

Ship Finance

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GETTING THE
DEAL THROUGH 

Switzerland

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Due diligence

1 How does one demonstrate title to or legal ownership of a vessel registered under the laws of your jurisdiction?

Title to or legal ownership of a vessel registered in the Swiss Register of Ships for seagoing vessels (the Swiss Register of Ships), maintained by the Swiss Maritime Navigation Office (SMNO), can be proven by a simple transcript of registry of the Swiss Register of Ships, which may be applied for and obtained for a small fee without proof of any particular interest.

2 How can one determine whether there are any liens recorded over a vessel?

In the Swiss Register of Ships, ship mortgages and certain statutory liens may also be recorded. However, unlike a transcript of registry, to obtain a full transcript of the Swiss Register of Ships, stating any recorded mortgages and liens, a justified interest (such as ownership or being a creditor) must be presented.

3 How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

If such security agreements, liens, charges or other encumbrances are not registered in the Swiss Register of Ships, apart from common due diligence there is no documentary way to determine whether such instruments have been granted in relation to a Swiss vessel. In particular, there is no general register in Switzerland where security interest, charges or pledges can be registered.

4 Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

An excerpt from the commercial register of the respective canton (in which the company has its registered seat) states whether the company is registered or cancelled or, for example, whether it is subject to ongoing insolvency proceedings etc. Third parties can rely on the registered information, provided, however, that they are in good faith (which is legally presumed). Such excerpts can be ordered for a small fee, certified from the respective cantonal commercial register, or are available uncertified and legally non-binding online. In Switzerland no 'certificate of good standing' (as known in certain other jurisdictions) is available.

5 Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

All commercial companies must be registered in the commercial register of the canton of their incorporation or registered seat. An excerpt from the commercial register provides for a summary of the most important characteristics of the company, such as its statutory purpose, its registered capital, its directors and other authorised signatories

(and their signatory rights). Information on members or shareholders depends on the particular legal form of the company. Such information is, for example, publicly available for Swiss limited liability companies, whereas for Swiss corporations limited by shares, the most common form of corporate structure in Switzerland, such information is not disclosed in the excerpt but must be requested from the company.

6 What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

Generally, a Swiss company is managed and represented by its directors, who in turn may delegate their powers to one or more of their members or officers. Such power and representation, as a rule, covers all actions that are within the scope and purpose of the company as provided for in its articles of incorporation and, again as a rule, third parties in good faith may rely on such unrestricted authority within that scope. It is, however, prudent to ask for the relevant resolutions of the board of directors when resolving to enter, for example, into a guarantee or a debt obligation. Also, certain particular transactions (such as disposal of fundamental assets or granting of a guarantee or other security to affiliated companies in an up- or cross-stream structure) require a shareholders' resolution.

7 Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

Generally, foreign lenders do not need to fulfil any particular requirements in order to extend credit to Swiss borrowers. Certain limitations apply, however, in relation to consumer credit or where a credit is backed by residential real property. Further, foreign lenders and creditors will not be deemed resident solely as a consequence of making a loan or other extension of credit to a Swiss obligor.

Repayment

8 Is central bank or other regulatory approval required for repayment of a loan in foreign currency?

There are no regulatory restrictions or controls on payments by a Swiss borrower to foreign creditors under a loan agreement, and the repayment of a loan in a foreign currency is not subject to central bank or other regulatory approval.

9 Do usury laws limit the interest payable to a lender in respect of a vessel financing?

Except for consumer credits, there are no particular federal statutory maximum limits on interest charged on loans in Switzerland with respect to vessels or otherwise. However, there are certain limits derived from general legal principles of Swiss law (such as abuse of law and excessive commitments) where interest is manifestly excessive, which is to be determined on a case-by-case basis. Further, some cantons have a limitation on interest rates (eg, in the canton of Zurich the maximum interest rate is currently at 18 per cent pa).

