Issues involved in enforcing a loan, guarantee, or security interest.
- Lenders' rights in an insolvency of a borrower, guarantor, or security provider.
- Regulatory issues affecting foreign lenders, including licensing or registration requirements in Switzerland applicable to foreign lenders making commercial loans to a borrower in Switzerland.

## Tax Implications

The taxes applicable to a loan transaction with a borrower who is incorporated in, or doing business in, a different jurisdiction from the jurisdiction where the lender is incorporated or doing business may have a significant impact on the transaction and whether it is feasible.

## Withholding Taxes

In the context of lending transactions involving Swiss obligors, withholding taxes (currently at the rate of 35%) can be triggered by interest payments under loans made by lenders outside of Switzerland (who are not Swiss tax residents) to borrowers incorporated in Switzerland, if the loans are re-characterized as a “bond” under the Swiss 10/20 Non-Bank Rules (as defined below and as commonly referred to in credit agreements). A loan is deemed to constitute a “bond” if either of the following applies:

- There are more than ten lenders under the same financing instrument (such as a loan agreement) who are not licensed as banks in accordance with the banking laws in force in their respective jurisdiction (Qualifying Banks) (this is the 10 Non-Bank Rule).
- The Swiss obligor has in aggregate more than 20 creditors who are not Qualifying Banks under all of its outstanding debts (this is the 20 Non-Bank Rule). Certain exceptions for intra-group creditors apply.

The 10 Non-Bank Rule and the 20 Non-Bank Rule are, collectively, referred to as the Swiss 10/20 Non-Bank Rules.

If the Swiss 10/20 Non-Bank Rules are not complied with, Swiss withholding tax will need to be withheld by the Swiss obligor. In these cases, a standard gross-up clause under the loan documentation may not be enforceable in Switzerland.

If the Swiss 10/20 Non-Bank Rules are complied with, interest payments by a Swiss obligor will not be subject to Swiss withholding tax on that basis. In any case, specific language is generally incorporated in the relevant cross-border loan documentation, to ensure that the Swiss obligor complies with the Swiss 10/20 Non-Bank Rules.

Swiss withholding tax can also be due in connection with up-stream or cross-stream security or guarantees granted by Swiss affiliated companies to secure a financing, where the agreed terms of the security or guarantee do not pass the arm's length test. In such cases the amount recovered by lenders upon enforcement of the relevant security or guarantee may be considered a hidden dividend distribution that is subject to Swiss withholding tax. A non-Swiss recipient of such dividend distributions is not entitled to receive a refund of the withholding tax if there is no corresponding double tax treaty between its home jurisdiction and Switzerland. In case of up-stream and cross-stream security or guarantees involving Swiss security providers or guarantors, the parties generally negotiate and include particular language in the loan documentation governing any potential deductions of withholding taxes on the enforcement proceeds.

If applicable, the tax rate of the withholding tax is 35% for interest payments made to a foreign lender. However, a Swiss resident lender should be able to claim full relief under Swiss domestic tax laws, and non-Swiss resident lenders may find that full or partial tax relief is available in case of double tax treaties (such as for example with the US, the UK, Luxembourg, Germany, and France).

Additionally, if the loan is guaranteed by a lien on Swiss real estate property and the secured lender (third or related party) is not a Swiss tax resident, the interest payments are subject to a special withholding tax (also known as a source tax). The federal tax rate is 3% and the cantonal rates vary from one canton to another (between approximately 12% and 33%). Full or partial tax relief may also be available under applicable double tax treaties.

- For more information, see Country Q&A, [Lending and Taking Security in Switzerland: Overview: Question 29](#) and [Question 30](#).

## Documentary Taxes

The execution or delivery of loan financing documentation (such as the loan agreement and the related security documents) normally do not give rise to stamp or documentary taxes in Switzerland. No stamp tax applies to the transfer of bonds or shares for security purposes.

