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13th Edition

Contributing Editor:
John Dewar
Milbank LLP

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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Infrastructure projects in the areas of leisure and property, transport, energy and the water sector continue to be significant. The projects are usually financed by public funds, however, due to projected increases in investment, private funds will likely become more important in the future.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

The market has been dominated by transport, stadium and leisure/property projects; for example, the theatre in Delsberg which also includes a shopping centre, commercial space and apartments.

2 Security

2.1 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?

Asset security can be given by pledge or by assignment or transfer for security purposes.

A pledge gives the secured party possession of the security while the security provider retains ownership of the security. A pledge can be obtained over movable assets, real estate property, and claims and rights. Because of the principle of accession (*Akzessorietätsprinzip*), which is applicable to pledges, each of the secured parties would need to be a party to the relevant pledge agreement. In a security trustee or security agent structure, Swiss pledge agreements therefore provide that the secured parties – represented by the security agent or trustee – are parties to the agreement.

The parties may favour creating security by assignment (for claims and rights) or transferring for security purposes (for movable assets), which gives the secured party full ownership of the asset. The secured party is contractually obliged to re-assign or re-transfer the asset to the security provider. An assignment is a non-accessory security, which means that a security agent or trustee may hold the security as fiduciary in its own name and for the benefit of all secured parties.

The valid creation of a security requires a security agreement and the perfection of the security interest. In the security agreement, the security provider undertakes to pledge or transfer/assign for security purposes certain assets to the secured party. Depending on the kind of asset, perfection is achieved through a declaration of pledge/assignment or delivery of the movable asset. Security interests over certain assets (real estate property, railways, aeroplanes and ships) require registration.

In order to obtain security over all assets of a Swiss company, a combination of a share pledge agreement and security agreements over the company's assets is required.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

For real property (which includes land, buildings and other constructions that are connected to the ground, whether overground or underground, e.g. pipelines), security is taken by way of mortgage or mortgage note. Both types of security require the conclusion of a mortgage agreement in the form of a notarised deed. The mortgage or mortgage note must be registered in the land registry for perfection. For certified mortgage notes, the secured party also needs to have possession of the mortgage note. Mortgage notes (whether certified or not) may be pledged or transferred for security purposes.

Movable assets such as machinery and equipment may be pledged or transferred for security purposes. A security agreement specifies the assets to be pledged or transferred. Since the security holder needs to be in possession of the pledged assets during the security period (*Faustpfandprinzip*), security over plants, machinery, equipment or inventory is possible, but usually not taken.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security over receivables can be taken either through pledge or assignment for security purposes (receivables are considered to be rights and claims).

Assignments for security purposes, which are more common, require a written agreement in which the assignor and the assignee specify the receivables to be assigned. Under certain circumstances, it is also possible to assign future receivables.

The debtor does not have to be notified of the assignment. However, before such a notification, *bona fide* payments by the debtor to the assignor will release the debtor from its payment obligations.

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

Security over cash deposited in bank accounts can be taken through a pledge or assignment for security purposes (over the claims the account holder has against the bank). Lenders usually prefer assignments. A written security agreement must describe the bank account claims to be pledged/assigned. It is not a legal requirement to notify the bank of the pledge or assignment, even if usually done in practice.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Security over shares in companies incorporated in Switzerland can be taken through assignment for security purposes or, more commonly, through a pledge of the shares. The pledge or assignment of shares requires a security agreement. The perfection of uncertified shares requires a written declaration of the pledge or assignment.

In practice, it is recommended to issue physical share certificates to strengthen the secured party's position in case of enforcement. To perfect the security over certified shares, the pledgee or assignee needs to have physical possession of the shares. For registered certified shares (in contrast to bearer shares), the shares also require an endorsement or assignment.

2.6 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 (in particular, shares, real estate, receivables and chattels)?

In relation to security over shares, receivables and chattels, there are generally no notarisation, registration, stamp duty or other fees that apply. Stamp tax of up to 0.3% may be levied on the transaction value in a transfer of ownership of securities if a Swiss bank or securities dealer is involved.

Security over real estate requires a notarised deed, which may incur notaries' fees. The registration of the mortgage or mortgage note with the land registry may incur registration fees as well as cantonal and communal taxes.

