

# The pitfalls and challenges of intra-group guarantees under Swiss law

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# 1. Overview

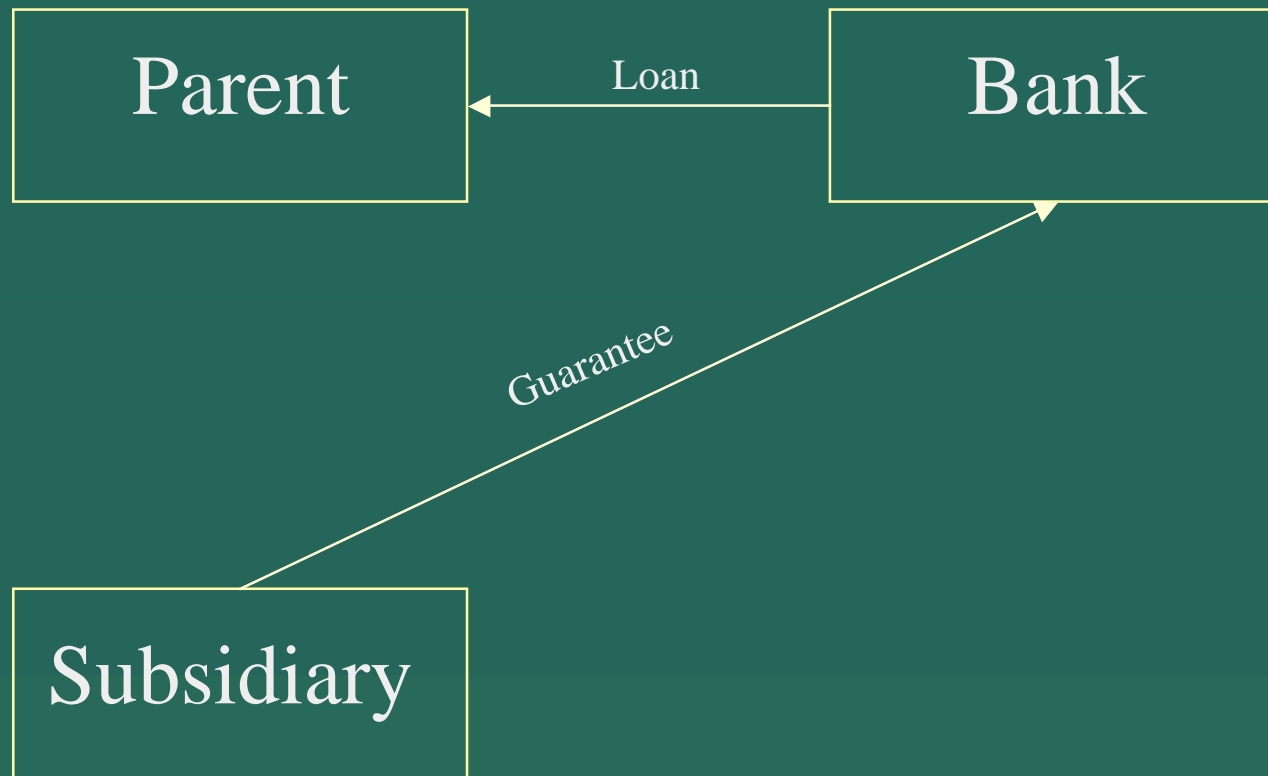
- Definitions
- Contract law
- Corporate law
- Bankruptcy law
- Tax law
- Conclusion/Summary



## 2. Definitions

- Group
  - No definition under Swiss law
  - Art. 663 e (1) Swiss Code of Obligations (group accounts): common management as a result of majority holding of votes or otherwise.
- Intra-group
  - Downstream
  - Upstream
  - Cross-stream
    - ⇒ Up/Cross-stream guarantee (by a Swiss company) in favour of (direct or indirect) parent or sister company (note: also security).

## 2. Definitions (2)





### 3. Contract law

- Guarantee (porte-fort) vs. surety (cautionnement)
- Independence
  - Form requirements



## 4. Corporate Law (1)

→ Guarantee against adequate consideration ?

- Fee
- Other benefit

⇒ Assumption that no or insufficient consideration



## 4. Corporate Law (2)

→ Guarantee within corporate purpose ?

- Capacity of corporate bodies to enter into the guarantee ?
- Ultra Vires: guarantee null and void

⇒ Check/amend articles of association



## 4. Corporate Law (3)

→ Repayment of share capital ?

- Art. 680 (2) of the Swiss Code of Obligations: no right to claim repayment of the capital
- Amount which can be distributed to shareholders as dividend
- Guarantee null and void

⇒ Limit guarantee to amount which can be distributed as dividend (profits and distributable reserves) at time of payment.





## 4. Corporate Law (4)

→ Hidden distribution of dividends ?

- Art. 678 (2) of the Swiss Code of Obligations: shareholders/directors and related persons to repay the company amounts received if clear disproportion with (i) consideration and (ii) economic situation of the company

⇒ Shareholders resolution to authorise distribution of dividends

⇒ Limit to amount which can be distributed as dividend



## 4. Corporate Law (5)

→ Liabilities of directors

- Art. 754 of the Swiss Code of Obligations: liability of directors
- Damages to company, creditors

⇒ Limit to amount which can be distributed as dividend



## 5. Bankruptcy Law

→ Challenge of guarantee for fraudulent preference

- Art. 286 Swiss Bankruptcy Law: gift, if within one year preceding the guarantor's bankruptcy
- Art. 287 Swiss Bankruptcy Law: guarantee for an existing debt if, within one year preceding the guarantor's bankruptcy and if guarantor is over-indebted
- Art. 288 Swiss Bankruptcy Law: guarantee to harm creditors or favour creditors, if within five years preceding the guarantor's bankruptcy

⇒ Check economic situation of guarantor



## 6. Tax Law

→ Financial contribution

- Withholding tax: withheld at guarantor level
  - 35%
- Income tax: at parent/sister level
  - Taxable income = arm's length consideration



## 7. Conclusion/Summary

If up/cross-stream guarantee with no adequate consideration:

- Check/amend articles of association
- Limit amount of guarantee to amount payable as dividend
- Have guarantee approved by shareholders' meeting (in addition to approval by board of directors)
- Check financial situation of guarantor
- Withhold 35% withholding tax