In certain circumstances, however, the transfer of certain securities (such as notes, bonds, or shares) evidencing or securing the loan, can be taxable under the Swiss Stamp Tax Act, and this includes when securities held as collateral

are realized or sold. A transfer of these instruments by securities dealers would be subject to Swiss federal transfer taxes, if no exemption applies. Furthermore, in the event of an enforcement of these securities, the transfer of ownership of the securities may be subject to stamp tax based on the value of the securities transferred, if a Swiss bank or a securities dealer as defined in the Swiss Stamp Tax Act was involved (as an intermediary or party to the transaction) and no exemption applies.

The Swiss federal transfer taxes are up to 0.15% if Swiss securities are transferred, and up to 0.30% if other (non-Swiss) securities are transferred.

Furthermore, certain cantonal stamp duties may apply if certain documents are executed in particular cantons (such as in the Cantons of Ticino, Vaud, Geneva, or Valais).

For more information, see Country Q&A, [Lending and Taking Security in Switzerland: Overview: Question 29](#) and [Question 30](#).

## Costs Affecting a Transaction

### Registration Fees

Registration fees may be payable with respect to documents that need to be filed with an official registry. This is the case, for example, for filings relating to security granted over immovable properties, such as registration of a mortgage over a Swiss real property or the creation of paper or registry mortgage certificates encumbering a Swiss real property. In the context of mortgage certificates, from a legal and practical perspective, one needs to distinguish between:

- Bearer mortgage certificates on paper (*Inhaberschuldbrief/cédule hypothécaire au porteur*), which can be transferred freely between persons once created and registered with the land registry.
- Registered mortgage certificates on paper (*Namenschuldbrief/cédule hypothécaire nominative*), which can be transferred by endorsement and, once created, do not require any further registrations with the land registry upon transfer.
- Mortgage certificates of registry (*Registerschuldbrief/cédule hypothécaire de registre*), which require an update of the relevant land registry registrations if they are transferred between persons and, thus, result in the payment of a (generally small) registration fee.

Although not required for perfection purposes, security over Swiss intellectual property rights is generally also registered with the Swiss Federal Institute of Intellectual Property and thus subject to registration fees.

Finally, any changes to the articles of association or to the composition of certain corporate bodies of Swiss companies which may be required in the context of a lending transaction will need to be registered in the competent commercial register, thus giving rise to registration fees.

The amount of the fees will overall depend on the federal, cantonal, or municipal legislation applicable to the relevant registry.

Other than the above, security over movable assets or claims which is customarily granted in lending transactions (such as an assignment of receivables, share pledge, or pledge over bank accounts) does not need to be registered with any official registry and therefore does not result in registration fees. Exceptions apply to movable assets that define ownership based on a register entry, such as ships and aircraft.

For more information, see Country Q&A, [Lending and Taking Security in Switzerland: Overview: Question 29](#) and [Question 30](#).

## Notaries' Fees

Notaries' fees may be payable with respect to documents that are drawn up as a public deed such as, for example, the constitution of mortgages or mortgage certificates on immovable property or the provision of a suretyship (*Bürgschaft/cautionnements*) by physical persons in an amount exceeding CHF2,000. The amount of the notaries' fees depends on the canton and municipality where the competent notary is based.

## Issues in Taking a Guarantee or Security

### Guarantees and Suretyships

Guarantees can be provided as a directly integrated part of the loan documentation or based on standalone documents. A guarantee can be granted in the form of an independent guarantee or a suretyship (*Bürgschaft*), the former being more common in commercial loan transactions. While an independent guarantee is not subject to any particular form requirements, a suretyship granted by an individual in an amount exceeding CHF2,000 must be issued in the form of a notarized public deed in order to be valid. In case of suretyships granted by legal entities, the written form is sufficient. In each case the maximum amount of the suretyship must be specified in the document.