The voluntary registration of a security over intellectual property with the intellectual property register incurs registration fees, but protects the holder of the security from a *bona fide* third party acquiring the intellectual property right.

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

Filings, notifications or registrations in relation to security over assets (only required for certain assets; see question 2.1) can usually be completed within a few days. During certain times of the year, in particular before the summer and Christmas break, it may take longer because registries may be overloaded with work.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

Generally, no. However, a pledge over real property may require a Lex Koller permit if the pledge is in favour of a foreign party. Further, pledges over railway and navigation companies operating under a federal concession require the consent of the federal council.

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Switzerland does not have its own legislation on trusts. However, Switzerland is party to The Hague Convention on the Law Applicable to Trusts and their Recognition, and therefore recognises foreign trusts.

Switzerland also recognises the role of security agents or trustees to enforce security and apply the proceeds from a security to the claims of the lenders. However, the principle of accession may cause challenges (see question 2.1).

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

Sometimes parallel debt structures are used in order to facilitate changes to the secured parties. Under a parallel debt structure, the borrower owes to the security agent in its individual capacity an amount equal to the aggregate of the amounts owed by the borrower to all lenders under the financing documents. However, this concept remains untested in Switzerland.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

A transfer or assignment for security provides the secured party with full ownership of the asset which he may privately enforce. This can be done even after the opening of bankruptcy proceedings. Receivables and claims may be collected from the third-party debtors or may be sold to a third party.

In the case of a pledge, the secured party may only privately enforce the asset if this has been agreed beforehand in the security agreement. Otherwise, the pledge must be enforced through enforcement proceedings with an insolvency official. A public auction, which is the standard procedure of realisation, can be time-consuming and create substantial costs. Under certain circumstances, *inter alia*, if all parties agree or securities or other items with a market or stock exchange price are to be realised, the debt collection office may allow the public auction to be replaced with a private sale.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

In general, the same rules will be applied to foreign investors and creditors as to domestic ones.

5 Bankruptcy and Restructuring Proceedings

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

Firstly, it is to be noted that bankruptcy proceedings over a project company do not affect collateral which has been transferred or assigned to the secured party for security purposes, and as such collateral is no longer part of the assets of the security provider. The secured creditors are not required to hand the collateral over to the bankruptcy administrator and can, if permitted by the security agreement, liquidate the collateral privately.

However, where security is granted in the form of a pledge, ownership remains with the security provider. If bankruptcy proceedings are opened over the security provider, he is no longer entitled to dispose of such assets and must hand the pledged assets over to the bankruptcy administration for liquidation with other assets. Swiss law guarantees the secured creditors' right to preferential satisfaction.

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

Security given by a bankrupt entity may become subject to clawback actions under the following conditions:

- Article 286 of the Federal Act on Debt Enforcement and Bankruptcy (DEBA): if the debtor did not receive adequate compensation for any gifts, gratuitous acts or dispositions, these acts become voidable if they were made within one year prior to the commencement of bankruptcy proceedings or one year prior to the notification of the debt moratorium against said debtor.
- Article 287 DEBA: the granting of collateral for existing obligations, to which the debtor was not obligated, the settlement of monetary debt by unusual means and the payment of undue debt are voidable, if carried out by an over-indebted debtor within one year prior to the opening of the bankruptcy proceedings or one year prior to the notification of the debt moratorium against said debtor.
- Article 288 DEBA: all acts carried out by a debtor within five years prior to the initiation of the bankruptcy proceedings or five years prior to the notification of the debt moratorium against said debtor are voidable, if carried out with the intent to harm its creditors or to favour certain creditors to the detriment of the remaining creditors, and the contracting party was aware of such intent.

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

The bankruptcy of certain entities is governed by specific bankruptcy regimes; the most important special regime deals with the insolvency of banks, security dealers and mortgage bond institutions. The proceedings are managed by the supervisory authority (FINMA) itself.

