

Lending to a Company Incorporated in Switzerland: Signing and Closing a Corporate Loan Transaction

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A Practice Note discussing the key signing and closing considerations for a loan agreement, guarantee, or security document which is subject to English law or the law of a US state where a borrower, guarantor, or security provider is incorporated in Switzerland.

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This Note is intended to be used to facilitate the signing and closing of a loan financing where a borrower, guarantor, or security provider (an obligor) is incorporated in Switzerland. While the issues to be considered in relation to an obligor when signing and closing a loan agreement, guarantee, or security document will be broadly similar regardless of an obligor's jurisdiction of incorporation, there will typically be jurisdiction-specific issues that will need to be considered.

It is important to identify any signing and closing issues, specific practices, or concerns early in a loan finance transaction which involves an obligor incorporated in a jurisdiction other than the governing law of the loan financing documentation. This will then make it easier to ensure that these issues, practices, and concerns do not

have a negative impact on the transaction timeline or lead to unnecessary transaction costs. Transaction-specific advice from lawyers in the appropriate jurisdiction should be taken in due course to ensure a transaction closes without any unforeseen issues.

This Note looks at the key signing and closing practicalities for a corporate loan made under a loan agreement, which is subject to English law or the law of a US state, to an obligor incorporated in Switzerland. It covers the following:

- Practicalities of signing arrangements.
- Execution requirements.
- Conditions precedent.
- Searches at public registries.
- Fees.
- Filing and registration requirements.
- This Note assumes the following:
 - The obligor is a company incorporated in Switzerland.
 - The loan agreement is subject to English law or the law of a US state.

Signing Arrangements

In-Person Signings

In Switzerland, it is not a legal requirement or typical for the parties (or their lawyers) to attend an in-person meeting to sign loan financing documents, such as a loan agreement, guarantee, or security documents.

However, certain documents must be signed at an in-person meeting before a notary, for example, mortgages over real estate or other public deeds (*öffentliche Beurkundung*) (Article 799(2), Swiss Civil Code (CC)).

Virtual Signings

Virtual signings are far more common than in-person signings in Switzerland. Generally, "wet ink" signatures are scanned and exchanged with other parties by email and then added to the execution copy of the respective agreement. A fully executed version of the agreement is then circulated among the parties by email.

If a document is governed by Swiss law, however, it is recommended that original signature pages be exchanged after a virtual signing. This is because Swiss legal academics disagree whether an exchange of pdf copies of signed signature pages by email is sufficient to satisfy the formal requirement to conclude a Swiss law governed contract "in writing" irrespective of whether that requirement is prescribed by law, as is the case for certain contracts such as an assignment of claims (Article 165(1), Swiss Code of Obligations (CO)), or merely agreed between the parties. If the requirement to conclude a Swiss law governed document in writing is not met, normally the relevant agreement or legal act is null and void (see Article 11(2), CO). It is therefore standard practice that a Swiss law

governed loan or security agreement provide that the originals of the signed signature pages be exchanged by courier within a few business days after the virtual signing.

Finally, virtual signings using electronic signature tools are not yet common in Switzerland in financing transactions and are generally not accepted by lenders or lenders' counsel (see also [Electronic Signature](#)).

Counterparts

English or US state law governed transaction documents may be signed in counterparts under Swiss law.

Signing in counterparts is also allowed where there are two or more authorised signatories for a Swiss entity.

Signatures to Swiss law governed documents, resolutions, and directors' certificates of Swiss entities can be on counterparts. In financing transactions, Swiss law governed agreements typically provide that the parties may sign an agreement in any number of counterparts, which then has the same effect as if the signatures on the counterparts were on a single copy of the relevant agreement.