In contrast to an independent guarantee, a suretyship is accessory in nature. The existence of a suretyship will therefore depend on the existence of the underlying secured obligations. In addition, in case of a suretyship the suretyship provider can raise the same objections as the obligor of the secured obligations. Given the stricter form requirements and the legal constraints applicable to suretyships, secured obligations in commercial loan transactions are usually guaranteed by independent guarantees. In that context, it is important that the independent guarantee is drafted in a manner to avoid it being qualified as a suretyship. The qualification as a suretyship will in particular depend on the type of person (individual or entity) granting the suretyship and the specific circumstances of a transaction, which need to be assessed on a case-by-case basis.

### Security

Generally speaking, a loan transaction can be secured by any of the following:

- Pledges over movable assets, rights and claims.
- Mortgages on immovable assets.
- Assignments for security purposes of rights and claims.
- Transfers for security purposes of legal title to movable or immovable assets (very rare in practice due to form requirements and substantial costs involved).

The type of security granted depends on the type of assets to be charged and the intended legal consequences.

General floating charges or all assets types of security are not available under Swiss law. As a consequence, transaction security over various types of assets are commonly reflected in separate agreements for each security provider and asset class as opposed to one single general security agreement.

### Pledge of Movable Assets

Typically, pledges are granted over bank accounts, shares, or intellectual property rights. There are no form requirements for a pledge of movable assets (although written form is standard practice in lending transactions), but

the written form is legally required for a pledge of rights and claims. The creation of a pledge over movable assets requires that such assets are transferred into the physical possession of the pledgee (or an agent acting as a direct representative in the name and for the account of the pledgee), while the pledgor retains ownership of such assets. A pledge is of an accessory nature so that its existence depends on the existence of the underlying secured obligation, and the pledgee must be identical to the creditor of the secured claims.

In an international context, the pledge of securities, claims, and rights is usually governed by the law chosen by the parties. This choice of law, however, cannot be asserted against a third party and only the law applicable to the pledged asset, claim, or right may be asserted against the debtor. Accordingly, it is necessary for its enforceability against the debtors that the Swiss law governed pledge is also valid under the laws of the jurisdiction of the debtors.

### **Pledge of Immovable Properties**

As for immovable properties (such as real property) securing obligations in loan transactions, the security is commonly granted by means of a transfer for security purposes of mortgage certificates (*Schuldbriefe/cédules hypothécaires*) or, less commonly, by a mortgage security directly charging the immovable property (*Grundpfandverschreibung/hypothèque*). The creation of a security over immovable property (by means of mortgage or mortgage certificates) requires the involvement of a notary who will notarise the relating notarial deed. This will result in additional fees (depending on the value of the immovable property and the location of such property) and require additional coordination during the transaction phase. No notary involvement is required if the mortgage certificates already exist in the correct amount and merely need to be transferred to the secured party for security purposes.

### **Assignment or Transfer for Security Purposes**

In case of an assignment or transfer for security purposes, the secured party receives full legal title to the assigned asset or claim. Upon discharge of the secured claim, the relevant assets or claims must be re-assigned or transferred back to the security provider on the terms agreed in the underlying security agreement. The assignment and transfer for security purposes is not of an accessory nature so that its existence is not linked to that of the secured claim. The assignment of claims is subject to a written form requirement under Swiss law.

As for the transfer for security purposes of immovable property, such transfer must be registered in the competent land registry.

In case of an assignment of claims for security purposes, a notification or consent by debtors is generally not a requirement to perfect the assignment, except for cases where the underlying contract requires the debtor's consent to an assignment. As long as a debtor has not been notified of the assignment, such debtor may in good faith pay its debt to the assignor. In an international context, the assignment of monetary claims and other rights is governed by the law chosen by the parties or, in the absence of such choice of law, by the law governing the assigned claim or right. This choice of law, however, cannot be asserted against the third party debtor without the consent of such third party debtor. In addition, the debtor can also raise objections as to the validity of the assignment under the law governing the assigned claim or right. If the debtor's consent is not obtained, it will be necessary to ensure that the assignment of rights and claims which are governed by Swiss law is also valid under Swiss law.

