Lending to a Company in Switzerland: Legal and Documentation Issues

by *Dr Markus Wolf* and *Charlotte Sophie Rüegg*, Baker McKenzie Zurich

Practice notes | Law stated as at 01-May-2023 | Switzerland

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

This Note is intended to be used for 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 drafting 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 legal or documentation 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 and appropriate amendments will need to be made to the documents used in the transaction.

This Note looks at the key legal and documentation issues 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:

- Legal issues such as corporate authority and corporate benefit, laws of general application to lending, granting of security interests and guarantees, laws affecting the amount of interest charged, and whether the concepts of facility agent and security trustee are recognised in Switzerland.
- Documentation issues such as typical contractual terms (for example, representations, undertakings (or covenants), and events of default), jurisdiction and arbitration provisions, and execution formalities.

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.

Legal Issues

Corporate Authority

A board resolution is usually required to approve the entry into the loan finance documents and authorise certain individuals to agree and execute the loan finance documents on behalf of a Swiss obligor. Separate powers of attorney authorising certain individuals to execute the loan finance documents on behalf of a Swiss obligor are not required as signatories will be directly authorised in the board resolution of an obligor. Where more than one entity of a group is a party to the loan finance documents, it is customary that authorisation to represent various parties in the same matter (*Doppel-/Mehrfachvertetung*) is provided in a board resolution and to release any signatories from the restrictions under Swiss law regarding self-dealing (*Selbstkontrahieren*).

Shareholder resolutions are only required where a Swiss obligor provides an upstream or cross-stream guarantee or indemnity, or provides a security interest for obligations of an affiliate other than a direct or indirect wholly-owned subsidiary.

Corporate Benefit

There are limitations on the granting of upstream and cross-stream guarantees or security interests, as Swiss law treats payments to or for the obligations of an indirect or direct parent company or sister entity as similar to a dividend distribution.

Upstream or cross-stream guarantees and security interests must be approved by a shareholder resolution which explicitly approves any future distribution of assets of the Swiss obligor in an enforcement scenario set out in the loan financing documents.

The guarantor's constitutional documents must also permit the granting of an upstream or cross-stream guarantee or security interest.

If amendments are required to a Swiss obligor's articles of association, these may take two to four weeks to finalise depending on where in Switzerland the obligor has its legal seat and how cooperative an obligor is in providing the relevant information, documents, and signatures for the amendment process.

Laws of General Application Relating to Lending, Granting of Security, and Guarantee

The relevance of Swiss Acts and ordinances for a particular loan financing transaction may vary from case to case. However, the following legislation is generally relevant:

- Swiss Code of Obligations of 30 March 1911 (CO), which regulates general contractual obligations and specific obligations under, for example, a loan agreement, and includes Swiss corporate law provisions.
- Swiss Civil Code of 10 December 1907, which includes provisions regulating security interests such as pledges.
- Swiss Debt Enforcement and Insolvency Act of 11 April 1889 (SDEBA), which includes provisions relevant for certain insolvency events of default and enforcement matters.
- Swiss Act on Private International Law of 18 December 1987 (PILA), which regulates enforcement matters in an international context.
- Various Swiss tax laws and COVID-19 related Acts and ordinances.

Capital Maintenance and Protection Rules

Under Swiss capital maintenance and capital protection rules, it is important that in an enforcement scenario, the guarantee payment or the application of proceeds from the enforcement of transaction security provided by a Swiss obligor to satisfy upstream or cross-stream obligations are limited to a Swiss obligor's freely distributable equity at the time payment under the guarantee is demanded or enforcement proceeds are applied. This limitation does not release a Swiss obligor from its obligations under any guarantee, indemnity, or transaction security provided. Rather, it postpones its payment obligations to a time when distributions are again permitted. Nevertheless, in an insolvency scenario, these limitations typically have a material adverse impact on the value of upstream or cross-stream security and guarantees.

However, it should be noted that these limitations are not applicable where the transaction security and guarantees are granted on an arm's length basis. Secured loan financing transactions are not usually structured to rely on the arm's length exception as it is difficult to establish what is considered "arm's length." If a loan financing transaction is structured to rely on the arm's

length exception, the risk remains that an upstream or cross-stream guarantee or security provided may be characterised as an unlawful return of shareholders' equity or as a hidden profit distribution and would render the guarantee or security invalid. This would also expose the board of directors of the guarantor or the security provider entity to personal liability if the unlawful upstream or cross-stream payments are not fully recovered from the borrower by the guarantor or security provider.