10 Are withholding taxes payable on principal or interest payments to non-resident lenders?

Generally speaking, no. However, interest credited to lenders may be subject to Swiss federal withholding tax at a statutory rate of 35 per cent if the borrowing is deemed to be collective fundraising (in the case that the number of lenders that are not banks exceed 10 and some other specific conditions are met). However, the principal is never subject to such tax, and creditors suffering the tax on interest may be entitled to a full or partial refund, subject to the application of a treaty for the avoidance of double taxation, if any.

Registration of vessels**11 What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?**

Only seagoing vessels that are used or intended for the commercial carriage of passengers or goods or for any other commercial activity at sea may be registered in the Swiss Register of Ships (article 17 of the Federal Law on Shipping under the Swiss Flag (the Navigation Act)). Generally, in order to be eligible for registration in the Swiss Register of Ships, a vessel needs to be seaworthy, must have a gross tonnage of at least 300 tons and must be classified by a classification society recognised by the Swiss Maritime Navigation Office (article 30 of the Navigation Act).

Exceptionally, subject to certain conditions and approval from the Federal Department of Foreign Affairs, seagoing vessels for a philanthropic, humanitarian, scientific, cultural or similar purpose may be registered in the Swiss Register of Ships (article 35 of the Navigation Act). Further, ocean-going yachts and small boats sailing under the Swiss flag used for non-commercial purposes can be registered in the Swiss Yacht Register. Offshore drilling rigs or mobile offshore drilling units are not considered vessels in the sense of the Navigation Act.

The effect of the registration of a vessel in the Swiss Register of Ships is that it provides for evidence of the vessel's Swiss nationality and confers the related rights, such as to fly the Swiss flag. Once a vessel has been registered in the Swiss Register of Ships, transfer of ownership requires a recordation of the transfer in the register in order to be valid (article 31 of the Navigation Act). Third parties relying in good faith on registrations as set out in the Swiss Register of Ships are generally protected.

12 Who may register a vessel in your jurisdiction?

For the purpose of registration of a seagoing vessel in the Swiss Register of Ships the applicant must comply with the following requirements:

- (i) residence and domicile: the following persons must be resident or have its registered office in Switzerland:
 - the owner of a sole proprietorship;
 - three-quarters of the partners or other members of a general or limited partnership or of a limited liability company who hold three-quarters of the capital or the share capital;
 - the shareholders of a stock corporation or limited partnership holding a majority of the share capital and two-thirds of the votes;
 - two-thirds of the cooperative members of a cooperative, who also have two-thirds of the cooperative capital created by participation certificates;
- (ii) nationality and control: the following persons must be Swiss nationals:
 - the above-mentioned natural persons;
 - legal entities participating in the business of a Swiss shipowner as partners, limited partners, shareholders, cooperative members and management;
- (iii) administration and management: two-thirds of the members of the administration and management of a stock corporation, a limited partnership, a limited liability company or a cooperative must be Swiss nationals. Furthermore, the majority must be resident in Switzerland; and
- (iv) financial resources: generally, the shipowner must have own funds corresponding to at least 20 per cent of the book value of the vessel registered in its name. The shipowner must disclose the origin of the funds invested in its vessel. The financing of a vessel may only be entirely with borrowed funds if it does not have an adverse effect

on the Swiss control on the company and its management and foreign creditors must accept immediate repayment of the debt upon the request of the Swiss Maritime Navigation Office.

13 Is there an alternate registry for international shipping operations?

No, there is no alternative registry in Switzerland for international shipping operations that allows for foreign ownerships of vessels.

Ship mortgages and other liens over vessels**14 What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?**

Swiss law provides for a contractual ship mortgage governed by the Swiss Federal Law on Vessel Registry (the Registry Law). By way of a ship mortgage any payment obligation can be secured, including current, future or contingent payment obligations (including swap obligations), provided, however, in relation to future or contingent obligations, that such obligations must at any relevant point in time be determined or at least determinable. The mortgage can also be established for third-party liabilities. A ship mortgage registered in the Swiss Register of Ships is a right in rem, affecting and following the ship even if the ship is sold (and the ship mortgage not cancelled).