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

Please see question 4.1.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

Swiss bankruptcy law provides for composition proceedings, which are aimed at enabling a debtor to reach a restructuring agreement with its creditors. It was introduced in the revised DEBA of 1 January 2014 and facilitates companies' access to protection under a moratorium for mere restructuring purposes.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Under Swiss corporate law, the board of directors has a general duty to safeguard the interests of the company, which includes the responsibility to ensure that the company remains financially sound and to take appropriate restructuring measures, should it be in financial difficulty. Depending on the balance sheet situation of the company, the directors are legally obliged to take specific measures, which depend on the level of losses the company has incurred.

Taking timely action is a key component of a director's duty to perform his/her tasks with due care. Failing to do so incurs the risk of becoming personally liable to anyone suffering losses, if an intentional or negligent breach of duty of care can be established. The relevant damage consists of the increase in the company's losses occurring between the point in time at which the board learned about the situation of over-indebtedness (and failed to notify the bankruptcy judge) and the date on which the company is declared bankrupt. In a series of decisions, the Swiss Federal Court held that subordinated debts should be included in the calculation of the damage caused to a company in a director's liability claim, as subordination does not constitute a waiver and thus does not diminish the company's damage. However, in light of a recent revision of Swiss corporate law, article 757 para. 4 of the Swiss Code of Obligations now states that subordinated debt should not be included in the assessment of the damage, therefore overturning the Swiss Federal Court's practice.

Further, the Swiss Penal Code may be applicable in case of reckless bankruptcy or mismanagement.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Few legal restrictions exist in relation to foreign ownership of a project company.

Foreign ownership may be restricted in public monopoly sectors or where licence or concession requirements apply (i.e. rail transport, energy supply and postal services).

For the acquisition of non-commercial property, Lex Koller should be consulted and concession requirements may have to be met. The acquisition of rural real estate is controlled by rural land legislation.

Domicile requirements apply in certain areas, such as air and maritime transport, hydroelectric and nuclear power or operation of oil and gas pipelines.

Regarding control of a project company, depending on the company type, certain restrictions as to the composition of the board of a Swiss company may apply.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Switzerland is bound by the World Trade Organization's General Agreement on Trade in Services and its Agreement on Trade-Related Investment Measures. Under the Organisation for Economic Co-operation and Development (OECD) Code of Liberalisation of Capital Movements, Switzerland has undertaken to refrain from discriminatory practices against foreign investments made by OECD investors. Further, 115 bilateral investment promotion and protection agreements (BITs) protect foreign investments. Dispute settlement mechanisms are often provided for in the BITs.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Under the Swiss Constitution, expropriation is only permissible if it is based on law, is in the public interest, is commensurate and the expropriated owner is fully compensated.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Switzerland's federal structure gives federal, cantonal and communal authorities legal competence to authorise projects. With regard to legislation and approvals of projects in the aviation, railway, transport, power generation, energy, telecommunication/radio and television sectors, the Federal Department of the Environment, Transport, Energy and Communications (DETEC) is the main competent organ. Cantonal and communal authorities will become involved if affected by a specific project. On the other hand, sectors like water management and mining are regulated by cantonal legislation.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Basically, no. However, exceptions may apply for legal transactions involving real estate, as in most cases notarial certification is required. If the specific project involves acquisition of non-commercial property by a foreigner, Lex Koller should be consulted and concession requirements may have to be met. The acquisition of rural real estate is controlled by rural land legislation. Should either legislation apply, a permit or a ruling of the competent authority must be obtained. Special licensing or approvals by the competent agency may be required for construction projects or projects in the area of public service.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Generally, the ownership of private land does not require a licence (see question 7.2 for exceptions). The same applies to the undertaking of business on private land. However, the exploitation of natural resources, even if located on the land of the interested party, may require a governmental permit or licence.

For state-owned land, the extraction and exploitation rights, as well as the operation of a pipeline, require a licence or concession and the payment of fees. In general, a foreign applicant needs to have a legal domicile or a branch in Switzerland during the tenure of the licence or concession to ensure compliance with Swiss law.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

With the exception of groundwater, which belongs to the cantons, natural resources belong to the owner of the land. However, their extraction may require a permit or licence. For state-owned land, please see question 7.3. Export restrictions apply in the energy sector.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

No, there are not. However, official exchange offices may charge a fee for their services.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are no restrictions, controls or fees, with the exception of applicable taxes (see question 17.1).