## **Common Issues in Guarantees and Security Agreements**

A company can grant a security interest in the form of a pledge or assignment for security purposes or transfer for security purposes to secure its own obligations under a loan agreement or the obligations of a third party (or both). In case of an up-stream or cross-stream guarantee or security securing the obligations of a direct or indirect parent or a sister company of an entity which is incorporated as a Swiss corporation or limited liability company, particular restrictions apply under Swiss capital maintenance rules.

In general, if a guarantee or security for obligations of a direct or indirect parent or sister company is not provided on arm's length terms (meaning on terms that would be agreed by an independent guarantor or security provider), the guarantee or security will be treated as if it were a distribution to shareholders (such as a dividend) from a Swiss

corporate law perspective in an enforcement scenario. Under Swiss law, a distribution can be made only from freely available equity, corresponding to the amount in excess of the nominal share capital and mandatory legal reserves which is permitted to be distributed to the company's shareholders.

Furthermore, the corporate purpose of the Swiss guarantor or security provider (as set out in its articles of association) should expressly cover and permit the granting of guarantees or security for obligations of affiliated entities (including direct or indirect shareholders and sister companies). In fact, the members of the board of directors are required to act in the interest of the relevant company and should not take any action that is contrary to the corporate purpose of the company as set out in its articles of association. On the formal side, the board of directors and shareholders of the guarantee-providing or security-providing company will need to approve the up-stream and cross-stream guarantee or security arrangements. The limitations applicable to available equity and the consequences in case of an enforcement of the guarantee and security need to be considered and reflected in the corresponding security agreements.

For more information, see [Country Q&A, Lending and Taking Security in Switzerland: Overview: Question 13](#).

## Issues in Enforcing a Loan, Guarantee, or Security Interest

### Capital Maintenance Rules

Under Swiss capital maintenance rules, if a Swiss obligor provides a guarantee or security for obligations of its direct or indirect parent or sister companies, in an enforcement scenario the guarantee payment or the application of proceeds from the enforcement of security provided by the Swiss obligor is limited to the amount that Swiss obligor could use to make distributions to its shareholders. Essentially, this is the amount of the Swiss obligor's freely distributable equity at the time payment under the guarantee is demanded or enforcement proceeds are applied.

This limitation does not free the Swiss obligor from its obligations under any guarantee, indemnity or transaction security. Rather, it postpones the Swiss obligor's payment obligations to a time when distributions are again permitted. Nevertheless, in an insolvency scenario, these limitations typically have a material adverse effect on the value of up-stream and cross-stream security and guarantees.

It should be noted, however, that these limitations do not apply where the transaction security and guarantees are granted on an arm's length basis. Given that it is quite difficult to establish what arm's length terms are and the legal risks associated with capital maintenance issues, transactions are hardly ever structured in a way to rely only on the arm's length element without any limitations. If transactions are not made on arm's length terms, the risks are that they may qualify as an unlawful repayment of shareholders' equity or as a hidden distribution that would trigger an immediate repayment obligation of the recipient, or that the board of directors may be exposed to personal liability if the up-stream or cross-streamed payments are not fully recoverable.

Customary Swiss limitation language typically requires the Swiss obligor to write up or sell certain assets which are not necessary for its business operations, or to reduce its share capital to the legally required minimum amount in order to generate freely available equity and thereby mitigate the impact of the limitation.

### Enforcement Actions and Types of Enforcement

The circumstances under which a guarantee or security can be enforced are usually set out in the loan documents. Depending on the type of security and the terms agreed between the parties, the secured party may need to give notice to the security provider of its intention to enforce prior to proceeding with such enforcement. The main types of security interests are enforced either by way of private enforcement or in accordance with the rules on official debt enforcement and bankruptcy proceedings set out in the Swiss Debt Enforcement and Bankruptcy Act (DEBA).

