

Private Debt in Switzerland – Practitioners’ Perspective

Key Considerations and Practical Solutions

Clément Bouvier
clement.bouvier@borel-barbey.ch

Luca Bozzo
luca.bozzo@borel-barbey.ch

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Introduction

Private debt has become an increasingly relevant financing tool in the Swiss market, particularly for privately held companies, real estate ventures, and bespoke or transitional financing needs. Unlike certain European jurisdictions, Switzerland does not have a banking monopoly on lending, which has contributed to the growing role of private debt. Today, this trend is further accelerated by the tightening of traditional bank lending standards, making it increasingly challenging (and, in some cases, even impossible) for certain borrowers, such as those in financial distress or seeking mezzanine capital, to access conventional credit facilities.

In this context, private debt offers flexibility in structuring, speed of execution, and tailor-made solutions that traditional lenders may no longer be in a position to provide. However, in the absence of standardised instruments and amid a regulatory landscape that is often less prescriptive than in neighbouring jurisdictions, structuring and executing private debt deals in Switzerland requires careful consideration of legal, tax, and practical aspects.

This article provides an overview of key issues frequently encountered in Swiss private debt transactions, based on recurring challenges and practical solutions observed in the day-to-day practice of structuring such financings. It does not aim to be exhaustive but rather to highlight the main points of attention and offer practical guidance for lenders, borrowers, and advisors involved in Swiss private lending deals.

1. Initial Structuring: Term Sheet, Parties and Due Diligence

At the outset of any private debt transaction, success depends not only on the strength of the legal documentation but also (and often more importantly) on how well the transaction is structured and framed from the very beginning. A carefully negotiated term sheet, a clear identification of the relevant parties, and a focused preliminary due diligence process are essential to ensure that the deal proceeds smoothly and that later-stage issues are minimised.

It is equally important to approach the transaction from a “worst-case scenario” perspective, assuming from the start that a default could occur and that guarantees or security interests may need to be enforced. Structuring the deal with this mindset helps ensure that the documentation, collateral package, and enforcement mechanics are robust from day one, thereby laying a solid foundation for the transaction and significantly mitigating downstream risks.

1.1 Term Sheet

A well-drafted term sheet plays a pivotal role in this early phase. While typically non-binding (except for certain provisions such as cost allocation, any agreed break fee, exclusivity, and confidentiality), it serves as a critical reference point for the commercial, financial, and legal parameters of the transaction. It should go beyond a mere summary of headline economics and outline the intended structure of the facility, including the type of instrument, interest rate mechanics (such as base rate, default rate, or PIK features), repayment profile, collateral package, key covenants, events of default, and any conditions precedent to funding.

In addition to outlining the key structural features of the deal, a robust term sheet should also address the allocation of transaction costs. It is standard practice for lenders to require the borrower to bear their legal and external advisory expenses, sometimes even if the transaction does not ultimately close. In practice, it is considered good discipline (and a useful filter to test the borrower’s seriousness) to require that all or part of these costs be paid upfront upon signature of the term sheet. Beyond ensuring that initial expenses (such as legal fees, valuation costs, and technical due diligence) are promptly covered, this approach also creates early financial commitment from the borrower and helps secure its engagement (particularly since a borrower would often explore multiple financing options in parallel). In competitive processes, this can be an effective way to lock in the relationship and deter the borrower from walking away easily. In transactions involving significant underwriting exposure, it may also be appropriate to include a break fee or termination charge, compensating the lender if the borrower unilaterally withdraws after commercial terms have been agreed.

1.2 Parties

Equally important is the early and accurate identification of the contracting parties. In group structures, it is essential to determine from the outset whether the borrower will be the operating company (OpCo) or a holding company (HoldCo), and which other entities (if any) will serve as guarantors or collateral providers. Particular care should be given to internal governance requirements, such as board or shareholder approvals, and to the need for any third-party consents (including regulatory clearances or waivers from existing lenders or contractual counterparties). Overlooking these elements can result in significant delays during the documentation phase and, in some cases, compromise the enforceability of key undertakings or security interests.

1.3 Due Diligence

Finally, conducting a targeted due diligence exercise before entering into binding documentation is strongly recommended. The goal is not to replicate a full M&A-style review, but to validate critical assumptions: the legal standing and authority of the relevant group entities, the ownership and transferability of the collateral assets, the existence of prior-ranking debt or security, and any legal, regulatory or tax constraints (such as Lex Koller restrictions on real estate (see Section 6.3 below) or Swiss withholding tax risks (see Section 7.1 below)). The outcome of this review often has a direct impact on the transaction structure, such as whether to adopt a Swiss or foreign law framework, whether to lend at HoldCo or OpCo level, or whether to include additional protections for the lender like interest reserves, enhanced covenants, or restrictions on upstream cash flow.

2. Types of Facilities and Debt Instruments

Private debt transactions commonly involve a variety of instruments and structures, many of which are derived from international market standards. These facility types are widely used across jurisdictions and are regularly applied in Swiss-based transactions, depending on the borrower's profile, the purpose of the financing, and the lender's risk appetite. While there is no "one-size-fits-all" model, a number of structures have become market practice.

Senior loans are typically secured and benefit from first-ranking claims over the borrower's assets. These facilities are usually extended to companies with predictable cash flows and high-quality collateral, and may include both term and revolving components. **Junior or mezzanine debt**, by contrast, ranks contractually or structurally below senior debt and often carries higher interest rates or equity-linked features (such as warrants or convertibles) to compensate for increased risk. This type of financing is commonly used in acquisition financings, growth capital situations, or balance sheet restructurings.