Practical Arrangements for the Delivery of the Finance Documentation

The signing procedure for a loan finance transaction is typically as follows:

- The execution copies of the loan finance documentation, and sometimes the separate signature pages, are usually sent by email to all parties with the corresponding signing instructions.
- The executed copies of the signature pages are sent back to the lender (or its lawyers) and compiled and attached to the relevant agreements.
- The lender (or its counsel) dates the agreement. The date must not be earlier than the date on which the last required signature was executed (Swiss Federal Supreme Court 129 IV 130 c. 2.3 and 3).
- A copy of the fully executed agreement is sent to all parties by email.

After all documents are exchanged, the lender's counsel usually prepares electronic or physical closing binders containing originals or copies of all transaction documents depending on the preference of the parties.

Searches at Public Registries

Swiss obligors involved in a corporate loan transaction are usually incorporated as a Swiss corporation (*Aktiengesellschaft*) or a limited liability company (*Gesellschaft mit beschränkter Haftung*) and registered in the commercial register (*Handelsregister*) of the canton in which they have their legal seat. The commercial register contains information on an obligor that is essential to prepare the legal documentation for loan transactions as follows:

- Full business name.
- Registered address.
- Information on the share or quota capital and the existing issued shares or quotas.
- Articles of association, including the company's purpose.

- Authorised signatories.

The cantonal commercial registers can be searched online (*Zefix: Central Business Name Index*). However, the information that is accessible in the online registers is not legally binding (Article 14(1), Commercial Register Ordinance (*Handelsregisterverordnung*)).

Information contained in certified excerpts of the commercial register are however legally binding and can be ordered online or by telephone. Delivery of certified extracts usually takes two to three business days and costs approximately CHF40 to 70 per excerpt, depending on the canton. These certified excerpts are typically ordered at the beginning of a loan finance transaction to facilitate drafting the loan agreement, guarantee, and security agreements, and again before signing to ensure the information is still accurate. This is particularly important when an obligor's lawyers (or less frequently, the lender's lawyers) are required to issue a legal opinion on a Swiss obligor's legal capacity and authority to enter into a loan agreement, guarantee, or security document.

Certified copies of the articles of association costs approximately CHF30 to 80 per copy, depending on the canton.

Other relevant public registers in relation to Swiss obligors involved in a loan financing transaction include the following:

- The land register (*Grundbuch*) in each canton for mortgages over real estate.
- The *Trademark Database* of the Swiss Federal Institute of Intellectual Property for intellectual property (IP) rights.

Signing Requirements

Deeds

The common law concept of executing a contract as a deed does not exist in Switzerland. However, a Swiss party to a loan agreement, guarantee, or security document governed by English or US state law must sign that document as a deed if required by the relevant governing law.

The creation or increase of a mortgage over real estate located in Switzerland must be in the form of a public deed (*öffentliche Beurkundung*) which must be drawn up by a notary. In Switzerland, the cantons regulate how public deeds are drawn up in their territory (Article 55(1), Final Title of the CC). In the Canton of Zurich, for example, public deeds are drawn up by public notaries (see section 1(a)(1), Notary Act of the Canton of Zurich (*Notariatsgesetz*)). The Canton of Zurich charges a fee of 1% calculated on the amount of the pledge or, in the case of amendments, on the amount by which the pledge is increased, but in either case not less than CHF100, to issue a public deed (see clause 1.2, Annex to the Notary Fee Ordinance of the Canton of Zurich (*Notariatsgebührenverordnung*)).

Virtual signing of public deeds is currently not possible in Switzerland.

Under Hand or by Hand

Under Swiss law, English or US state law governed transaction documents can generally be signed "by hand" by authorised signatories. The method in which a Swiss obligor signs a transaction document governed by English or US state law must comply with the applicable English or US state law. If, for example, English law prescribes that a certain document must be executed as a deed by a Swiss obligor, then that Swiss obligor must comply with these formal requirements.

However, under Swiss law, the signing of an agreement in the context of a financing transaction is rarely subject to particular formal requirements, however, a notable exception is the creation or increase of mortgages over real estate, which requires a public deed (see *Deeds*).