The mortgage must specify the amount, or where such amount is not determined, a maximum amount, in each case in Swiss francs, up to which the vessel serves as collateral for the secured claims. The vessel must be clearly identified. It does not necessarily need to be the property of the debtor and, therefore, the mortgage can be established as third-party collateral. It is possible to establish mortgages on one or more vessels to secure sole or joint liability of the vessel owner. In any other cases of collateralisation of several vessels quotas need to be specified for each vessel up to which a vessel serves as collateral. In the absence of specification, the quotas are determined in proportion of the values of the vessels.

There is no particular standardised form, but the contractual ship mortgage must be agreed in writing between the shipowner and the secured party and will only be validly established upon recordation in the Swiss Register of Ships. The same recordation requirement applies to statutory liens on Swiss registered vessels (see question 21).

15 Give details of any required form for ship mortgages in your jurisdiction.

The agreement for a contractual ship mortgage must be made in writing and requires recordation in the Swiss Register of Ships in order to be validly created (see question 14).

16 Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

There is no separate register of mortgages for seagoing vessels registered in Switzerland, but mortgages are recorded in the Swiss Register of Ships.

The Swiss Maritime Registry Office (SMRO) is responsible for supervising the Swiss Register of Ships, but the administration has been delegated to the Land Registry Administrator of the canton of Basel-Stadt, which is the addressee of any application for registration of a vessel or a ship mortgage over a Swiss vessel.

Further to publicly available detailed information about the vessel (see question 2), the Swiss Register of Ships contains, inter alia, information on the respective creditor, the rank of the mortgage, the maximum amount up to which the vessel serves as collateral and an eventual maturity date.

Ship mortgages and statutory liens require the recordation in the Swiss Register of Ships to be validly established.

17 Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

For the valid registration of a mortgage in the Swiss Register of Ships it is required to state the maximum amount in Swiss francs up to which

the vessel is liable for all claims of the creditor (see question 14). There is no requirement to state a maturity date. The mortgage agreement is typically an agreement separate from the underlying debt instrument. Such debt instrument does not need to be filed with or attached to the mortgage agreement.

18 Can a mortgage be registered in the name of an agent or trustee for the benefit of multiple lenders?

The agent concept is commonly used in Switzerland in syndicated loans and security agency arrangements. The security interests are often granted in favour of a security agent acting not only on its own behalf but also as a direct representative for all other secured parties under the financing arrangement. Due to the accessory nature of various security interests granted under Swiss law, a new lender acceding to a loan agreement by virtue of an assignment of rights of another lender will, thus, automatically be secured by the respective security without any additional steps required regarding the amendment of the security documents.

As the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1985 (Hague Trust Convention) is applicable in Switzerland and the Swiss Private International Law Act transposes the Hague Trust Convention into national law, foreign trusts as defined in the Hague Trust Convention are recognised in Switzerland. A security trustee of a foreign trust can, thus, enforce its rights. However, as certain security interests, such as a pledge or a mortgage, due to their accessory nature cannot be vested in the security trustee as a third party acting as security holder in its own name, such a security trustee can only act as a direct representative of the other secured parties.

The SMRO generally accepts the registration of a ship mortgage in favour of a mortgagee acting as security agent (or trustee) as a direct representative of other secured parties of a financing syndicate (if such is the role of the mortgagee under the respective financing documentation).

19 If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?

As long as the security agent (trustee) acting as the direct representative of the other secured parties remains the same entity, the lenders participating in the syndicate may change without amending the security documents or the Swiss Register of Ships, subject, however, to the requirements regarding the financial resources, as stated under (iv) in question 12 being met (see also question 18).

20 If the mortgagee transfers its interest to a new lender, agent or trustee what filings are required? Is the mortgagor's consent required?