Typically, the secured party has the contractual right to choose between private enforcement, which is less formalistic and usually faster, and official debt enforcement and bankruptcy proceedings under the DEBA. In case of private enforcement, the secured party is required to realize the security in a way to receive the best price for the assets



under the relevant circumstances by way of private sale or public auction. Assets with an objectively determinable market value should be realized at that market value and can also be purchased by the secured party for its own account at the market value, as a result of which the purchase price will be set off against the secured obligations. In case of a security assignment of receivables, the parties can agree that the secured party has the right to collect directly any of the assigned receivables from the respective debtors.

For more information, see [Country Q&A, Lending and Taking Security in Switzerland: Overview: Question 20](#).

## Lenders' Rights in Insolvency

### Types of Insolvency Proceedings

In the event of a Swiss debtor's insolvency, insolvency proceedings will be subject to and governed by the Swiss debt enforcement and bankruptcy laws set out, in particular, in the DEBA. All companies registered in the Swiss commercial register are subject to Swiss bankruptcy proceedings.

Banks, insurance companies, collective investment schemes, securities dealers, portfolio managers, managers of collective assets, and financial market infrastructures are subject to particular insolvency regimes based on the prudential regulation applicable to each.

#### Debt Enforcement Procedure

Swiss bankruptcy proceedings subject to the DEBA can be initiated by individual creditors that apply to the competent bankruptcy court for an order to declare the relevant entity's bankruptcy, after going through a statutory debt enforcement procedure with respect to such creditor's financial claims. The purpose of the debt enforcement procedure is to confirm the legal merits of the relevant claims, or the recognition and enforceability of claims based on a foreign judgment, and to give the debtor the possibility to settle the claim within the legally set deadlines prior to declaring it bankrupt. During the course of the statutory debt enforcement procedure, the debtor may raise various legal defenses with respect to the claims asserted against it.

#### Formal Bankruptcy Proceedings

Once the merits of the claim have been confirmed by a court, or a foreign judgment has been recognized and is enforceable, and in each case the amount due remains unpaid, the competent court can declare the opening of formal bankruptcy proceedings.

In addition to the above, any individual creditor may apply to the competent bankruptcy court for an order to declare the debtor's bankruptcy without first having to go through the statutory debt enforcement procedure, if the creditor can demonstrate that the debtor has, in general, ceased to make payments of debts when due.

A corporation may file for its own bankruptcy if it is illiquid or over-indebted and the directors do not succeed in negotiating private restructuring measures or composition agreements.

If a corporation's board of directors has or should have reason to believe that the corporation's debts exceed its assets (meaning the corporation is over-indebted), the board is required to immediately prepare interim financial statements based on going concern values (provided that a going-concern scenario is realistic). If the interim financial statements show that the corporation's debts exceed its assets or that there is no going concern scenario, interim financial statements must also be prepared based on liquidation values. All interim financial statements must be audited.

If the balance sheet based on liquidation values also shows that the company is over-indebted, the board of directors is legally required to file for bankruptcy or a composition moratorium with the competent court unless one of the following exceptions applies:



- Creditors subordinate their claims and the relating interest due on such subordinated claims, in an aggregate amount not less than the corporation's over-indebtedness, to the claims of all other creditors.
- An out-of-court restructuring to remedy the over-indebtedness is substantially likely within a reasonable period, but no later than 90 days after the audited interim financial statements are available, and provided that the claims of the creditors are not additionally jeopardized by the restructuring.

Upon the opening of formal bankruptcy proceedings, all assets of the debtor will become part of the bankruptcy estate (including assets that have been pledged to third parties) and can be administered and disposed of only by the bankruptcy office or a bankruptcy administrator. All claims against the debtor, except for those secured by a mortgage on the debtor's immovable property, will become immediately due. The bankruptcy proceedings ultimately lead to the liquidation of the debtor's assets.

Creditors can no longer enforce their claims individually, but are all subject to the rules of the bankruptcy proceeding and are required to prove their claims with the competent bankruptcy administration.