Minimum Interest Provision

There is a risk that a tax gross-up provision would not be enforceable against a Swiss borrower because Swiss withholding tax laws require the payer to shift the tax burden of Swiss withholding tax to the payee. Any agreements that contradict this obligation are null and void. This point is typically addressed by including a minimum interest provision in the loan financing documentation that provides for a re-calculation of the interest amount so that the payee will recover the full amount from the payer without circumventing the gross-up prohibition.

Non-Bank Rules

Loan financing to a Swiss obligor triggers the applicability of Swiss tax law rules, commonly referred to as the "Swiss non-bank rules." Compliance with such rules is required to ensure that no Swiss withholding tax, currently 35%, becomes applicable on interest payments under the loan finance documents.

In summary, the Swiss non-bank rules are as follows:

- The ten non-bank rule requires that no more than ten non-bank lenders (that is, entities that are not licensed as banks in their jurisdiction of incorporation) participate in the loan finance transaction (this rule is tested on a transaction-specific basis).
- The 20 non-bank rule requires that the Swiss obligor does not have more than 20 non-bank creditors across all of its borrowings (this rule is tested on an aggregate basis).

Compliance with Swiss non-bank rules is typically addressed through any of the following:

- **No flowback undertaking.** Inclusion of an undertaking in a loan agreement (or a side letter agreement where the loan agreement has already been signed and the Swiss entity accedes as a guarantor or security provider at a later stage) that the loan proceeds will not be used in Switzerland in a manner that would trigger Swiss withholding tax consequences as determined by the Swiss Federal Tax Authority. This approach, however, is only possible where a Swiss entity acts as guarantor or as security provider but not as borrower.
- **Tax ruling.** A Swiss obligor's counsel obtains a tax ruling confirming that the contemplated lending structure involving a Swiss obligor does not trigger any adverse withholding tax consequences. Tax rulings can usually be obtained within two to four weeks.
- **Fully-fledged non-bank rules provisions.** This requires the inclusion of various definitions, a representation and an undertaking by a Swiss borrower regarding compliance with the 20 non-bank rule, and assignment and transfer restrictions designed to ensure that there will, at no point in the term of the loan financing, be more than ten non-bank lenders participating in the loan financing transaction or more than 20 non-bank lenders in a Swiss obligor's overall financing structure.

Swiss COVID-19 Support Measures

Entities that have obtained a loan, surety, guarantee, non-refundable contribution, or other financial support under any Swiss public financial support scheme in connection with the COVID-19 pandemic must not distribute any dividends or make loans for a certain period of time. This will limit the relevant Swiss entity's ability to send funds upstream to an affiliate for debt servicing purposes. It will also adversely affect the value of upstream and cross-stream guarantees and security interests provided by the relevant Swiss entity because upstream and cross-stream guarantees and security interests are treated similarly to dividend distributions in an enforcement scenario. To address this topic, a representation is typically given in a loan agreement that no Swiss group company has obtained such governmental support. If such support has been obtained, loan agreements typically provide a representation that any support has been repaid in full before execution of the loan financing documents, if possible, or an undertaking that repayment will occur within a certain period of time after the loan financing transaction closing date.

Specific Governing Law Clause

From a Swiss conflict of laws perspective, jurisdiction clauses must specify the court or courts that have jurisdiction. This is relevant for jurisdiction clauses that provide for a court that is not located in a jurisdiction where the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention) applies. For jurisdictions of states that have ratified the Lugano Convention, it would, from a Swiss law perspective, be sufficient to say, for example, "The courts of Belgium have exclusive jurisdiction […]."

Where the Lugano Convention does not apply, the jurisdiction clause should be drafted to comply with the PILA which requires that the court that has jurisdiction must be sufficiently determinable by specifying a town or city, for example, "The courts of Sydney, New South Wales, Australia have exclusive jurisdiction [...]."

Merger, Demerger, or Transfer of Assets and Liabilities

If a Swiss obligor is involved in a merger (*Fusion*), demerger (*Spaltung*), or transfer of assets and liabilities (*Vermögensübertragung*) under Swiss law, the secured parties only learn about the transaction through the respective publication in the Swiss Official Gazette of Commerce, as under Swiss law there is no statutory obligation of the obligor to inform the secured parties about the contemplated transaction. There is also no statutory right of the secured parties to prevent this type of transaction. Also, a contractual prohibition in the loan agreement or the relevant security agreement may not prevent an obligor from entering into the transaction. Therefore, a Swiss company whose shares have been pledged to the secured parties may be merged without the secured parties being able to prevent the transaction. The only remedies available to the secured parties in this scenario are the contractual remedies if an event of default has occurred as a result.