Secured vs. unsecured debt is a critical distinction in private lending. Secured debt benefits from collateral (such as share pledges, real estate security, or receivables), which enhances enforceability and lender protection in the event of default. However, the creation and perfection of Swiss law security interests require careful planning and documentation (see Section 6 below). Unsecured debt, while more flexible, exposes lenders to higher recovery risk and is typically reserved for borrowers with strong credit profiles or group support.

Term loans provide a lump sum disbursement, often repayable through fixed instalments or bullet payments. These are suitable for capital expenditure, acquisitions, or refinancing purposes. **Revolving credit facilities**, on the other hand, are drawn and repaid multiple times over the life of the facility and are more commonly used to finance working capital or operational liquidity.

Finally, **bridge loans** and **unitranche facilities** have gained traction in recent years. Bridge loans are short-term instruments used to "bridge" a funding gap before a longer-term solution is put in place (e.g. a capital raise or asset sale). Unitranche structures blend senior and subordinated features into a single tranche, offering speed and simplicity to the borrower while requiring more complex intercreditor arrangements on the lender side.

Each of these instruments comes with its own set of legal and practical implications, which must be assessed at the structuring stage to ensure alignment with the parties' commercial objectives and regulatory constraints.

Other instruments (such as PIK loans, second-lien loans, HoldCo loans, convertible notes, or NAV-based facilities, etc.) may also be used depending on the context, illustrating that the range of structuring possibilities in private debt is virtually unlimited.

3. Interest-Related Considerations

Interest provisions in private debt transactions are not just commercial terms. They are key structuring tools that directly affect lender returns, borrower flexibility, and legal enforceability. In the Swiss context, particular care must be given to the design of interest mechanics, especially when dealing with unconventional payment structures, distressed borrowers, or international parties unfamiliar with Swiss constraints. The following Sections outline key considerations and practical guidance for structuring interest provisions in Swiss private debt transactions.

3.1 Usury and Default Interest

While Swiss law does not impose a fixed statutory cap on contractual interest rates, it does prohibit arrangements that are considered **usurious**. Under Article 157 of the Swiss Criminal Code, usury requires two cumulative elements: (i) a significant disproportion between the consideration and the performance (for example, an unusually high interest rate compared to prevailing market conditions) and (ii) the lender's exploitation of the borrower's position of weakness, such as financial distress, dependency, or inexperience.

In commercial practice, usury is rarely invoked unless interest rates exceed 15% per annum, although this is not a hard threshold and, under certain circumstances, rates of up to approximately 20% may still be considered admissible, particularly where the borrower is sophisticated and no position of weakness has been exploited.

However, default interest (i.e. the interest charged after an event of default or delay in payment) deserves closer attention. If cumulative with ordinary interest and set at a punitive level (e.g. ordinary interest of 10% plus default interest of 12%), the clause may be requalified as a penalty under Article 160 of the Swiss Code of Obligations ("CO") and may be reduced by a judge. Best practice is to clearly distinguish ordinary interest from default interest, to justify the rate (e.g. risk profile, illiquidity), and to avoid compounding both types simultaneously unless the economic rationale is well documented.

3.2 Make-Whole Provisions and Prepayment Protection

Private lenders, especially credit funds and alternative investors, often underwrite loans with a target return in mind over a fixed maturity. Voluntary prepayment, refinancing, change of control, or acceleration following an event of default, may jeopardise that return and create a reinvestment risk. To mitigate this, lenders commonly require prepayment protection clauses, most often structured as make-whole provisions.

A make-whole clause typically obliges the borrower to pay a minimum amount of interest, even if the loan is repaid early. The make-whole amount typically equals the net present value of all (or a contractually defined portion of) the interest that would have accrued until maturity (or until the end of a specified no-call period), which may be discounted at an agreed rate (often risk-free or benchmark).

Alternatively, more straightforward prepayment fees may apply (e.g. 3% in year 1, 2% in year 2, etc.), often structured as "no-call" periods followed by step-down periods. These are easier to negotiate and enforce, especially with sponsors or borrowers unfamiliar with make-whole mechanics.

Under Swiss law, absent clear judicial precedent, make-whole provisions and prepayment fees are generally enforceable, although courts may reduce their amount if deemed excessive or punitive (Article 163(3) CO). To mitigate this risk, such clauses are often structured as an alternative performance obligation (i.e. a fee payable in case of early repayment rather than a penalty), and the contractual rationale (economic compensation for lost interest income) should be expressly stated.

3.3 Interest Reserve

In deals involving limited or delayed cash flow, such as real estate developments, restructurings, or early-stage corporate financings, it is common to structure an interest reserve. This typically involves setting up a **dedicated account**, funded upfront either by the borrower or from the loan proceeds, from which interest payments are made during a defined period (e.g. the first 12 to 24 months of the facility).

An interest reserve serves several purposes: (i) it reduces the risk of short-term default during the early stages of the loan; (ii) it avoids unnecessary recourse to enforcement or default mechanisms triggered by mere liquidity mismatches; and (iii) it improves cash flow predictability for both parties.