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, this is possible.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Restrictions do not apply, as long as dividends are only paid from the disposable profit (after the mandatory allocation of profits to the legal reserve of the project company).

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Before a competent authority authorises a public project, it will examine the compatibility of such project with Swiss environmental, health and safety laws. However, these laws would generally not affect the financing part of a project.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

Switzerland is a signatory to the General Procurement Agreement dated 15 April 1994 (GPA) and has concluded a bilateral agreement with the European Union (EU). These international treaties provide the legal framework for both federal legislation and cantonal procurement legislation, of which there are 26 different ones. The fundamental principles of public procurement regulation are equal treatment, transparency and competition.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

According to the Federal Insurance Supervision Act, foreign insurance companies that insure risks situated in Switzerland are obliged to obtain a licence for their business activities from FINMA. Foreign companies must have a branch in Switzerland and appoint a general agent.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, they are.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

The restrictions depend on the country of origin of the employees. Foreign workers from the European Free Trade Association (EFTA) or EU states enjoy unrestricted access to the Swiss labour market due to the Agreement on Free Movement, entered into between the EU and Switzerland in 1999. For workers from all other countries – so-called "third countries" – work and residence permits are strictly controlled and only granted if (i) he/she is a highly qualified worker, and (ii) his/her skills are urgently required and the Swiss or EFTA/EU labour markets do not have suitable people available.

Following Brexit, the Agreement on Free Movement between Switzerland and the UK is no longer applicable. According to a new agreement between Switzerland and the UK, employees who were already employed in the other country may remain there. For the transfer of employees after Brexit, the countries have agreed to a temporary solution, the Services Mobility Agreement, which is effective until 31 December 2025 and provides for facilitated access to both markets.

On 9 February 2014, the Swiss electorate voted in favour of an initiative limiting immigration into Switzerland by setting quantitative limits and quotas, which has been cautiously implemented by the Swiss government. In May 2020, the Swiss electorate rejected a new initiative to terminate the Agreement on Free Movement with the EU.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Importation of goods into Switzerland depends on the purpose and the value of the goods. For foreign professional equipment and contractor equipment, specifically imported for a project and for a limited period of time, the temporary admission procedure may apply. However, in some cases permanent importation could be less expensive and less time-consuming. Furthermore, VAT may apply.

10.2 If so, what import duties are payable and are exceptions available?

Customs tariffs are available on the website of the Swiss Federal Customs Administration (http://www.tares.ch). Besides temporary imported goods, exceptions exist for commercial samples and specimens as well as for goods intended for non-profit organisations. As of 1 January 2024, industrial tariffs have been abolished which are estimated to create welfare gains at some CHF 860 million.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

In general, yes. *Force majeure* risks are, in practice, often covered by insurance.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Swiss Penal Code provides regulations to combat corruption in the public as well as in the private sector. A maximum sentence of five years' imprisonment or a fine may be imposed on a member of a judicial or other Swiss or foreign authority

who (i) offers, promises or grants an advantage, or (ii) requests or accepts a promise or a bribe. In the private sector, active and passive bribery are punishable by a maximum sentence of three years in prison, or a fine. Criminal prosecution of corrupt business practices may also be extended to the employer company, should it not have undertaken all requisite and reasonable organisational precautions required to prevent the bribery of public officials or persons in the private sector by its staff. The responsible company can receive a fine of up to CHF 5 million.

13 Applicable Law

13.1 What law typically governs project agreements?

Swiss project agreements will usually be governed by Swiss law.

13.2 What law typically governs financing agreements?

Financing agreements will usually be governed by the law of the jurisdiction where the arranger of the financing is located.

13.3 What matters are typically governed by domestic law?

The security agreements will usually be governed by the law of the country where the security is located to ensure their validity and enforceability in the case of insolvency. For assets located in Switzerland, security agreements creating a security interest over these assets will be governed by Swiss law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Switzerland recognises and enforces waivers of immunity. Swiss courts also recognise the choice of jurisdiction in civil law matters. However, certain matters are subject to mandatory exclusive jurisdiction rules (such as disputes related to property or disputes in public law matters).

