

Practice notes

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

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Abstract:

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 Ireland.

Body:

This Note is intended to be used to facilitate the signing and closing of a loan financing where a borrower, guarantor, or security provider (each, an obligor) is incorporated in Ireland. 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 that 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 Ireland. It covers the following:

- Signing practicalities.
- Signing formalities.
- Conditions precedent.
- Searches at public registries.
- Fees.
- Filing and registration requirements.

This Note assumes the following:

- The obligor is a company incorporated in Ireland.
- The loan agreement is subject to English law or the law of a US state.

Signing Practicalities

In-Person Signings

It is not necessary to have a physical signing meeting in Ireland. The usual practice is for the loan agreement, guarantee, or security document to provide that it can be executed in

counterparts. Lawyers for the respective parties then co-ordinate execution by their clients. PDFs of signed documents are then circulated in advance of closing.

Where original documents have been signed in "wet ink," these are not typically required to be held by lender's counsel pre-closing, and will often follow post-closing. One exception is where security over shares is to be granted. Here, some lenders will require the original share certificate(s) and other share deliverables to be held by them at or prior to closing, though this is negotiated on a case-by-case basis.

Documents can be signed in advance of a closing meeting. In such cases, it is usual for the signatory to give an agent (such as a solicitor) authority to date the document and deliver it to the other party. Depending on the scale of a transaction, parties may elect to have a physical closing meeting if there are deeds to be executed by an Irish company.

Virtual Signings

The decision of the courts in England and Wales on virtual signings known as the Mercury decision (*R. on the Application of Mercury Tax Group Limited and Masters v HM Commissioners of Revenue and Customs [2008] EWHC 2721 (Admin)*) has been discussed in Irish case law, and the Law Society of Ireland has issued guidelines for virtual closings. The Law Society of Ireland recommends three options for virtual signings, as follow:

- A PDF copy of the execution version of the agreement is sent to a signatory's solicitors for signature. For convenience, a separate signature page of the agreement may also be included, but this is not necessary. This option must be followed where the document is a deed, and either:
 - the document in full must be signed and returned; or
 - the document in full must be returned with a PDF of the signed signature page.
- A PDF of the signed signature page is exchanged with authority to append it to a final agreed version of the agreement.
- A signature page of the final agreed version of the document is obtained, in advance, with authority to append it to the agreement at closing.

The first option above is only available once both:

- The document is in final agreed form between the parties.
- All parties, or their solicitors, have confirmed to the other parties that they have no further comments on a document, and it can be considered as agreed form.

This is typically evidenced by circulation of the execution version of a document in an email to all parties containing details of the signing process. The second and third options are only available where the document is not required to be executed as a deed.

Counterparts

An Irish obligor can sign a loan agreement, guarantee, or security document in counterpart, provided that a document is neither:

- Expressed to be a deed.
- Prohibited by the applicable governing law or as set out in a document itself.

Typically, documents governed by Irish law will include a boilerplate clause which permits signing in counterpart.

Practical Arrangements for the Delivery of the Finance Documentation

An Irish obligor's solicitor will usually be in possession of the originals of the signed transaction documents on or prior to closing. Typically, parties to a corporate loan financing are happy to close transactions based on receipt of PDFs of the signed transaction documents, with an undertaking or confirmation by an obligor's solicitor to send the original signed documents to the lender's solicitors after closing. These will be delivered to a lender's Irish solicitor for onward transmission to lead counsel in another jurisdiction, though in some instances they may be sent directly to the lead counsel.

Where security over shares is being taken, the lender's solicitors may want to take delivery of certain original documents prior to closing, for example:

- Share certificates.
- Stock transfer forms.
- Dividend mandates.
- Proxies.
- Resignation and authority letters from the directors and company secretary.

This is subject to commercial negotiation. Often, delivery will follow on the day of closing or soon thereafter. The same process applies to notices, required under security documents, which need to be served on third parties to perfect a security interest. The lender's solicitors will often require originals of those notices at closing, to ensure a notice is served promptly after closing.

Searches at Public Registries

In the context of a secured corporate loan financing, a lender's solicitor will carry out the following checks:

- A search at the Irish Companies Registration Office (CRO) to ensure:
 - the obligor has not been struck off;
 - the obligor is not subject to a winding up order or examinership (court-supervised restructuring) order;
 - no receiver has been appointed to some or all of the obligor's assets; and
 - no prior charges have been registered and not discharged.
- A search in the High Court to check for any unsatisfied judgments or winding-up or insolvency petitions of an Irish obligor.

The time needed to procure the above search results can vary depending on the law search company involved and may take longer at peak times. Best practice is to order the searches the day before they will be required, and refresh them on the closing date.

In the case of real estate financing transactions, the following additional searches should be requested:

- A search at the Sheriff's office (to include a Receiver of Fines search) against the relevant property and any obligors.
- A search in the Land Registry for registered property or the Registry of Deeds for unregistered property.

Planning searches against the property at the relevant local authority, CRO searches, and some property and High Court searches, can be carried out online. However, some searches require physical attendance at the relevant registry office, such as planning searches in certain areas.

For liability reasons, it is market practice to outsource these searches to professional search companies who charge a fee for this service. The cost of engaging a professional searcher varies depending on the number of companies and the registers to be searched against.

There is no system in Ireland for preserving priority of a security interest merely by checking a register.