From a structuring perspective, the interest reserve account should ideally be held with the lender or, if held by the borrower, be pledged in favour of the lender and made subject to controlled disbursement mechanisms. The amount should be calibrated conservatively (e.g. covering 6 to 24 months of interest, depending on risk), and drawdowns should be documented through a simple mechanism (e.g. automatic debit instructions).

3.4 Capitalised and PIK Interest

Under Swiss law, the automatic capitalisation of interest is generally unenforceable. While Article 105(3) CO generally prohibits interest from accruing on unpaid default interest, Article 314(3) CO extends this principle by prohibiting parties from agreeing in advance that interest will itself accrue interest. Such arrangements may only be valid if (i) the accrued interest is incorporated into the principal through a novation expressly agreed after the interest has fallen due, or (ii) the loan operates as a current account or another arrangement expressly recognised by commercial usage (typically limited to banking relationships).

Payment-in-kind (“PIK”) interest, which refers to interest settled in kind rather than in cash (for example, through the issuance of additional debt instruments, equity, or other consideration), may be acceptable under Swiss law. Because the interest is deemed effectively paid rather than capitalised, this mechanism generally falls outside the scope of Article 314(3) CO, provided that the in-kind payment validly discharges the underlying interest obligation.

In practice, Swiss law-governed facilities rarely include automatic capitalisation clauses. Transactions requiring deferred or non-cash interest are typically structured either under foreign law (most often English or New York law) or through a PIK mechanism, which achieves the intended economic effect without contravening Swiss law. However, capitalised interest may still be implemented under Swiss law if structured through a periodic novation.

4. Representations and Covenants

A robust set of representations and covenants is central to any private debt transaction. These provisions serve to align the interests of the parties, protect the lender’s position throughout the life of the facility, and provide early warning mechanisms in the event of financial or operational deterioration.

Financial covenants typically form the backbone of ongoing lender protection. Common metrics include leverage ratios (such as Net Debt to EBITDA), coverage ratios (such as DSCR – Debt Service Coverage Ratio), and asset-based indicators (such as Loan-to-Value, or LTV). These covenants are usually tested on a quarterly or semi-annual basis, and may include cure rights such as equity injections or asset disposals, depending on the borrower’s profile and the lender’s risk appetite.

In addition to financial covenants, borrowers are typically subject to a broad set of **affirmative and negative covenants**. Affirmative covenants may include, among other things, obligations to maintain the borrower’s legal good standing, comply with applicable laws, preserve assets, maintain insurance coverage, and keep accurate books and records. Negative covenants are designed to limit actions that could materially alter the borrower’s risk profile or impair the lender’s position. These commonly include restrictions on incurring additional indebtedness, making distributions to shareholders, changing the corporate structure or business activities, undertaking acquisitions, or disposing of material assets. A particularly important negative covenant is the **negative pledge**,

which prohibits the borrower from granting security over its assets to third parties without the lender's consent. This ensures that the lender maintains a first-ranking or *pari passu* position and that the collateral base is not diluted during the life of the loan. Taken together, these undertakings aim to ensure that the borrower's financial and operational profile remains consistent with the lender's expectations and that the enforceability and value of any collateral is preserved throughout the term of the facility.

Information undertakings also play a key role, enabling the lender to monitor the borrower's condition and anticipate any deterioration. These generally include the delivery of periodic financial statements, compliance certificates, forecasts, and prompt notice of any default, material litigation or significant adverse developments.

Material adverse change ("MAC") clauses may be included either as drawstop conditions or as standalone events of default. While often resisted by borrowers due to their broad and subjective nature, they can provide lenders with an important degree of flexibility, particularly in uncertain macroeconomic environments. In the Swiss private debt context, MAC clauses tend to be more common in committed facilities and are usually subject to careful negotiation.

Last but not least, **representations and warranties** form a critical layer of legal assurance for lenders. They typically cover a wide range of topics, including the borrower's corporate existence, authority to enter into the transaction, compliance with laws, financial condition, no default, and absence of litigation. Particular attention must be paid to representations regarding the ownership, validity, and enforceability of any collateralised assets. These representations are essential to mitigate enforcement risks and ensure that the security package is legally effective and enforceable, both in a Swiss context and, where relevant, in cross-border structures.

Overall, a well-calibrated covenant and representation framework must strike a balance between protecting the lender and preserving the borrower's operational flexibility. While some provisions may be heavily negotiated in bespoke transactions, they remain key instruments for managing risk and ensuring the success of the financing relationship.

5. Events of Default

Events of Default ("EoD") clauses are a central component of any private debt facility. They define the circumstances under which the lender may accelerate the loan, enforce its security, or exercise other contractual remedies. A well-calibrated EoD regime strikes a balance between protecting the lender's position and avoiding disproportionate consequences for technical or remediable breaches.

Typical events of default include non-payment of interest or principal, breach of financial or general covenants, misrepresentation, cross-default (or cross-acceleration) with respect to other financial indebtedness, insolvency-related events (such as moratorium, composition proceedings, or bankruptcy filings), unlawful or unauthorised use of the facility, and invalidity or unenforceability of key transaction documents. In practice, additional EoDs are often tailored to capture specific risks, such as loss of a key permit, change of control, or litigation above a defined threshold.

In some cases, the facility agreement will include **grace or cure periods**, particularly for covenant breaches or reporting failures. These allow the borrower to remedy a breach within a specified time before it escalates into a formal default. Similarly, certain defaults may only be triggered above a materiality threshold, either in absolute monetary terms or by reference to the borrower's financial condition. The inclusion of such thresholds can be an effective way to prevent technical or immaterial issues from resulting in disproportionate enforcement action.