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

As provided for in the Private International Law Act (PILA) and the New York Convention, a Swiss court must decline its competence in favour of an arbitral tribunal if a valid arbitration clause has been agreed on between the disputing parties and if the dispute is arbitrable pursuant to Swiss law.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Switzerland is a party to the New York Convention and is a member of the International Centre for the Settlement of Investment Disputes (ICSID).

15.3 Are any types of disputes not arbitrable under local law?

Only disputes regarding monetary claims are arbitrable under Swiss law.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

This is not applicable in the area of project finance.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

No, we have not seen calls for political risk protections.

17 Tax

17.1 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?

While interest paid on a loan granted to a Swiss non-bank is generally free from taxes, interest payments may become subject to 35% Swiss withholding tax if the loan qualifies as a bond for Swiss withholding tax purposes. A syndicated loan is treated as a bond and is subject to a withholding tax charge if (i) a Swiss tax-resident borrower of one syndicated facility (providing for identical conditions) owes interest-bearing money of more than CHF 500,000 to more than 10 lenders which are not banks (the "10 Non-Bank Rule"), or (ii) a Swiss tax-resident borrower under debt relationships with different conditions owes interest-bearing money of more than CHF 500,000 to more than 20 lenders which are not banks (the "20 Non-Bank Rule").

For interest payments secured by Swiss real estate, withholding tax at a rate of 13%–33% (federal and local tax) may be levied unless there is a double tax treaty for the foreign tax-resident lender.

The granting of an upstream or cross-stream security may trigger a 35% dividend withholding tax if not granted on arm's-length terms (a so-called "constructive dividend"). For non-Swiss lenders, a refund may be granted only pursuant to a double tax treaty between Switzerland and the country of residence of the lender.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Industrial companies and production-related service providers that are located in specifically determined economic development areas and that are creating new jobs through a new venture, or are preserving existing jobs through a substantial realignment of their existing business, can get a Swiss federal tax holiday for a period of up to 10 years. In order to obtain a federal tax holiday, the canton must also have granted a cantonal tax holiday for the same type of business activity. The federal tax holiday can lead to an annual tax credit of up to CHF 95,000 for each newly created job and CHF 47,500 for each maintained job.

A transfer of securities may be subject to Swiss transfer tax. For interest and dividend payments, see question 17.2. A moderate stamp duty rate applies to the incorporation of a Swiss company limited by shares with shareholders' equity of more than CHF 1 million.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

No, there are not.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

To begin with, bonds will be placed directly with investors or indirectly via banks with no involvement of a stock exchange. If trading on a stock exchange is desired, the Swiss Stock Exchange (SIX) is the main equity exchange in Switzerland. The listing process involves the duty to publish a prospectus, the subscription period, and the lodging of a listing application with the stock exchange, and the issuer must meet various requirements set out in the Listing Rules. In order to remain listed, the issuer has to carry out certain duties such as publication of price-sensitive data.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Instruments like *Istina'a, Ijarah, Wakala* and *Murabaha* reflect general principles of Islamic finance. For *Shari'ah*-compliant transactions in the scope of an Islamic project, such financing structures can be used in Switzerland.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

Although Swiss contract law is based on the principle of contractual freedom, it is disputed whether the parties can choose a non-governmental law as the governing law of a contract or a dispute. To our knowledge, there have not been any recent notable cases involving *Shari'ah* law in the finance sector.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Generally, no.



Daniel Hayek is chairman of the management committee and head of the Insolvency and Restructuring team as well as the Corporate and M&A team of Prager Dreifuss. Daniel has been a partner with Prager Dreifuss since 2001. His practice focuses on all aspects of insolvency and restructuring matters, including representing creditors in bankruptcy-related litigation, registering or purchasing claims or in enforcing disputed claims before courts. His longstanding expertise includes M&A, corporate finance, takeovers, banking and finance, and corporate matters, including restructuring situations. Daniel has: represented the trustee and security agent of the bondholders regarding their claims against one of Europe's largest independent oil refiners, the Swiss-based Petroplus group; secured the enforcement of a large claim based on derivatives in litigation against the bankrupt estate of the Swiss Lehman entity; and advised the trustee of the Kodak pension plan on the acquisition of assets and restructuring.

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