Restriction on Interest Rates, Accrual of Default Interest, and Other Fees Payable

In accordance with Swiss law principles on usury, interest rates must not be excessive. Whether an interest rate is considered "excessive" depends on various factors and the circumstances of the transaction, for example, the currency of the loan, the rate of inflation, the term and purpose of the loan, the risk profile of the financing, whether the loan is secured or unsecured. Cantonal laws have previously provided for maximum rates of interest of 1.5%per month which is equal to a maximum annual rate of interest of 18%. While most cantons have abolished such laws, the Introductory Act to the Swiss Civil Code of the Canton or Zurich of 2 April 1911 (EG-ZGB ZH) still provides that for credit transactions, other than consumer credit, the annual cost of credit may not exceed 18%. It is therefore fair to assume that the interest limit under Swiss law is generally in the range of approximately 18% per year. If an interest rate is contested, then a court may reduce the interest rate at its discretion.

A court may qualify default interest as a contractual penalty (*Konventionalstrafe*) pursuant to Article 160 et seq of the CO and may in its sole discretion reduce the agreed amount of default interest if it considers it to be excessive. The same consequence applies if parties have agreed that default interest accrues on interest payments that are not paid on their due date (Article 105, paragraph 2, CO).

An agreement that default interest will be compounded with the overdue amount and bear interest may be null and void, pursuant to Article 314, paragraph 3 of the CO, if the agreement is reached prior to the due date of the overdue amount.

Is the Concept of a Facility Agent or Security Trustee Recognised?

Facility Agent

The concept of a facility agent acting as agent on behalf of a group of lenders is recognised under Swiss law. If a facility agent is appointed or authorised to act on behalf or for the benefit of another person in an agreement governed by Swiss law, for example under a Swiss law governed security document, parties should be aware that any appointment or authorisation to act on behalf or for the benefit of another person is revocable at any time under Swiss law. Consequently, it may be terminated at any time even though it is stated to be irrevocable (Article 32 et seq, CO). There are no powers or duties implied by Swiss law that would override duties typically set out in an English law or US State law governed loan agreement provided that the exercise of such powers or duties would not lead to a result that is incompatible with Swiss public policy (*ordre public*).

Security Trustee

Swiss law governed transaction security is categorised as either accessory security interests (*akzessorische Sicherheiten*) or non-accessory security interests (*nicht-akzessorische Sicherheiten*).

Non-Accessory Security Interests

As far as non-accessory security interests are concerned, for example, security transfers (*Sicherungsübereignung*) or security assignments (*Sicherungsabtretung*), Swiss law permits a security trustee to act and enter into the security agreement in its own name for the benefit of the secured parties.

Accessory Security Interests

As far as accessory security interests are concerned, for example pledges (*Pfandrechte*), the concept of a security trustee is not recognised from a Swiss law perspective.

By way of background, each secured party has its own claim against a borrower for the amount of its participation in a loan. Therefore, the creation of a pledge solely in favour of a security trustee is not possible and the accessory security interest must be granted to all secured parties. However, the secured parties may be represented by a security agent acting in its own name and in the name and on behalf of the secured parties. The secured parties will therefore become parties to the pledge agreement and the security agent will also be a party to the pledge agreement acting in the name of and on behalf of each secured party.

Alternatively, a parallel debt structure can be put in place whereby the security agent is designated as a joint and several creditor of all secured obligations. This structure allows the security agent to act in its own name. However, parallel debt structures are still untested under Swiss law and it cannot be ruled out that they may qualify as a circumvention of principles of Swiss property law and Swiss insolvency laws.

Set-Off

As a rule, a Swiss obligor's waiver of its right of set-off under an English law or US state law governed loan financing document is enforceable from a Swiss law perspective. However, certain Swiss legal scholars take the view that this waiver would not be valid on the insolvency of a Swiss lender.

Unlawful or Illegal Purpose of Loan

Under Swiss law, agreements with an unlawful, impossible, or immoral purpose are void from the outset (Article 20, CO).