According to Swiss law, claims (ie, loans) can be transferred by way of a written assignment between the existing creditor and the new unless there is any statutory or contractual restriction. In the case of a contractual restriction the consent of the debtor of the claim is required. The ship mortgage represents an ancillary right of the loan which is transferred to the assignee along with the relevant claim (article 170 of the Swiss Code of Obligations). Due to the accessoriness of the ship mortgage to the underlying claim, however, it should be noted that the validity of the ship mortgage depends on the validity of such claim. Thus, a mortgagee is only in a position to exercise its rights under a ship mortgage to the extent that the underlying claim is valid, due and enforceable (and being a direct representative of the other secured parties in case of a lending syndicate).

The transfer of the mortgagee's rights (ie, of the new creditor) is to be recorded in the Swiss Register of Ships. In the case of a syndicated financing arrangement, it is of utmost importance that the new lender, agent or trustee represents the other lenders (if applicable) as a direct representative. In general, the mortgagor's consent is not required.

21 What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?

In addition to the contractual ship mortgage, Swiss law grants certain statutory liens to certain creditors for registration in the Swiss Register

of Ships (article 51 of the Registry Law), such as a seller's claim on the sold ship or claims from maintenance of a ship.

These statutory liens must be recorded in the Swiss Register of Ships in order to be valid. Such recordation shall take place within three months of the transfer of ownership and the acceptance of the repaired vessel by the shipowner, respectively.

As Switzerland is a party to the International Convention Relating to the Arrest of Seagoing Ships of 19 May 1952, arrests based on this Convention may only be executed with regard to maritime claims as defined in article 1 of the Convention. However, due to Switzerland's geographical location without sea access, an arrest of a vessel including associated ships may prove to be difficult in actuality.

22 What maritime liens rank higher than a mortgage lien?

According to the Navigation Act, the following liens set forth in article 2 of the International Convention of 10 April 1926 for the Unification of Individual Rules relating to Liens and Mortgages on Seagoing Vessels (the 1926 Convention) are statutory liens without registration and rank higher than contractual ship mortgages and statutory liens recorded in the Swiss Register of Ships:

- law costs due to the state, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other public taxes and charges of the same character, pilotage dues, and the cost of watching and preservation from the time of the entry of the vessel into the last port;
- claims arising out of the contract of engagement of the master, crew and other persons hired on board;
- remuneration for assistance and salvage, and the contribution of the vessel in general average;
- indemnities for collision or other accident of navigation, as also for damage caused to works forming part of harbours, docks and navigable ways, indemnities for bodily injury to passengers or crew, and indemnities for loss of or damage to cargo or baggage; and
- claims arising on contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the time owner of the vessel, and whether the claim is his or her own or that of ship-chandlers, repairers, lenders or other contractual creditors.

23 May non-mortgage liens be recorded over a vessel?

Except for the Swiss statutory liens (see question 21), no other non-mortgage liens may be recorded over a vessel under Swiss law in the Swiss Register of Ships.

24 Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?

According to article 1 of the 1926 Convention, mortgages that are duly established according to the law of the signatory state where the vessel is registered will be recognised in Switzerland. The priority will be the same as if it had been a similar mortgage over a Swiss-flagged vessel.

25 What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?

The enforcement procedure for ship mortgages follows *mutatis mutandis* the rules for the enforcement proceedings for real estate as per the Swiss Debt Collection and Bankruptcy Act (DCBA) to the extent that the Registry Law does not provide special provisions. Following the creditor's initial request for enforcement of the ship mortgage, the debt enforcement office provides the debtor with the summons to pay; if the debtor or the shipowner has filed an objection against the summons to pay, the debt enforcement office will request the creditor to initiate legal proceedings to set aside the objection and to obtain an enforceable title by a court in order to be able to file a petition to continue the execution.

The creditor may file the request for realisation with the debt enforcement office no earlier than one month and no later than one year from delivery of the summons to pay.

The common form of foreclosure is the sale of the mortgaged asset in a public auction by the competent debt enforcement office or, if all involved parties agree to it, an open sale. The foreclosure shall be concluded within three months as of the creditor's application for realisation. Notwithstanding the foregoing it is to be noted that the debt collection officer may at any time dispose of objects that require costly maintenance or cause disproportionately high storage costs.