Upon the occurrence of a continuing event of default, the lender will typically have the right (but not the obligation) to accelerate the loan, demand immediate repayment, and enforce any available security (see Section 6.5 below). The enforcement process under Swiss law depends heavily on the type of collateral involved, and strategic considerations (including timing, valuation method, and potential adverse publicity) often play a key role in determining how and when enforcement is pursued.

In syndicated or club deals, these rights are usually exercised through an agent acting on behalf of all lenders, and subject to majority lender instructions. In bilateral settings, the lender may act directly, but must still comply with applicable notice requirements and, where relevant, any contractual or statutory constraints on enforcement timing or procedure.

6. Security and Guarantees

Security interests and personal guarantees are key components of private debt structuring, particularly in a jurisdiction like Switzerland where the availability and enforceability of collateral can significantly influence pricing, risk allocation, and recovery prospects. Although Swiss law offers a relatively creditor-friendly framework, it also imposes certain formalities and legal distinctions that must be carefully navigated to ensure a robust security package.

6.1 Pledge vs. Assignment for Security Purposes

Under Swiss law, two main legal mechanisms are available for taking security over assets: pledge (*nantissement*) and assignment for security purposes (*cession à titre de garantie*). A pledge gives the lender an *in rem* security right that is accessory in nature (see overview of Suretyship in Section 6.6 below) and enforceable against third parties, while legal ownership remains with the security provider. In contrast, an assignment for security purposes entails a transfer of legal title to the secured creditor, subject to the contractual framework agreed between the parties, and with an obligation to retransfer the asset upon full discharge of the secured obligations.

While both legal mechanisms may permit the secured creditor to proceed with private enforcement, provided that such enforcement is expressly provided for in the contractual documentation, the principal advantage of an assignment for security purposes lies in its treatment under Swiss insolvency law. In the event of the security provider's bankruptcy, pledged assets will generally fall into the bankruptcy estate and are subject to a stay of enforcement and formal liquidation procedures. By contrast, assets that have been validly assigned for security purposes will, pursuant to the majority view in Swiss legal doctrine, not form part of the bankruptcy estate. As a result, private enforcement would remain (in principle) permissible even after the opening of insolvency proceedings, offering greater flexibility and speed of execution.

That said, the transfer of legal ownership inherent in a security assignment may itself create legal, tax, or regulatory issues, depending on the nature of the asset and the identity of the assignor. For example, assignments involving shares or assets of regulated entities may require FINMA approval, and those involving Swiss real estate may trigger restrictions under the Lex Koller. From a tax perspective, the assignment may also lead to withholding tax, stamp duty, or capital gains tax implications. Accordingly, while security assignments can offer material enforcement benefits in distressed scenarios, they are not always suitable or neutral in terms of legal consequences, and must be assessed with care.

In practice, the choice between pledge and assignment should be carefully assessed in light of the nature of the collateral, the parties' insolvency risk profile, the preferred enforcement strategy, and the regulatory or tax sensitivities involved. Where insolvency robustness is a critical concern, and the asset is well-suited to assignment, this structure may provide a meaningful advantage, albeit sometimes at the cost of added complexity and structuring effort.

6.2 Security over Shares or Equity Interests

Where the borrower or a guarantor is a company, lenders often require a pledge over shares or equity interests as part of the security package. In the case of Swiss corporations (*sociétés anonymes*) or limited liability companies (*sociétés à responsabilité limitée*), this generally involves the issuance and physical delivery of share or quota certificates, duly endorsed or assigned in blank, to the secured creditor or its agent.

To ensure a smooth enforcement process, it is strongly recommended that any transfer restrictions contained in the company's articles of association be removed in advance. Although such restrictions may not block enforcement

as a matter of Swiss law, their existence can cause delays or disputes during the realisation process. It is also considered good practice for the pledge to be recorded in the company's share register, with an appropriate annotation reflecting the existence of the security interest.

In addition, it is customary for the board of directors to adopt advance resolutions approving the entry in the share register of any future acquirer designated by the secured creditor in the event of enforcement. This measure aims to facilitate the transfer of the pledged shares during enforcement and to anticipate corporate formalities that could otherwise delay the process.

6.3 Real Estate Security

Where real estate is involved, the most common security instrument is a transfer for security purposes of a mortgage certificate (*cédule hypothécaire*), which may exist in either paper or registered form. The mortgage certificate must be formally created and registered with the competent land registry (*registre foncier*) in accordance with applicable procedures. Any creation, modification, or cancellation of a mortgage certificate requires the intervention of a local Swiss notary. This step is not only mandatory but also often determinative of timing, particularly where multiple properties or stakeholders are involved.

While both pledge and transfer for security purposes over mortgage certificates are theoretically possible, it is generally not recommended to pledge a mortgage certificate. Under Swiss law, enforcement of a pledge over a mortgage certificate requires the prior realisation of the movable asset (i.e. the mortgage certificate itself) before proceeding with enforcement against the underlying real estate. This two-step process adds complexity and delays proceedings. By contrast, transferring the mortgage certificate for security purposes allows the secured creditor to proceed directly with enforcement of the real estate without first realising the mortgage certificate as a separate asset.