If a borrower uses the loan proceeds for an unlawful or illegal purpose, lenders may have remedies based on contract (*Vertrag*) (Article 97 et seq, CO) and tort (*Delikt*) (Article 41 et seq, CO). From a practical perspective, lenders would, as a first step, accelerate the loan based on the occurrence of a relevant event of default, as the relevant borrower has not used the loan proceeds for the purpose described in the loan agreement.

Lending in Switzerland or to borrowers incorporated in Switzerland for the purposes of financing transactions with financial instruments including shares (for example, Lombard lending) qualifies as a financial service (*Finanzdienstleistung*) under the Federal Act on Financial Services (FinSA). Lenders are subject to FinSA in case the proceeds of the loan are used for such a purpose. This means that lenders essentially need to be compliant with the rules and requirements that come with the provision of financial services under FinSA (for example, code of conduct rules, organisational requirements, duty to register with a client register, and duty to affiliate an ombudsman's office).

Documentation Issues

Finance Documentation: Mandatory Clauses and Layout

Insolvency

If a Swiss obligor is required to make representations as to the non-existence of insolvency triggers or insolvency proceedings, or if the existence of such circumstances constitutes an event of default, the relevant provisions should also refer to the insolvency triggers and insolvency proceedings under Swiss law (particularly regarding over-indebtedness, bankruptcy proceedings, and composition proceedings) (see also *Events of Default*).

Conditions Precedent

Typically, Swiss obligors provide an officer's or director's certificate which includes the following conditions precedent attached as annexes:

- A copy of the certified articles of association of the Swiss obligor.
- A certified copy of the register extract from the relevant commercial register of the canton where a Swiss obligor has its legal seat.
- A copy of a board resolution of a Swiss obligor.
- A copy of a shareholder resolution (if relevant).
- A copy of the register of shareholders and beneficial owners of a Swiss obligor.

Depending on whether the loan financing transaction is secured, further conditions precedent or conditions subsequent may be required and will be set out in the relevant security document.

Repayment and Voluntary Prepayment

There are no restrictions on the repayment of a loan in instalments or voluntary early prepayments of a loan by a Swiss incorporated borrower.

Representations and Warranties

In addition to the usual set of representations and warranties provided for in the Loan Market Association (LMA) or Loan Syndications and Trading Association (LSTA) recommended forms of loan agreement, the following representations and warranties are typically included if a Swiss obligor is party to the loan financing transaction.

Compliance with Swiss Non-Bank Rules

It is market standard to include a representation (and a corresponding undertaking) that the Swiss obligor is in compliance with the Swiss non-bank rules (for more information, see *Laws of General Application Relating to Lending, Granting of Security, and Guarantee*). Typically, the representation includes limitations to ensure that a Swiss obligor is not in breach of this representation solely as a result of any non-compliance by a lender with the transfer or assignment provisions, a lender declaring that it does qualify as a bank for the purposes of the Swiss non-bank rules when it does not, or a lender subsequently ceasing to qualify as a bank.

No COVID-19 Public Financial Support

In the context of an upstream or cross-stream security interest or guarantee, it is paramount for the secured parties to ensure that the security and guarantee package is not undermined by statutory restrictions imposed under public financial support schemes in connection with the COVID-19 pandemic (see *Laws of General Application Relating to Lending, Granting of Security, and Guarantee*). The relevant representation could be drafted as follows:

> The Swiss borrower has not obtained any loan, surety, guarantee, non-refundable contribution or other financial support under any public financial support schemes in connection with the COVID-19 pandemic or any similar federal or cantonal scheme in Switzerland.

In cases where such public financial support has been obtained, it is recommended to include an undertaking to repay such financial aid within a reasonable timeframe ideally prior to, or contemporaneously with, the initial utilisation under a loan agreement.

Undertakings

Swiss Non-bank Rules

In addition to the usual set of undertakings provided for in the LMA or LSTA recommended forms of loan agreement, one of the following undertakings would typically be included where a Swiss entity acts as a borrower, guarantor, or security provider:

- **Compliance with the Swiss non-bank rules**. An undertaking to correspond to the respective representation regarding compliance with Swiss non-bank rules (see *Non-Bank Rules*).
- **No flowback of proceeds to Switzerland**. In a loan financing transaction where there is no Swiss borrower and the proceeds of the loan are not intended to be used or lent to an entity incorporated in Switzerland, a so-called no flowback undertaking would be included instead of the full-fledged Swiss non-bank rules provisions (see *Laws of*

General Application Relating to Lending, Granting of Security, and Guarantee for more information regarding a no-flowback undertaking; see also *Non-Bank Rules*).

