FRORIEP SWISS LAWYERS

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BANKING & FINANCE BRIEFING

SELECTED ISSUES OF SWISS LAW IN FINANCE TRANSACTIONS

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1. CORPORATE INFORMATION

1.1 Legal forms

There are several legal forms under which a business can operate in Switzerland, ranging from personal firms and partnerships to corporations. The two most common types of companies are the corporation *(Aktiengesellschaft, Société anonyme, Società anonima*) and the limited liability company *(Gesellschaft mit beschränkter Haftung, Société à responsabilité limitée, Società a garanzia limitata)*. The corporation is still the preferred type of company; it can be used for listed and private companies (there is no difference between a "plc" and a "ltd" under Swiss corporate law).

1.2 Certified excerpt from the Commercial Register

In order to verify that a Swiss company is existing and duly incorporated and that the agreements have been signed by the authorised signatories, an up-to-date certified copy of the excerpt from the Commercial Register should be requested as a condition precedent. The excerpt also shows general information about a Swiss company, such as an abbreviated description of the company purpose, the date of first registration, exact name, registered address, share capital as well as number, type and nominal value of the shares.

Shareholders of a corporation (both bearer and nominal shares) are anonymous to the extent that they are not registered in the Commercial Register. If the Swiss company is a limited liability company, the shareholders will be registered in the Commercial Register and shown on the excerpt.

Any person who is not a signatory and registered as such in the Commercial Register and shown on the excerpt would need a valid power of attorney in order to act on behalf of the company.

1.3 Articles of association

Under Swiss corporate law, companies are free to enter into all transactions which are covered by the company purpose. An act violating the company purpose would be declared null and void. The description of the company purpose in the excerpt from the Commercial Register is an abbreviated version. Therefore, a certified copy of the current articles of association of the Swiss company

should also be requested prior to completion. Normally, the purpose clauses of Swiss companies are very widely drafted in order to permit the company to engage in various activities.

1.4 Resolutions of the board of directors

Even though it is not compulsory according to Swiss corporate and contract law to have a board resolution approving a certain transaction for the company, it may nevertheless be advisable in certain circumstances to request minutes of the resolutions of the board of directors of the corporation *(Verwaltungsrat, Conseil d'administration, Consiglio di amministrazione)* or the management of the limited liability company *(Geschäftsführung, Gérants, Gerenti)*.

Resolutions must be passed with a duly qualified quorum at properly convened meetings of duly appointed directors and should authorize the contemplated transaction and state that the board deems the transaction(s) to be covered by the company purpose as set out in its articles of association and also to be in the best corporate interest of the company.

1.5 Resolutions of the general assembly

In principle, there is no need for a resolution by the general assembly for a company to validly enter into a transaction. Execution by the board of directors and/or authorised signatories would suffice. In certain circumstances it is; however, advisable to request a resolution of the general assembly of corporations *(Generalversammlung, Assemblée générale, Assemblea generale)* or of limited liability companies *(Gesellschafterversammlung, Assemblée des associés, Assemblea dei soci)*, namely in the event that the transaction triggers issues of upstream benefits (see paragraph 4 below).

2. LICENSES, AUTHORISATIONS, REGISTRATION

2.1 Licences and authorisations

In general, no consents, licences, approvals or authorisations by any governmental or other authority or agency of or in Switzerland are necessary in connection with:

(a) the execution and delivery of transaction documents;

(b) the legality, validity, binding nature and enforceability of transaction documents; and

(c) the performance of the obligations of the Swiss company under transaction documents.

2.2 Registrations and filings

In general, no registration, recording or filing with any governmental or other authority or agency of or in Switzerland is necessary in relation to or in connection with the execution and delivery of transaction documents by a Swiss company, or the performance of the obligations expressed to be assumed in the transaction documents by a Swiss company.

An important exception to this rule is that mortgages on real estate, ships and aircrafts must be registered with the competent land or ship register or aircraft record.

3. TRANSACTION DOCUMENTS

3.1 Form requirements

In general, transaction documents are not subject to any statutory form requirements and do not need to be binding and enforceable. However, in some cases there is a requirement for notarisation (e.g. mortgage on real estate).

Furthermore, if a person (as opposed to a company) signs a personal guarantee, such guarantee could be construed as a suretyship under Swiss law which needs to be notarised and signed by the spouse of the guarantor as well in order to be binding and enforceable.

In general, Swiss private international law allows for the choice of a foreign law to govern guarantees (see paragraph 3.2 below); however, there is a slight danger that a guarantee which does not fulfil the aforementioned Swiss form requirements may be held to be against Swiss public policy. It may therefore be advisable to request the signature of the spouse in the case of a personal guarantee by a Swiss person, no matter which law governs the guarantee.

3.2 Choice of English Law

Under Swiss conflict of laws, an explicit choice of a foreign law as the law governing transaction documents is valid, provided it is valid under the law governing the contract. In a claim brought before a Swiss court, the court would apply the chosen foreign law provided:

(a) such law can be established (the task of establishing foreign law may be assigned to the parties); and

(b) the application of provisions of the foreign law does not lead to a result that is incompatible with Swiss public policy (ordre public), i.e. is in conflict with fundamental principles of Swiss law. It should however be mentioned that in commercial and corporate matters Swiss courts do not often hold a contract to be contrary to ordre public, safe in exceptional circumstances.