When real estate forms part of the collateral, a thorough "Lex Koller" (i.e. the Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents) analysis is essential. In a nutshell, this legislation restricts the acquisition of Swiss residential real estate by non-Swiss individuals or entities, subject to various exemptions and limitations depending notably on the nature, location, and intended use of the property.

In particular, certain forms of enforcement (or even the mere holding of security interests by foreign lenders) may, in specific circumstances, be deemed to constitute an indirect acquisition under Lex Koller. Furthermore, the mere financing of a company owning Swiss real estate may, where the amount of the financing exceeds a certain proportion of the property's value, also fall within the scope of the law. These considerations may ultimately affect the validity and enforceability of the security package (or, in some cases, of the entire financing structure).

For this reason, a case-by-case Lex Koller assessment is required whenever Swiss real estate is directly or indirectly involved in a financing transaction. This requirement applies not only where real estate assets form part of the collateral, but also, for instance, where the borrower itself owns Swiss real estate, or where the shares of a company holding (directly or indirectly) such property form part of the collateral. The assessment should address, among other aspects, the status, nature and use of the property, the nationality and control structure of the lender, as well as the structuring options available to mitigate potential regulatory exposure. Non-compliance with Lex Koller restrictions may result in the nullity of the transaction (in whole or in part), expose the parties to civil and criminal liability, and lead to significant practical obstacles or delays in enforcement.

6.4 Security over Other Asset Types

Lenders may also take security over a broad range of movable and intangible assets, such as receivables, bank accounts, intellectual property rights, insurance claims, inventory, equipment, or even artworks and other luxury assets. Depending on the asset class, security may be created either by way of pledge or by assignment for security purposes, with the choice primarily driven by considerations of perfection, enforceability, and the lender's enforcement strategy.

Under Swiss law, the validity and enforceability of such security interests depend on compliance with specific formal requirements, which may include the execution of written agreements, the transfer of possession of the

secured assets (typically in the case of movable property), notification to relevant third parties, or registration with competent authorities (notably in the case of intellectual property rights). In certain cases, enforcement rights may be restricted or postponed if the pledgor retains control or disposal rights over the secured assets, unless and until such rights are contractually suspended.

As a result, careful structuring is required to ensure that the security is not only valid under Swiss law, but also effective and enforceable in practice.

6.5 Overview of security enforcement options

Generally speaking, there are three options available to enforce a security interest in Switzerland: (i) private realisation, (ii) special debt enforcement proceedings under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("DEBA"), or (iii) ordinary bankruptcy proceedings under the DEBA. Among these, private realisation is usually preferred by secured creditors, as it offers greater speed, flexibility, and creditor control compared to the formal procedures set out in the DEBA.

Private realisation may take place only with the prior consent of the security provider, typically granted in advance in the security agreement. It can take the form of (a) a private sale of the collateral to a third party (either in a bilateral transaction or by way of an auction, private or public) or (b) the secured creditor assuming ownership of the collateral at fair value (appropriation or *Selbsteintritt*). A private sale must be carried out with diligence and in good faith, using a process designed to achieve an adequate / fair price and to avoid conflicts of interest. Failure to comply with these requirements can expose the enforcing creditor to civil liability towards the security provider for damages caused by an undervalued sale. Appropriation, whereby the secured creditor acquires ownership itself, is generally accepted for assets traded on a stock exchange or market. For private assets, such as unlisted shares, the requirements are less settled, but enforcement by appropriation is generally considered permissible if the security provider has contractually consented (either upfront or subsequently) and if the value of the asset can be objectively determined without disadvantaging the security provider. In all cases, the secured creditor must notify the security provider, account properly for the collateral's value, and credit such value against the secured obligations, returning any surplus. Non-compliance may lead to nullity of the appropriation and civil liability for breach of duty of care. Importantly, in the case of pledges (*nantissement*) if the pledgor enters bankruptcy, any private realisation of pledged assets is, in principle, automatically stayed, and the collateral must instead be realised by the bankruptcy office. By contrast, assets assigned or transferred by way of a security assignment or transfer fall outside of the bankruptcy estate and remain enforceable directly by the secured creditor notwithstanding the assignor's insolvency.

Special debt enforcement proceedings (*poursuite en réalisation du gage*) may be used for enforcement of pledged assets only (i.e. this route is not available for security assignments) if no private realisation has been agreed or chosen. These proceedings are limited to the realisation of the pledged collateral, but they automatically cease upon the bankruptcy of the pledgor, at which point the creditor must enforce its rights through the bankruptcy proceedings.

Finally, enforcement may also take place in the context of ordinary bankruptcy proceedings. In such cases, the collateral is liquidated as part of the debtor's estate, but the secured creditor retains priority to be satisfied from the proceeds of the collateral ahead of unsecured creditors. Bankruptcy proceedings differ depending on the legal form of the debtor but generally lead to the liquidation of all assets and the distribution of proceeds according to statutory ranking.

In practice, secured creditors would have a strong preference for private realisation, as it allows them to bypass statutory time periods, objections under the DEBA, and the involvement of the bankruptcy office, thereby ensuring a faster and more controlled enforcement process. However, in bankruptcy scenarios, creditors secured by pledges must rely on the more formal enforcement frameworks provided by the DEBA.

6.6 Personal Guarantees

In addition to asset-based collateral, lenders may also request personal guarantees from shareholders, UBOs, sponsors, or affiliated group entities. Under Swiss law, there are two main forms of guarantees, which differ

significantly in terms of form, nature, and enforceability.