Environmental laws

Under Swiss administrative law, the "polluter-pays principle" (*Verursacherprinzip*) (Article 2, Environmental Protection Act of 7 October 1983 (EPA)) is applicable. Any person who causes measures to be taken under the EPA to protect people, animals and plants, their communities and habitats against harmful impacts must bear the costs of such measures.

For a polluter to be held liable, an adequate causal link between the polluting action and the damage caused is required. Where the purpose of a loan agreement does not contravene environmental laws and an undertaking by an obligor is included to require compliance with relevant environmental laws, it is unlikely that a lender would be held liable for any adverse actions or omissions by an obligor. If, however, in an enforcement scenario, the lenders enforce their security interests in certain assets (for example, shares in an obligor) and an obligor continues with any polluting activities, then a lender may incur liability under environmental laws for any damage caused.

Negative Pledge

Subject to certain limitations, an undertaking in a loan agreement or security document not to grant security to another creditor is from a Swiss law perspective primarily enforceable against the respective obligors. A "negative pledge" undertaking is not directly enforceable against a third party unless the third party is a party to the relevant transaction documents or has provided the "negative pledge" undertaking.

Events of Default

Events of default set out in the LMA or LSTA recommended forms of loan agreement, for example, non-payment, non-compliance with other obligations, misrepresentation, cross-default, insolvency, insolvency proceedings, creditor's process, unlawfulness, repudiation, and material adverse change are also applicable to a Swiss obligor that is party to an English law or US state law governed loan agreement.

A provision stating that a lender is entitled to early repayment without the need for a lender to make demand is enforceable from a Swiss law perspective.

From a Swiss law perspective, there are no statutory provisions that could restrict a lender's ability to waive an event of default. There are, however, certain principles under Swiss law that could restrict a Swiss obligor's right to remedy an event of default, for example, negligence or fault, misuse of rights, breach of general principles of good faith, or prohibition of abusive behaviour.

Insolvency-related events of default are amended to include jurisdiction-specific wording or definitions to avoid any ambiguity. The following are typical Swiss insolvency events of default:

- A Swiss obligor or other relevant group entity is over-indebted (*überschuldet*) within the meaning of the Swiss Code of Obligations and its board of directors becomes obliged to notify the competent bankruptcy court.
- Commencement of bankruptcy proceedings (*Konkursverfahren*) which typically lead to the insolvent liquidation of an entity.

- Commencement of composition proceedings (*Nachlassverfahren*) which lead to either the corporate rehabilitation or (more often than not) the insolvent liquidation of the relevant entity with a higher recovery rate compared to that obtainable in bankruptcy proceedings.

Loan Transfers

If a loan agreement is governed by English law or US State law and based on the LMA or LSTA form of loan financing documentation, then a lender can rely on the typical LMA loan transfer provisions.

As far as Swiss law governed accessory security interests are concerned (for example, pledges), the rights and claims of the secured parties that are secured by the accessory security interest should be transferred on a continuing basis. Due to the accessory nature of the Swiss security interest, the security interest will automatically terminate if the secured rights and claims are cancelled or extinguished and re-established by way of new contractual arrangements between different parties. In this scenario, the Swiss law security interest would have to be put in place again which results in the time periods for avoidance actions starting to run again.

Under Swiss law, a security interest may become subject to so-called avoidance actions (*actio pauliana*) if during a certain period prior to the commencement of the security provider's bankruptcy (the so-called look-back period) certain actions were taken to the disadvantage of the security provider's other creditors and such actions fulfil the requirements pursuant to one of the avoidance provisions set out in Article 286 to 288 of the SDEBA as follows:

- **Article 286 of the SDEBA**. Avoidance of gifts and other gratuitous transactions if not less than one year prior to the opening of a bankruptcy proceeding against the security provider a security interest was granted without arm's lengths consideration.
- **Article 287 of the SDEBA.** Avoidance due to over-indebtedness if during the look-back period of one year while being over-indebted the security provider has, for example, provided a security interest for existing obligations which the security provider was subsequently not obliged to secure.
- **Article 288 of the SDEBA**. Avoidance for intent if specific action by the security provider was intended by it to lead to a creditor preference. No strict intent is required though. It is sufficient that creditor preference was foreseen by the security provider as a consequence of a certain action and that such creditor preference was accepted. In addition, it is required that the counterparty was aware or should have been aware of the intention to prefer creditors. The look-back period for avoidance for intent is five years from the commencement of bankruptcy proceedings.