3.3 Jurisdiction

Under Swiss law, the submission to the jurisdiction of English courts for claims against a Swiss company is valid if it is valid according to the rules set out in the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988 (“Lugano Convention”, 88/592/EEC).

3.4 Rank of claims

The obligations of a Swiss company under each transaction document normally rank at least equally (pari passu) with all present and future unsecured and unsubordinated indebtedness of the company, safe for indebtedness which is mandatorily preferred by virtue of a provision of bankruptcy, insolvency or similar laws of general application in Switzerland.

3.5 Notices and service of process

Under Swiss law, a notice given but not actually received by an addressee may be considered not to have been properly served.

Direct mailings to a Swiss company may not be a manner of service permitted by law, particularly in case of direct service of writs and similar legal instruments by English courts through public or private means directly to Swiss addressees, unless specifically allowed by international treaties to which Switzerland is a party. Service of process provisions which are typically provided for in English law contracts may not be valid.

3.6 Default interest

Based on usury laws, default interest rates in excess of 18 percent per annum may not be enforceable in Switzerland.

4. UPSTREAM BENEFITS

4.1 Restrictions

There are certain restrictions in Swiss corporate law for Swiss companies granting a benefit to group companies other than their own subsidiaries. In finance transactions these so called 'upstream benefits' could typically arise if a Swiss company grants a security interest to a lender to secure obligations of its parent or other group company. Guarantees and other security interests granted by a Swiss subsidiary or other Swiss group company may therefore require the insertion of specific limitation language in the respective agreements.

4.2 Violation of the company purpose

Bodies that are authorised to act on behalf of a company, i.e. the board of directors, may perform all legal acts in the name of the company that are covered by the company purpose (see the general comment in paragraph 1.3 above). Transactions which are not covered by the company purpose (acts which are ultra vires) are null and void. Granting upstream loans or securities may constitute an ultra vires act.

4.3 Company interest

Directors must at all times act in the best interest of their company. There is no concept of group of companies under Swiss corporate law, and hence companies must enter into transactions that are in their own interest rather than in any "group interest". Granting a security for the benefit of a parent company and/or other group companies would be null and void if such security is not given at arm's length or would result in the disposal of essential operating assets of the Swiss subsidiary or is obviously exceeding its economic capacity.

4.4 Violation of withdrawal rules

A security granted by a Swiss subsidiary to secure obligations of a parent and/or group company may be considered as a deemed return of equity and could therefore violate withdrawal regulations under Swiss corporate law.
Under Swiss law it is controversial which kinds of contribution must not be returned to shareholders: according to a conservative view, the share and participation capital, the blocked quota of general reserves, the reserves for own shares, the appreciation reserves and the premium on shares *(agio)* are subject to this prohibition. According to a more liberal view, only the share and participation capital and the premium on shares *(agio)* are subject to this prohibition. The violation of the prohibition of return of contributions would lead to the invalidity of the benefit granted in favour of the parent, and would revive the shareholders' obligation to pay contributions.

4.5 Hidden distribution of dividends to shareholders

Even in the event that no prohibited return of equity as set out above is given, the security granted could represent a hidden distribution of dividends. A benefit granted in favour of a parent group company qualifies as a hidden distribution of dividends if – according to the standard "dealing at arm's length" – there is a manifest disproportion of consideration which is to the detriment of the Swiss subsidiary. A hidden distribution of dividends may trigger withholding tax at the current rate of 35%.

5. TAX ISSUES

In general, there are no registration, stamp or other similar taxes or duties payable in Switzerland as a matter of Swiss law in connection with the execution or performance of typical transaction documents.

Upstream benefits (see paragraph 4 above) may trigger withholding tax at the current rate of 35%.

If there are more than ten (10) non-banks participating with regard to the facility by way of assignment, transfer, novation or sub-participation or if the Swiss company has more than twenty (20) non-bank creditors, interest payments become subject to withholding tax at the current rate of 35%. For the purpose of the threshold of 20 non-bank creditors, private placements ("club-deals") are counted as one per formal written instrument of debt acknowledgement (tranch) and under certain circumstances, where the refinancing of a bank is such that the bank appears to be only interposed and not acting in its own economical interest, the lenders to that bank would also count for the threshold of 20 non-banks.

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WHO IS FRORIEP?

Founded in Zurich in 1966, Froriep is one of the leading law firms in Switzerland, with around 60 lawyers and offices in Zurich, Geneva and Zug, as well as foreign offices in both London and Madrid, serving clients seeking Swiss law advice.

We have grown a domestic and international client base ranging from large international corporations to private clients. Our unique, truly integrated, international structure mirrors our strong cross-border focus. We value and promote continuity and strong client relationships. Our teams are tailor-made, assembled from every practice area and across our network of offices.
Many of our lawyers are recognised as leaders in their practice areas, and our clients benefit from our in-depth knowledge and the rich diversity of talents, languages and cultures that makes our lawyers particularly versatile and adaptive.

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