The first form is suretyship (*cautionnement*), governed by Articles 492 et seq. CO. This type of guarantee is highly formalistic and subject to strict statutory requirements. A written agreement is mandatory, and where the guarantor is an individual, the suretyship must generally be executed before a notary and spousal consent may be required. A key characteristic of suretyship is its accessory nature: it is intrinsically linked to the underlying obligation. Consequently, if the secured claim is transferred, amended, novated, extinguished, or declared unenforceable, the suretyship automatically follows the same fate. While this dependency provides a degree of predictability for all parties involved, it can also limit the creditor's flexibility in enforcing the guarantee, particularly where the enforceability or scope of the underlying obligation becomes uncertain.

The second form is the independent guarantee (*garantie indépendante*), based on Article 111 CO, which governs undertakings to ensure third-party performance (*porte-fort*). Unlike suretyships, independent guarantees are not accessory to the underlying obligation. This means the guarantor's obligation to pay remains valid even if the underlying debt is invalid, extinguished, or otherwise unenforceable. Typically, the beneficiary can demand payment upon the occurrence of the agreed trigger event without having to prove the enforceability of the underlying claim. Independent guarantees are therefore more flexible and autonomous, providing the beneficiary with a direct and independent right to payment.

Because of this flexibility, the distinction between independent guarantees and suretyships depends heavily on drafting. If the terms of an independent guarantee are ambiguous, there is a risk of requalification as a suretyship, which would subject the guarantee to all the statutory formalities and limitations applicable to suretyships. It is therefore essential to pay careful attention to the structure, the wording of the obligations, the conditions for enforcement, and the scope of liability. Poorly drafted guarantees can easily become unenforceable or significantly restricted under Swiss law, so extreme caution is required in all cases.

6.7 Upstream and Cross-Stream Guarantees and Security Limitations

In the absence of guidance from Swiss courts but according to the prevailing view in Swiss legal doctrine, where a Swiss group company provides a guarantee or security (or may otherwise be liable) for the obligations of a parent company (*upstream undertaking*) or a sister company (*cross-stream undertaking*), such upstream or cross-stream undertaking is subject to specific Swiss corporate law requirements and limitations. Most importantly, the use of enforcement proceeds resulting from foreclosure in an up-stream or cross-stream security interest or guarantee is limited to the equity of the relevant Swiss security provider / guarantor which is freely available for distribution as dividends to its shareholder.

This limitation is rooted in Swiss capital maintenance rules and the statutory protection of both general and special reserves. In very simple terms, these rules prohibit the repayment of share capital to shareholders and the distribution of reserves other than through a properly adopted dividend resolution reflecting the available distributable reserves. To ensure compliance with these capital and reserve protection provisions, it is considered best practice to include specific limitation language in any up-stream or cross-stream security or guarantee granted by a Swiss security provider or guarantor.

According to what we consider to be the prevailing view in legal doctrine, the amount of freely available equity of the security provider (i.e. the amount that can actually be used from the enforcement proceeds to discharge the secured obligations) will have to be determined at the time of enforcement of the relevant up-stream or cross-stream security interest or guarantee. In accordance with best corporate practice, the determination requires that an interim balance sheet be drawn up by the relevant Swiss security provider / guarantor as per the date of enforcement, which is then audited by its statutory auditors, and that the relevant interim balance sheet is being approved by the board and the shareholders of the security provider / guarantor. Such a process may significantly delay the secured creditor's receipt of the enforcement proceeds.

It is discussed in legal doctrine that the limitations discussed above may not apply (i) where the Swiss up-stream or cross-stream security provider / guarantor has received an arm's length consideration for providing the up-stream or cross-stream security or guarantee or (ii) to the extent that funds borrowed under a facility agreement by the parent of the Swiss up-stream or cross-stream security provider / guarantor have been on-lent to such security provider.

7. Tax Considerations

This Section provides an overview of certain Swiss tax considerations relevant in the context of financing transactions. Specific advice should always be sought on a case-by-case basis, as tax treatment may vary depending on the structure of the transaction, the parties involved, and the nature of the secured assets.

7.1 Swiss Withholding Tax Implications

Under Swiss tax law, payments of interest by a Swiss borrower or guarantor may, in certain circumstances, be subject to Swiss federal withholding tax (“WHT”) at a current rate of 35%. Whether WHT applies depends primarily on the nature and structure of the financing arrangement.

As a general rule, interest payments under standard loan agreements are exempt from WHT. However, interest on Swiss bonds and “debenture-like” instruments is subject to WHT. A loan to a Swiss entity may be requalified as a bond for WHT purposes if the so-called “Non-Bank Rules” are triggered. These rules provide that a loan is treated as a bond where:

- the aggregate number of non-bank lenders (including sub-participants) exceeds 10 under a single facility agreement with identical terms; or
- the aggregate number of non-bank lenders (including sub-participants) across all of the Swiss entity’s interest-bearing indebtedness with non-identical terms exceeds 20; and
- the total amount of the Swiss entity’s interest-bearing indebtedness (including loans, facilities, and private placements) is at least CHF 500,000.