As a consequence of the foreclosure of a vessel in relation to the enforcement of a ship mortgage, statutory liens also cease to exist upon such a forced sale.

The costs for the judicial sale are 2 per mille of the vessel's sale value.

26 May a vessel be sold privately by a mortgagee? Will the sale discharge liens over the vessel?

A vessel registered in Switzerland may only be sold privately by a mortgagee if such private sale was contractually agreed among the parties involved. Without such basis, a vessel may only be sold by way of a forced sale by the respective debt enforcement office as stated under question 25. A sale will not automatically discharge liens registered in the Swiss Register of Ships, as a cancellation of the latter is required for the respective discharge (see also question 14).

27 What are the limitations on rights of self-help by a mortgagee?

As a rule, a mortgagee does not have any self-help remedies under Swiss law.

28 What duties does a mortgagee owe to an owner or third-party creditors?

Unless a mortgagee has contractually agreed on certain duties, a mortgagee does not owe any duty to an owner or a third-party creditor.

Collateral

29 May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?

No, this is not possible.

30 May finance leases be recharacterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

A finance lease arrangement is unlikely to be recharacterised as a financing contract by a court due to the fundamental principle of freedom of contract, provided, however, it has not been entered into by the parties in order to circumvent any potential financing restrictions against one of the respective parties. It is further to be noted that with regard to movable assets it is not possible to establish a non-possessory lien under Swiss law. Therefore, a finance lease that is structured as a sale and lease back transaction is only possible for movable assets recorded in a register (such as ships, aircraft and railroads).

31 How is a security interest created over earnings of a vessel, charter contracts, insurances, etc? How are these security interests perfected?

Security interests over receivables or other contractual rights may be created by way of an outright transfer or assignment for security purposes or a pledge. For both types of security a written agreement is required. Future receivables can also be subject to a security interest, provided that such future receivables may be identified or are at least identifiable at any relevant point in time and such security interest only becomes effective upon the claim coming into existence (see also question 14).

32 Must security interests against non-vessel collateral be registered to be enforceable? If so, where are such filings made?

Other than registration of the security in the relevant register regarding railroads, aircraft and ships, there are no registration requirements for the valid creation of security interests over movable assets in Switzerland. The main types of security interests over movable property under Swiss law are outright transfers or assignments for security

purposes or pledges which are valid without any registration in a public register.

33 How is a security interest over a deposit account established? How is a security interest perfected?

The creation of a security interest over a deposit account usually takes the form of a pledge (less common is an assignment for security purposes). Cash deposits held in deposit accounts are treated as claims of the beneficiary against the bank. The valid creation requires a written pledge agreement, but no further steps are legally required for the perfection of the security interest. It is to be noted, however, that to enforce the pledge against the deposit account bank the pledge must also be notified to the respective bank. Further, until the deposit account bank has been notified of the security interest created, the bank may pay any amount to or on the instruction of the account holder. Thus, the deposit account bank should be promptly notified about the creation of the security interest, ensuring that the consent of the secured party is required for the discharge of the bank's payment obligations towards the deposit account holder.

34 How are security interests in non-vessel collateral enforced?

The enforcement of a security interest in non-vessel collateral depends on the type of security and differs in the realisation of the respective security, while pledged assets may be enforced either by private enforcement (private sale or public auction) where the parties have agreed to such and only as long as the pledgor as debtor is not in declared insolvency, or by an enforcement based on the DCBA. To enforce a pledged asset based on the DCBA, the creditor requires an enforceable title against the debtor (see question 25). On the other hand, where an asset is assigned or transferred as security, the secured party already has ownership of the asset, and therefore a formal enforcement is unnecessary as long as there is no contractual obligation of the creditor to return the assets. If the latter is the case, similar rules to the private enforcement of a pledge apply.

35 How are share pledges for vessel financings established? Are share pledges or share charges common in your jurisdiction?

