

Switzerland

The floating charge is no longer a foreign concept

It is now possible to create a Swiss security over intermediated securities that is similar to a floating charge, although this has yet to be embraced by the market



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Switzerland has been a good market for acquisition finance for quite some time, and it seems that interest in acquiring Swiss companies is still growing.

So far this year we have already seen high-profile transactions such as the acquisition of the Swiss Syngenta group by ChemChina. The \$43bn deal, once completed, is said to be the biggest Chinese foreign takeover ever.

It goes without saying that in any leveraged acquisition finance transaction a good security package is a key component for success.

In general, foreign lenders in Switzerland can expect to obtain security over types of assets such as receivables, real estate and bank accounts, and in a form (assignment or pledge) they are used to seeing in an international context. There is one exception, though. Floating charges, ie a security over an underlying asset or group of assets which is subject to change in quantity and value over time are seemingly unavailable in Switzerland.

In principle, this statement is true. According to the Swiss principle of speciality rights in rem must pertain to individual objects or rights. Consequently, security can be taken over rights and objects that can be individualised, but there are no securities over an aggregate of things or rights under Swiss law.

There are ways to mitigate the consequences of the principle of speciality. For example, an assignor can assign all its current and future claims vis-à-vis third parties as a security so long as they can be individualised, or the contents of a warehouse can be pledged when the security agent has control over the warehouse – ie the keys. However, it goes without saying that this principle of speciality does not sit well on the concept of a floating charge.

A new category of rights

On 3 October 2008 the Swiss Federal Intermediated Securities Act (FISA) entered into force. FISA introduced to Swiss law intermediated securities (Bucheffecten), ie fungible claims or membership rights vis-à-vis the issuer that are credited to a securities account of an intermediary such as a bank, for example.

Prior to FISA there were only two categories of rights under Swiss law: objects and claims. Intermediated securities are a new category of rights and the question arose of the extent to which the pre-existing principles of Swiss law

should apply to them. Security over intermediated securities can be established by transferring the full title of the intermediated securities to an account controlled by the lenders. Alternatively, the intermediated securities can be pledged in favour of the lenders. To complete such a pledge the account owner and the intermediary must enter into an irrevocable control agreement according to which the intermediary stipulates to act on the instructions of the lender without approval or participation of the account holder.

However, subject to an agreement between the lender and the account holder the latter may continue to operate the account until the intermediary receives a blocking notice by the lender.

Since intermediated securities are a new category of rights it is not completely clear if, or to what extent, the pre-existing principles of Swiss law, including the principle of speciality, should be applicable.

It was clear from the beginning that the principle of speciality in its purest form demanded either granting security over all intermediated securities in an account or specifying each intermediated security in the underlying agreement. The first option seems rather inflexible and may lead to commercially unjustifiable results, and the second option appears to be somewhat impractical.

To avoid these issues FISA introduced the option of granting security over a value quota of an intermediated securities account. Therefore, it is possible to create a Swiss security over intermediated securities that is, to a certain extent, similar to a floating charge.

Options and flexibility

So far, it seems that the market has not yet fully embraced the Swiss ‘floating charge’ over intermediated securities because lenders prefer, in most cases, the court-tested alternatives such as a pledge of physical share certificates, if these are available. However, additional options and more flexibility is always welcome when a securities package is structured.

And last but not least, since Swiss law has adopted the floating charge in one area it may be introduced in other areas too, by new legislation.