Electronic Signature

Switzerland distinguishes between three levels of e-signature:

- **Simple electronic signature (SES).** An SES means data in electronic form that is attached to or logically associated with other electronic data and provides for authentication of the signatory. Examples of this type of "quasi e-signature" include scanning a wet ink signature or adding a name to an electronic document such as an email.
- **Advanced electronic signature (AES).** An AES is uniquely associated with its owner, providing additional security. It is usually based on a private or public key system and accompanied with a digital certificate issued by a trusted provider.
- **Qualified electronic signature (QES).** A QES is an advanced electronic signature that has been generated according to certain rules provided by statutory law and is supported by a qualified and valid certificate issued by a trusted provider that is recognised by a competent public or private body. It is the most secure e-signature.

Under the Swiss Federal Act of 18 March 2016 on Electronic Signatures (Federal Act on Electronic Signatures), the QES is the only legally recognised equivalent to a wet ink signature, subject to any statutory or contractual provisions stating otherwise (Article 14(2bis), CO).

- In accordance with Article 5(2), Federal Act on Electronic Signatures, the Federal Office of Communications (OFCOM) periodically publishes a list with recognised trusted providers for the QES, which includes the following:
 - Swisscom (Schweiz) AG.
 - QuoVadis Trustlink Schweiz AG.
 - SwissSign AG.
 - The Federal Office of Information Technology, Systems and Telecommunication.

DocuSign is not a recognised certification service provider, and electronic signatures created using DocuSign are not deemed equivalent to a wet ink signature under Swiss law.

- Any agreements or legal acts (such as notices) for which statutory law requires it to be in written form will require the use of a QES to be legally valid and enforceable in electronic form. If the formal requirement is not met, the agreement or legal act is null and void (Article 11(2), CO). This requirement

also applies if the parties agree that the relevant agreement must be concluded in writing (Article 16(2), CO).

- A number of agreements cannot be concluded through an e-signature, including mortgages over real estate, suretyships (*Bürgschaften*) by natural persons with a value of over CHF2,000, and other public deeds, which must be issued in person by a notary public.
- The QES is currently only available for natural persons. However, legal entities may use a so-called regulated electronic seal, which permits legal entities to authenticate their communication with certain public authorities that accept these seals (see *Corporate Seals*). If a legal entity wants to file documents with the commercial registry, documents must be signed by the authorised signatories with wet ink signatures or using a QES.

However, the QES is currently not common in financing transactions and generally not accepted by Swiss lenders. Where Swiss lawyers are required to issue legal opinions regarding a Swiss obligor's capacity, it is market practice that all transaction documents are signed by the Swiss obligors using wet ink signatures.

Corporate Seals

The common law concept of company seals does not exist in Switzerland. However, legal entities may use regulated electronic seals (see *Electronic Signature*).

Contracts entered into by a Swiss company must be signed by its authorised signatories and signed with wet ink signature or using a QES.

Notarisation

Notarisation is rarely required in corporate loan transactions except in respect of mortgages over real estate (see *In-Person Signings*) or amendments to the Swiss obligor's articles of association.

Digital notarisations are not yet possible in Switzerland. In general, the parties must attend a meeting with the notary public in person and sign any documents using wet ink signatures. However, in certain cantons, public notaries (*Amtsnotare*) may issue public deeds in electronic form or produce electronically certified copies of public deeds. Also, some cantons permit a notary public to certify signatures by correspondence if they know the signatory concerned personally and if they are familiar with their signature (*Fernbeglaubigung*).

Apostille

In general, an English law or US state law governed loan agreement or guarantee with a Swiss obligor as a party does not require an apostille. However, if a public deed (*öffentliche Urkunde*), such as a notarial deed, or an excerpt from the commercial register is submitted to a public authority and was issued in a country other than that of the public authority to which it is submitted, the origin of the deed must usually be authenticated before it can be submitted. The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, to which Switzerland is a party, requires the application of an apostille by an authority designated by the country in which the public deed was originally issued to authenticate it.