It is possible for a mortgagee to register a priority entry in the Land Registry in relation to a registered property over which security will be taken. If the priority entry is successfully registered, a mortgagee will have a period of 44 days (after the registration date of the priority entry) to apply to register the instrument of charge in question. Any application for registration made by a third party after the registration date of the priority entry, and before the mortgagee applies to register the instrument, will therefore rank after the mortgagee's application.

Although it is possible for a company to register a person who has standing authority to bind it with the Companies Registration Office, this is seldom done. Instead, it is assumed that a director has ostensible authority to bind a company, and a CRO search should indicate an obligor's current directors (although the register may not be up to date).

Signing Formalities

Deeds

In Ireland, Section 64(2) of the Land and Conveyancing Law Reform Act 2009 governs the execution of deeds. Irish companies must execute deeds under their common seal in accordance with its constitutional documents or the Companies Act 2014 (the Companies Act). Unless the constitutional documents provide otherwise, any two directors (or one director and the secretary of the company) must countersign the affixing of the seal, on the same page where the seal is affixed. The deed can be signed in counterpart by the other parties.

A company can circumvent the need to execute a deed under its common seal by appointing an attorney to act on its behalf, provided that the attorney executes a deed in the presence of a witness.

An individual that is a party to a deed must execute a deed in the presence of a witness.

Signing under Hand

Loan agreements and guarantees with an Irish obligor as a party are usually signed under hand, that is, without the need to affix the company seal rather than as a deed.

Electronic Signature

Electronic execution of documents is governed by the E-Commerce Act 2000 (the E-Commerce Act) and EU Regulation (EU) No 910/2014 (eIDAS Regulation). Under the E-Commerce Act, all parties to a document must consent to the use of electronic signatures. Consent can be implied, but it is best practice to explicitly provide for the use of electronic signatures in the loan financing transaction documents or obligor board approvals.

A deed cannot be executed by a company using electronic signatures. This is because it is not possible to affix a seal to a document electronically. Where both an individual and a witness are executing a deed electronically, they must do so in each other's physical presence.

Section 10 of the E-Commerce Act lists the documents which cannot be signed electronically, including documents transferring interests in real property, trusts, and sworn declarations.

Company Seals

A company seal is an embossed image, with the company's name on it, produced by a mechanical device. It is best practice for the seal to be applied to a coloured disc, affixed to the execution section of a document that requires it, so that it is immediately visible. Though the E-Commerce Act and the eIDAS Regulation provide for electronic seals, it is currently technically impossible to apply an electronic seal to a document.

An Irish collective asset-management vehicle, a corporate entity formed pursuant to the Irish Collective Asset-Management Vehicles Act 2015, is not required to have a seal. It therefore can create security interests by signing an agreement by hand.

Notarisation

Under Irish law, a notary is not required for an Irish obligor to execute a loan agreement, guarantee, or security document that is governed by English law or US State law.

Apostille

An apostille is not required in most loan financing transactions. It is most often seen where there is a need to verify the authenticity of the signature or seal of a public officer, such as a notary public. This itself is usually required by particular non-Irish local law requirements.

The Irish Department of Foreign Affairs applies an apostille to documents at a cost of EUR40 per apostille stamp.

Translations

Legal documents for Irish obligors are nearly always drafted in English rather than Irish, which is the other officially recognised language in this jurisdiction. Translations therefore do not usually form part of loan financing transactions, unless specifically requested or agreed commercially. If a loan agreement, guarantee, or security document with an Irish obligor is not executed in either English or Irish then a certified translation into either of these languages will be required for a document to be used in court proceedings in Ireland.

Conditions Precedent

A loan agreement typically contains conditions precedent. These are normally set out in a separate clause or schedule of the agreement and typically include, in respect of an Irish obligor, the following:

- A copy of the constitutional documents of each Irish obligor.
- A copy of a resolution of the board of directors of each Irish obligor approving the Irish obligor's entry into the transaction and the loan financing documents.
- A certificate of each Irish obligor:
 - confirming that borrowing or guaranteeing or securing, as appropriate, the loan would not cause any borrowing, guarantee, security or similar limit binding on it to be exceeded;
 - certifying that each copy of a document is correct, complete and in full force and effect as at a date thereof; and

- confirming that each Irish obligor has complied with sections 82 and 239 of the Companies Act 2014.
- Security and other loan finance documents.
- Legal opinions in respect of the capacity of an Irish obligor and validity and enforceability of any Irish law governed documents.
- Financial information, for example, a pro forma balance sheet, copies of bank mandates and a funds flow statement.
- Group structure chart.
- Register of members.
- Know-your-customer documentation and information required by a lender.
- Utilisation request or drawdown notice.
- Winding up and insolvency searches.

Filing and Registration Requirements

There are no filing requirements for a loan agreement or guarantee.

Where an Irish company creates security over any of its assets (except for certain financial assets including cash, money credited to a bank account and shares, bonds, and debt instruments securities), particulars must be filed with the Companies Registration Office within 21 days of the date of creation of the charge. The fee for this filing is currently EUR40. The same requirement applies to a company incorporated outside Ireland that establishes a branch in Ireland.

Where a fixed charge is created over the book debts of a company, a notification to the Irish Revenue Commissioners (the Irish tax authority) must be made within 21 days to preserve priority of the security over potential claims by the Irish Revenue Commissioners against the chargor for unpaid value added tax and employee taxes. There is no charge for this filing.

Charges over other types of asset require additional registration, as follows:

- Land.
- Aircraft.
- Ships.
- Certain types of intellectual property (patents, trademarks and designs).
- Agricultural produce or stock.