A security interest granted over shares of a Swiss company (for both Swiss limited liability companies and corporations limited by shares) may be created by way of pledges or outright transfers or assignments for security purposes. The creation of a security is always based on a valid security agreement; however, the perfection differs according to the form of the shares (ie, whether they are certificated, uncertificated or intermediated securities). In the case of certification, valid creation requires the due endorsement and physical transfer of the certificates to the pledgee (or in case of syndication to the agent). Uncertificated shares must be pledged or assigned in writing, whereby intermediated securities can either be transferred to the secured party's securities account, or the security provider and the intermediary may enter into an irrevocable agreement so that the latter will comply with any instructions from the secured party.

36 Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

Prior to the enforcement of the share pledge, the pledgee is not at risk to be exposed to debts or other liabilities of the pledged company. If the pledge is enforced, the pledgee will only be subject to such risk in case the pledgee becomes the shareholder of the pledged company either as per the foreclosure procedure as per the DCBA or by way of a private sale (if so agreed in the pledge agreement).

Tax considerations for vessel owners

37 Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?

Swiss corporations as well as individuals living in Switzerland are subject to income tax with regard to all revenues, including those earned in connection with vessels. The rate depends on the respective canton and municipality where the corporation has its registered seat with respect to the individual lives; however, a non-Swiss resident owner is not subject to any tax in connection with the ownership of the registered vessel.

38 Is there an optional tonnage tax exempting vessel owners from tax on income?

At the moment, there is no tonnage tax in Switzerland. The Swiss National Council has expressed its intention to discuss legislation for such tonnage tax.

39 What special tax incentives are available to shipowners registering vessels in your jurisdiction?

Currently there are no tax incentives available to shipowners registering vessels in Switzerland.

40 Are there any other noteworthy tax provisions specifically applicable to shipping, shipping income or ship finance?

No, there are none.

Insolvency and restructuring**41 Is there a general scheme of reorganisation or insolvency administration in your jurisdiction?**

Yes, Swiss law provides for a general scheme of reorganisation or insolvency administration, mainly regulated by the DCBA. Special rules apply to banks, insurance companies or investment funds. The company or, under certain circumstances a company's creditor, may apply for rescue procedures, where the competent court can grant a moratorium which may lead to a composition agreement affecting both secured and unsecured creditors. In general, pledged assets will not be liquidated as long as the moratorium is in effect.

42 Will the courts of your jurisdiction respect the rulings of a foreign court presiding over reorganisation or liquidation proceedings?

Generally yes; according to the Swiss Federal Act on Private International Law a foreign bankruptcy decree rendered in the state of the debtor's domicile will be recognised in Switzerland on application of the trustee in bankruptcy or of a creditor if certain requirements (such as enforceability in the state where it was entered or compatibility with Swiss public policy) are met.

43 Has your jurisdiction adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law?

No, the Model Law on Cross-Border Insolvency has not yet been adopted by Switzerland.

44 What is the order of priority among creditors? In what circumstances will creditors be required to disgorge payments from an insolvent company?

The priority among secured creditors depends on the ranking of the security, which is, unless agreed differently by the parties, generally determined in chronological order. However, for security over assets entered in a register, such as a ship mortgage, the ranking of the security is determined by its rank in the relevant register. Such rank is agreed among the respective parties when the security over the asset is granted and may not affect an already registered secured party without its prior consent. If several security interests rank equally, the realisation proceeds will be applied proportionally among the respective creditors.

Generally, in a bankruptcy proceeding the DCBA defines the order of priority of creditors' claims – secured creditors enjoy priority over unsecured creditors. As the pledged assets of a bankrupt company fall within the bankruptcy estate, the proceeds of the realisation of the assets are used to discharge the claims of the secured creditors.

The proceeds of the remainder of the bankruptcy estate will be used to discharge the unsecured creditors, who are satisfied in the following order:

- certain unpaid claims of employees and of pension funds; certain claims derived from family law; and unpaid social security contributions;
- other unsecured creditors; and
- subordinated creditors.

