

Practitioner's note: structuring a financing for a trader in Zug

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The practitioner advising a bank or a trader on a financing in which a Zug company is the borrower or the security provider should address the following points. The corporate authority of the Zug company to enter into the financing and to grant security, including the limits that Swiss law imposes on upstream and cross-stream guarantees and security, which may constitute a distribution of reserves and require corresponding board and shareholder resolutions and limitation language.¹ The withholding tax consequences of the financing, including the Swiss rules on the number of non-bank lenders, which can turn a loan into a bond subject to withholding tax.² The validity and perfection of the security under the applicable law, and in particular the transfer of possession for pledges of goods and the notification of assignments where the governing law requires it. The enforcement of the security in the event of insolvency, including the treatment of the lenders' claims in a Swiss bankruptcy. And the compliance of the financing with sanctions and anti-money-laundering rules, which the lender's own compliance function will scrutinise before it approves the transaction.

1 Notes

1. Art. 680 para. 2 OR (no right of the shareholder to reclaim paid-in capital) and Art. 675 para. 2 OR (dividends only from balance sheet profit and reserves formed for that purpose), swissrights.ch, SR 220. Roland Fischer and Pascal Genoud, "Schrackenlose Drittsicherheiten im Konzern", GesKR 2/2018, lenzstaehelin.com: upstream security is subject to the capital protection rules, and the secured party can recover only to the extent of the security provider's freely distributable funds; best practice requires a basis in the articles and approval by the board and the general meeting of the security provider; Swiss limitation language limits recovery to the distributable amount at enforcement

and provides for interim accounts, distribution resolutions and compliance with withholding tax. ↩

2. ESTV, Kreisschreiben Nr. 47 "Verrechnungssteuer – Obligationen", 25 July 2019 (copy published by the Steuerverwaltung Basel-Landschaft, baselland.ch, KM545): a bond (Anleihensobligation) exists where a Swiss debtor borrows from more than ten creditors on identical terms, a cash bond (Kassenobligation) where a non-bank debtor borrows continuously from more than twenty creditors on variable terms, in each case with a total of at least CHF 500,000; domestic and foreign banks are not counted as creditors (the "10/20 non-bank rule"). ↩

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