Upon a declaration of bankruptcy, it is no longer possible to enforce a right of pledge granted by the bankrupt debtor through private enforcement proceedings. Claims secured by a right of pledge have a preferential treatment in that the secured creditors will have a direct right to receive the enforcement proceeds of such collateral to satisfy their secured claims. Claims that are not covered by the enforcement proceeds of the pledged assets will be distributed according to the general rules on distribution among creditors under the DEBA.

Assets, claims, and rights that have been transferred or assigned for security purposes prior to the opening of bankruptcy proceedings are no longer the bankrupt debtor's property and, therefore, are not included in the bankruptcy estate. However, claims and rights that have been assigned for security purposes, but only came into existence after the opening of bankruptcy proceedings against the debtor, will fall into the debtor's bankruptcy estate and will not be transferred to the secured party.

Subject to certain restrictions, a creditor may set off its claims against the claims of a bankrupt debtor. No set-off is allowed if a debtor of the bankrupt party became a creditor only after the opening of bankruptcy proceedings or if a creditor of the bankrupt party became a debtor only after the declaration of bankruptcy.

As for realization proceedings, the DEBA provides for a public auction or, subject to certain conditions, a private sale. Enforcement proceeds are used to cover the following:

- Enforcement costs.
- Claims of secured creditors.
- Claims of unsecured creditors according to their ranking as set out in the DEBA.

## Composition Moratorium

Under the DEBA, it is also possible for the debtor or, under certain conditions, a creditor, to apply for a provisional composition moratorium (*provisorische Nachlassstundung / sursis concordataire provisoire*) with the competent court in order to seek a restructuring. First, courts will grant a provisional composition moratorium for a maximum of four months (extendable by an additional four months). Courts can refuse to grant a provisional composition moratorium only if there are no prospects for rehabilitation or for the confirmation of a composition agreement. If, during the provisional moratorium, it becomes apparent that there is a prospect for the debtor's restructuring or confirmation of a composition agreement, the court will grant a definitive composition moratorium for a further four to six months (extendable to a maximum period of two years) and appoints a composition commissioner (*Sachwalter / commissaire*).

If the debtor can be restructured during the composition moratorium, the composition court will lift the moratorium and the debtor will go back to the ordinary course of business. If there are no prospects for the debtor's restructuring or for the confirmation of a composition agreement, the court will open bankruptcy proceedings.

During the composition moratorium, debt collection proceedings and bankruptcy proceedings cannot be initiated against the company and pending proceedings are stayed. This also applies to proceedings relating to pledged assets (with the exception of pledges on immovable property, whereby the immovable property cannot be realized during the composition moratorium). In addition, any interest on unsecured claims ceases to accrue.

In addition, the debtor's power to dispose of its assets may be restricted. While the debtor may continue to manage its affairs under the surveillance of the court-appointed commissioner (debtor in possession), the composition court may order that certain actions require the approval of the commissioner or that the commissioner will manage certain affairs of the debtor on its behalf. Particular actions, such as the sale of fixed assets or the granting of security over the debtor's assets, require the prior consent of the composition court or a creditor committee, if one is appointed.

If a composition agreement appears achievable, the composition commissioner will call a meeting of creditors so they can approve the draft composition agreement (*Nachlassvertrag / concordat*) according to particular majority rules. Composition agreements are also subject to the approval of the competent composition court. The DEBA provides for two types of composition agreements:

- Ordinary composition agreements (*ordentlicher Nachlassvertrag / concordat ordinaire*).
- Composition agreements with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actif*).

Upon confirmation of the composition agreement by the composition court, the composition agreement becomes binding on all involved parties.

Following the approval of a composition agreement, all debt collection proceedings are ceased. As for pledged assets, the part of the secured claims that is covered by the collateral remains unaffected by the composition agreement. Any enforcement proceedings relating to pledged assets can be continued from the time of the judicial confirmation of the composition agreement.