In Switzerland, the competent authorities for issuing apostilles on Swiss public deeds are either the competent cantonal authorities (in Zurich, for example, the State Chancellery of the Canton of Zurich (*Staatskanzlei des Kantons Zürich*)) or the Federal Chancellery (*Bundeskanzlei*) in Bern.

Translations

In general, it is not a legal requirement in Switzerland to have loan financing documentation governed by English or US state law translated into an official Swiss language (that is, German, French, Italian, or Romansh (Article 70(1), Federal Constitution of the Swiss Confederation)).

However, a translation may be required in a court proceeding in Switzerland arising out of or in connection with loan financing documentation, since court proceedings are held in the official language of the canton in which the case is heard. Cantons that recognise two or more official languages regulate their use in the proceedings (Article 129, Swiss Civil Procedure Code). In Zurich, for example, the official language in which court proceedings are held is German (Article 48, Constitution of the Canton of Zurich (*Verfassung des Kantons Zürich*)).

No translations are necessary in arbitral proceedings that are held in English. Since 1 January 2021, the Swiss Federal Supreme Courts accepts legal documents that are drafted and filed in the English language in arbitral proceedings (Article 191, Federal Act on Private International Law; Article 77(2bis), Federal Act on the Swiss Federal Supreme Court).

Conditions Precedent

A Swiss obligor entering into a corporate loan agreement governed by English or US state law usually must provide the following documents as conditions precedent:

- A copy of the current certified articles of association and an up-to-date commercial register excerpt relating to a Swiss obligor.
- A copy of a board resolution approving the terms of and the transaction contemplated by a loan agreement, guarantee, or security document, and approving the execution, delivery, and performance of the loan agreement and any transaction security document.
- Specimen signatures of each person authorised by a board resolution.
- A copy of the register of shareholders and beneficial owners of a Swiss obligor.
- A director's certificate (or officer's certificate), which certifies that the conditions precedent documents relating to a Swiss obligor are accurate and up to date.

The borrower or guarantor typically must provide further documents as conditions precedent, including any documents required for the lender's compliance with "know your customer" obligations in relation to the borrower and the borrower's group structure chart, financial statements and business plan, or other documents.

In addition, the Swiss borrower's counsel usually issue a legal opinion concerning the legal capacity and authority of a Swiss obligor to enter into a loan agreement and the relevant loan finance documents. The lender's Swiss counsel usually issues a legal opinion concerning the validity and enforceability of the Swiss law governed security documents.

It may also be necessary to obtain a tax ruling from the competent Swiss tax authorities before signing to avoid unintended tax consequences of a loan agreement and any guarantee or security document to which the Swiss obligor is a party. As it can take several weeks for the tax ruling to be issued, the application process should

ideally be started early in a loan finance transaction. The tax ruling application is usually drafted and filed by a Swiss borrower's counsel.

Filing and Registration Requirements

Generally, loan agreements or guarantees with Swiss obligor as a party and most security interests created over assets owned by a Swiss obligor do not need to be filed or registered in Switzerland.

However, in some cases registration is required. Mortgages over real estate are only valid if recorded in the land register (*Grundbuch*) (Article 799(1), CC). Registration requirements also apply to security over ships or aircraft (see Swiss Federal Act on the Shipping Register (*Bundesgesetz über das Schiffsregister*) and Swiss Federal Act on the Aircraft Register (*Bundesgesetz über das Luftfahrzeugbuch*)).

Furthermore, it is Swiss standard practice, although not a legal requirement, to register a pledge agreement over IP rights, such as rights in and related to any copyright, design, domain, patent, or trademark, with the competent IP authorities (such as the Swiss Federal Institute of Intellectual Property). The pledgor is typically required to register the agreement post-signing. However, registration is not required to create a legally valid and binding IP pledge. It is sufficient if the pledgor unconditionally pledges the IP rights as security to the pledgee, pursuant to Article 899 to 906 of the CC.

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