According to the DCBA, certain transactions by an overindebted debtor could lead to the avoidance of a transaction (*actio pauliana*).

Update and trends

As of May 2018, Switzerland's seagoing fleet comprised of 31 vessels, which are to be found in all of the world's seas. The Swiss government announced in 2017 that the granting of federal financial guarantees for the financing of Swiss vessels will not be further pursued and, thus, no new guarantees will be available. As this was in fact one of the prerequisites that, in times of conflict or crisis, Switzerland's federal government could requisition Swiss-flagged merchant ships to serve the country's economic needs, such a change in practice could have a positive effect on the Swiss seagoing fleet, provided that the respective legislation is adapted accordingly. In addition, the Swiss parliament is planning to discuss in the near future the implementation of a tonnage tax, which could increase the attractiveness of Switzerland as a state of registration.

This means that the granting of collateral for existing liabilities without the obligation to do so, the discharge of an obligation by unusual means and the payment of an obligation not yet due for payment may be contested in court if (i) the transaction occurred during a suspected period of one year prior to the seizure of assets, the adjudication of bankruptcy or similar proceedings; and (ii) the debtor was overindebted at the time the transaction occurred, unless the beneficiary proves that it was unaware of the debtor's insolvency. Furthermore, creditors may contest all legal acts within five years before the opening of the bankruptcy proceedings damaging the assets of the creditors that were undertaken with the intent of their disadvantage (which was recognisable to the beneficiary third party).

45 May a vessel owner provide security on behalf of other related or unrelated companies? What are the requirements for it to be enforceable?

Generally, a Swiss company owning a vessel may provide security on behalf of other related or unrelated companies if this is within the company's purpose as stated in its articles of association. Furthermore, a ship mortgage may be established, even though the shipowner is not the debtor of the secured claim (article 40 of the Registry Law). However, for the provision of a security to an affiliated company which is to be considered as of an up- or cross-stream nature (ie, to the parent or sister company of the respective Swiss company), certain limitations and requirements apply according to the prevailing view in Switzerland. Essentially, the enforcement of such a security interest could be treated as the equivalent of a dividend distribution as far as formal and substantive requirements and limitations are concerned and, thus, limited to the amount that the Swiss company could distribute to its shareholders as a dividend and subject to Swiss tax implications.

Other than that, a security must be at arm's length and duly entered into and validly established in order to be enforceable. A secured party is advised to confirm the proper corporate approval, in particular in the case of up- or cross-stream security.

46 Is there a law of fraudulent transfer that permits a third-party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

Yes, there is. The granting of a mortgage for existing obligations that the debtor was not previously bound to secure may be voidable if the mortgage was granted during the one-year period prior to the seizure of assets or the opening of bankruptcy by a debtor who was already insolvent (see question 44). The secured party bears the burden of proof that it has acted in good faith.

47 How may a creditor petition the courts of your jurisdiction to declare a debtor bankrupt or compel liquidation of an insolvent obligor?

A creditor must have complied with the preliminary debt collection procedure as described under question 25. Following the filing by the creditor of the petition to continue the execution, the debt collection office will issue a bankruptcy warning by which the debtor is ultimately demanded to satisfy the creditor's claim within 20 days. The creditor may further request the drawing of an inventory of all the debtor's

assets. If the creditor is not satisfied, it can apply to the bankruptcy court to declare the opening of the bankruptcy of the debtor.

The purpose of the bankruptcy proceeding is the realisation of all the debtor's assets in order to satisfy the creditor's claims from the proceeds (in accordance with their priorities and, if applicable, secured rights).

48 Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)?

If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

Switzerland has not directly adopted the Model Netting Act into national law. However, the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading and the respective ordinance provide for the primacy of certain agreements in the event of insolvency of obligors. The relevant offsetting agreements shall include netting provisions as well as the default agreements contained in bilateral or framework agreements and in particular the netting agreements according to the ISDA Master Agreement.

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