In addition, under the anti-avoidance practice developed by the Swiss Federal Tax Administration (“SFTA”), these rules may also apply where the loan is granted to a foreign borrower but secured or guaranteed by a Swiss entity, particularly if (i) the borrower is a foreign subsidiary of the Swiss security provider / guarantor; (ii) the borrower is a special purpose vehicle (SPV); and (iii) the proceeds of the loan are on-lent or otherwise flow back to the security provider / guarantor or its other Swiss subsidiaries.

To avoid a loan being requalified as a bond for Swiss WHT purposes, the loan documentation typically include specific provisions whereby, among others, the Swiss borrower represents that it will not have more than 20 non-bank creditors at any time during the term of the loan, each lender confirms its bank or non-bank status for WHT purposes, and the borrower may withhold consent to any transfer that would breach the Swiss Non-Bank Rules.

Separately, the enforcement of upstream or cross-stream security interests or guarantees granted by Swiss entities may, in certain circumstances, trigger Swiss WHT exposure. While the mere granting of a guarantee or security does not, in itself, give rise to WHT (but may result, in certain circumstances, in a loan being recharacterised as a Swiss bond even though the borrower which benefits from the guarantee is a foreign entity), the enforcement of a guarantee or security interest against a Swiss security provider / guarantor may trigger withholding tax on the resulting payment, which can be recharacterised as a deemed dividend.

It should also be noted that where WHT applies, double tax treaties may reduce or eliminate the WHT burden, provided that the appropriate procedures (e.g. refund applications) are followed. However, such processes can be cumbersome and time-consuming, as they often require extensive documentation, compliance with strict formal requirements, and, in some cases, lengthy processing times by the SFTA before refunds are granted.

7.2 Real Estate Taxes

Where the security granted in connection with a loan involves real estate assets located in Switzerland (whether directly (e.g. through mortgage certificates or similar instruments) or indirectly (e.g. via a pledge over the shares of a Swiss company holding real estate assets)) the granting, transfer, or enforcement of such security may have certain Swiss tax implications.

First, cantonal real estate transfer duties may apply. Switzerland has no federal real estate transfer tax; such duties are levied at the cantonal level, and the rules, rates, and thresholds vary significantly between cantons. These duties may be triggered upon the transfer of legal title to real estate or, in certain cantons, upon the transfer of an interest in a real estate company (for example, where there is a change of control of an entity whose principal assets consist of Swiss real property). The mere granting of a mortgage or pledge over Swiss real estate does not typically trigger transfer duties. However, the enforcement of such security - for example, through foreclosure or appropriation of the property by a lender - may, depending on the canton, be treated as a taxable transfer.

Second, where security over Swiss real estate is granted in favour of non-Swiss lenders, federal and cantonal source tax on mortgage interest may be due. The direct federal component is 3% on gross interest, while cantonal rates vary by canton (generally between 10% and 30%). The tax must be withheld by the Swiss security provider. Treaty relief may be available, subject to the usual formalities.

Given these potential tax exposures, particularly in cross-border lending, it is essential to analyse the relevant rules early in the structuring process and, where necessary, consider tax rulings or alternatives structuring to mitigate risks.

7.3 Thin Capitalisation Rules

Swiss tax law generally allows companies to deduct interest expenses on debt from their taxable profits, provided the debt structure complies with the thin capitalisation requirements set by the SFTA. The SFTA applies safe harbour rules that define the maximum permissible debt levels based on the fair market value of a company's assets. Any debt from shareholder or related entities exceeding these thresholds may be reclassified as hidden equity, with two main consequences: (i) interest on such excess debt is treated as a hidden dividend and is therefore non-deductible for corporate income tax purposes; and (ii) such interest payments may also trigger WHT, as they are deemed distributions to shareholders or related parties. In the context of group financing, particular care must be taken with upstream or cross-stream guarantees and intra-group loans to ensure compliance with thin capitalisation rules, especially since third party debt can be recharacterised as shareholder debt where such debt is guaranteed by related entities. Proper debt-to-equity structuring is therefore essential to preserve interest deductibility and avoid unintended withholding tax leakage.

7.4 VAT Treatment of Fees and Costs

The Swiss Value Added Tax ("VAT") treatment of financing-related fees and costs must also be considered. Under Swiss VAT law, the granting of loans, credit facilities, and related guarantees generally qualifies as an exempt financial service, meaning that no VAT is charged on such transactions. However, fees for services that are not strictly financial in nature (such as structuring advice, legal support, or arranger mandates) may be subject to Swiss VAT at the standard rate (currently 8.1%), depending on the exact nature of the service. In cross-border scenarios, where services are provided by or to non-Swiss parties, reverse-charge mechanisms may apply, requiring a careful case-by-case assessment of the VAT position. Finally, because many financing activities are VAT-exempt, input VAT on related costs may not be recoverable by the borrower or guarantor.

8. Regulatory Considerations

Financing transactions involving Swiss borrowers, guarantors, or assets may trigger various Swiss regulatory considerations, particularly where cross-border elements are involved or where the financing is syndicated or marketed to multiple investors. The following areas are particularly relevant in the context of private debt transactions.

8.1 Applicability of FINSA/FINIA

The Swiss Financial Services Act ("FINSA") and the Swiss Financial Institutions Act ("FINIA") govern the provision of financial services and the licensing of financial institutions in Switzerland. As a rule, the mere granting of loans

by a lender does not trigger FINIA licensing obligations, nor FINSA conduct obligations. However, FINSA conduct obligations may apply if a lender offers loans to finance transactions involving financial instruments or products (particularly where such instruments or products are marketed in or into Switzerland), as this can qualify as a financial service. In cross-border financings, foreign lenders and their representatives should therefore assess carefully whether their activities could qualify as the provision of regulated financial services in Switzerland.