## Avoidance of Certain Actions or Transactions

The bankruptcy administration and, under certain conditions, individual creditors can sue for the avoidance of actions by the debtor that:

- Were taken during a certain period (of one year or five years, depending on the type of avoidance action) prior to the opening of the debtor's bankruptcy (the so-called *période suspecte*).
- Were to the disadvantage of the debtor's creditors.
- Fulfil the requirements of one of the avoidance provisions set out in the DEBA, which relate to the following:
  - voidability of a gift (with a *période suspecte* of one year);
  - voidability due to over-indebtedness (with a *période suspecte* of one year); and
  - voidability for intent (with a *période suspecte* of five years).

In addition, the set-off by a third-party debtor of a bankrupt corporation is voidable if that third-party debtor acquired a claim against the corporation prior to the opening of the corporation's bankruptcy, but in awareness of the

corporation's illiquidity, in order to gain, by way of set-off, an advantage for itself or a third party to the detriment of the bankrupt estate. Avoidance actions that are available in the debtor's bankruptcy are also available after the court's confirmation of a composition agreement with the assignment of assets.

The most common avoidance action under Swiss law is the voidability for intent. This action may be brought if the debtor carried out an act during the *période suspecte* of five years with the intention of disadvantaging its creditors generally, or of favouring certain of its creditors to the disadvantage of others, and such intention was recognisable to the other party. Pursuant to Swiss case law, to establish the required intent on the part of the debtor, it is sufficient to establish that the debtor could have, and must have, anticipated that the relevant act would disadvantage the entirety of its creditors or favour individual creditors over other creditors. It is not necessary that the debtor was over-indebted at the time the relevant act was carried out.

As a result of the broad interpretation in Swiss case law of the requirements relating to the avoidance action for intent, a corporation's board of directors is essentially required to ensure the equal treatment of its creditors as soon as the board is aware that the corporation is in a situation of financial distress.

## Order of Priority

Costs and expenses of the bankruptcy proceedings have priority over other claims. Such preferential treatment extends to claims under agreements the bankruptcy administrator entered into or continued on behalf of the debtor after the opening of bankruptcy proceedings (such as rental agreements and salaries).

With respect to all other claims, Swiss mandatory law makes the distinction between the following categories:

- Secured creditors, which are generally paid first from the proceeds of their respective security.
- Two classes of statutorily preferred creditors, such as claims of employees (to a certain extent) or social insurance schemes.
- General unsecured and unsubordinated creditors.
- Subordinated creditors.

For more information, see [Country Q&A, Lending and Taking Security in Switzerland: Overview: Questions 21 to 24](#).

## Regulatory Issues Affecting Foreign Lenders

### Making a Loan

For a summary of the regulatory requirements that a foreign lender needs to comply with before it may make a commercial loan to a borrower in Switzerland, such as licensing, filing, or registration requirements, see [Practice Note, Lending to a Company in Switzerland: Regulatory Issues: Restrictions on Making Loans or Taking Security or Guarantees: Restrictions on Making Loans](#).

### Taking a Guarantee or Security Interest

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can take a guarantee or a security interest from an entity in Switzerland, or a security interest over assets located in Switzerland, see [Practice Note, Lending to a Company in Switzerland: Regulatory Issues: Restrictions on Making Loans or Taking](#)

Security or Guarantees: Restrictions on Taking Security or a Guarantee.

## Enforcing Rights Under a Loan Agreement

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce its rights under a loan agreement against a borrower in Switzerland, see [Practice Note, Lending to a Company in Switzerland: Regulatory Issues: Restrictions on Making Loans or Taking Security or Guarantees: Restrictions on Enforcing Rights Under a Loan Agreement](#).

## Enforcing Security Interests

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce security interests in Switzerland, see [Practice Note, Lending to a Company in Switzerland: Regulatory Issues: Restrictions on Making Loans or Taking Security or Guarantees: Restrictions on Enforcing Security](#).