To avoid the risk of rights and claims becoming unsecured, it is paramount from a Swiss law perspective that the underlying English or US State law governed rights and claims of the secured parties under a loan agreement are transferred on a continuing basis without extinguishing and re-establishing an agreement.

Jurisdiction Clause

A party needs to establish whether the Lugano Convention or the PILA is applicable for the recognition and enforcement procedure in Switzerland.

Lugano Convention

Asymmetric jurisdiction clauses are, from a Swiss law perspective, enforceable in a context where a court of a signatory state of the Lugano Convention has rendered the relevant decision.

However, while there are no precedents in this regard in Switzerland, it should be noted that the French court de cassation has held asymmetric jurisdiction clauses invalid (Court of Cassation, Civil, Civil Chamber 1, 26 September 2012, 11-26.022; Court of Cassation, Civil, Civil Chamber 1, 25 March 2015, 13-27.264). The French court decisions have been criticised though and the former Lugano Convention of 1988 expressly provided for asymmetric jurisdiction clauses.

PILA

Swiss scholarly writing generally affirms the validity of asymmetric jurisdiction clauses if an obligor expressly consents to such a jurisdiction clause in favour of a lender.

Accordingly, court decisions rendered under an asymmetric jurisdiction clause by a non-signatory state of the Lugano Convention are generally enforceable from a Swiss law perspective.

Arbitration

Switzerland is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and arbitration clauses are, in general and subject to certain requirements pursuant to the New York Convention and the SDEBA, enforceable against Swiss obligors. The enforceability of a foreign arbitral award in Switzerland is subject to, among other matters, the following requirements:

- The award is based on a valid arbitration agreement applicable to the respective arbitration proceeding.
- The party against which the award is addressed has been given notice and was able to present its case before the arbitral tribunal.
- The award is final and binding and was not set aside under the laws of the jurisdiction it was made.
- The award is not contrary to Swiss public policy and is capable of settlement by way of arbitration.
- The arbitral proceedings resulting in the award adhered to the principles of due process of law.

Execution Formalities

Form

Certain legal acts and agreements (for example, assignments of monetary claims or rights, pledges of uncertified shares or quotas or of other claims for which no deed or only debt certificates (*Schuldscheine*) exist or sureties (*Bürgschaften*)) need to be made in writing and signed by the relevant parties. In loan finance transactions all agreements are typically made in writing even if not required by law. Swiss scholarly writing disputes whether an exchange of PDF copies of signed signature pages by email is sufficient to meet the formal requirement that a document is in writing. Therefore, it is recommended that original signature pages be exchanged as far as Swiss law governed documents are concerned. The same applies for agreements where parties have agreed to document an agreement in writing. If the requirements for the written form are not met, then an agreement could be held to be null and void.

Signatures

Lenders in the Swiss market typically require any Swiss law governed documents, resolutions, and directors' certificates of Swiss entities to be signed with wet-ink signatures. The use of electronic signature tools, for example DocuSign, is typically not accepted. The same applies for Swiss parties signing non-Swiss law governed documents, particularly if Swiss lawyers are required to provide an opinion on the capacity of a Swiss obligor to enter into a document. Although Swiss law provides for certification services for electronic signatures and applications of digital certificates, electronic signature tools are not common in Switzerland in loan financing transactions.

Counterparts

Signatures to Swiss law governed documents, resolutions, and directors' certificates of Swiss entities can be on counterparts. Signing in counterparts is also allowed where a Swiss obligor requires two authorised signatories.

Stamp Duties, Taxes, and Notarial Requirements

Generally, there are no such requirements, except for certain cantonal stamp duties (for example, in the cantons of Ticino, Vaud, Geneva or Valais) and taxes and charges for notarial services in connection with the creation and registration of a mortgage certificate (*Schuldbrief*).

For a discussion on the key signing and closing considerations of a loan financing where an obligor is incorporated in Switzerland, see *Practice Note, Lending to a Company Incorporated in Switzerland: Signing and Closing a Corporate Loan Transaction*.

END OF DOCUMENT

Related Content

Practice notes

Lending to a Company in Switzerland: Regulatory Issues • Law stated as of 01-Jan-2023

Lending to a Company Incorporated in Switzerland: Signing and Closing a Corporate Loan Transaction • Law stated as at 01-Feb-2023

Lending to a Company in Switzerland: Structuring the Transaction • Law stated as of 01-Feb-2023