8.2 Swiss banking rules and “acceptance of deposits”

Where a financing structure involves the issuance of bonds, notes, or other debt instruments to Swiss investors (whether such investors participate directly in the borrower or indirectly through a Swiss or foreign lending vehicle) Swiss banking regulations must be carefully considered.

Under the Swiss Banking Act (“BA”) and the Swiss Banking Ordinance (“BO”), any activity that (i) entails accepting deposits from the public on a professional basis (i.e., liabilities owed to clients, subject to statutory exceptions) or (ii) involves publicly soliciting deposits with the aim of providing financing to a broad group of persons or entities, is deemed to constitute banking activity. Such activity requires a banking license and is subject to FINMA supervision.

Pursuant to Article 6(1) BO and FINMA Circular 2008/3 (“Public deposits with non-banking institutions”), activity is considered to be conducted on a “professional basis” if it involves either (i) holding deposits of more than 20 investors or (ii) soliciting deposits from an unlimited number of persons, irrespective of the actual final number of investors (even if fewer than 20). Certain liabilities, however, are expressly excluded from the definition of deposits.

Of particular relevance for private debt structures is Article 5(3)(b) BO, which provides that bonds and other standardised debt instruments issued in large numbers (or equivalent non-securitised rights) do not qualify as deposits, provided that investors are supplied at the time of offering with at least the following information:

- the name, registered office and a brief description of the issuer’s purpose;
- the interest rate, issuance price, subscription period, release date, term and repayment conditions;
- the latest audited annual and consolidated financial statements, and, if older than six months, interim financial statements of the issuer and any security provider;
- details of any collateral provided; and
- the bondholder representation, if foreseen in the offering documentation.

Where these disclosure requirements are met, an offering of bonds will generally not be considered to involve the acceptance of deposits from the public for Swiss regulatory purposes.

Furthermore, offerings made exclusively to institutional clients as defined in FINMA Circular 2008/3 (e.g. regulated financial institutions, pension funds, municipalities, or corporates with professional treasury operations) typically fall outside the scope of Swiss banking regulation, as they do not constitute deposits from the public. In private placements, particularly in the case of refinancing bonds placed on a strict “one-to-one” basis, market practice is to limit the number of targeted investors to fewer than 20.

8.3 Anti-money laundering obligations

The Swiss Anti-Money Laundering Act (“AML”) imposes KYC and due diligence obligations on lenders and arrangers qualifying as financial intermediaries (e.g. banks, securities firms, or certain non-bank lenders). These obligations may extend to non-Swiss lenders if they operate through a Swiss branch or appoint a Swiss arranger. In syndicated private debt financings, AML processes are often centralised with the facility agent or arranger, but each lender remains responsible for compliance under applicable law.

8.4 Lending within groups and documentary expectations

Intra-group lending does not generally trigger FINSA/FINIA licensing or AMLA obligations, provided no third-party funds are involved. However, lenders should maintain proper documentation evidencing the nature and terms of intra-group financing, particularly where Swiss entities act as guarantors or security providers. Proper documentation also supports transfer pricing compliance and avoids regulatory requalification risks.

8.5 Collective investment schemes concerns for syndicated private debt

Where a syndicated private debt structure involves pooling funds from multiple investors for the purpose of granting loans, the transaction should be assessed under the Swiss Collective Investment Schemes Act ("CISA"). If the structure qualifies as a collective investment scheme, licensing or registration with FINMA may be required. That said, standard loan syndications arranged by regulated financial institutions are typically structured to avoid falling within CISA's scope, but early regulatory review is advisable to ensure compliance.

Conclusion and Practical Insights

Private debt transactions in Switzerland offer significant flexibility in structuring, but this flexibility comes with complexity. With no fully standardised documentation and a regulatory framework that interacts with multiple areas of Swiss law - from security and tax to regulatory and enforcement mechanics - each deal requires a tailored approach.

From a practical perspective, several insights stand out:

- **Plan early and structure carefully:** Many of the issues that may later become deal-breakers (such as security enforceability, withholding tax exposure, or Lex Koller restrictions) can be anticipated and mitigated at the term sheet stage.
- **Align interest and covenant mechanics with the commercial reality:** Interest reserves, PIK features, prepayment protections, and financial covenants should be calibrated to reflect the borrower's cash flows and the lender's risk appetite while staying within Swiss legal constraints.
- **Anticipate enforcement scenarios:** Swiss law offers creditor-friendly options, but perfection formalities, insolvency risks, and cross-border complexities require careful security structuring from the outset.
- **Manage regulatory and tax risks proactively:** Withholding tax traps, thin capitalisation rules, and FINSA/FINIA considerations can materially affect transaction feasibility and structuring if not addressed early.

Above all, early involvement of specialised financial, tax, and legal advisers is essential. Expert input at the structuring stage ensures that commercial terms are documented in a manner that is enforceable, tax-efficient, and regulatory-compliant, reducing the risk of unexpected issues at funding or enforcement.

Well-designed private debt structures do more than record today's deal: they anticipate tomorrow's challenges, balance lender protection with borrower flexibility, and establish a durable foundation for sustainable financing relationships.

