

Loan signing and drawdown (CP) Q&A: Ireland

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This Q&A provides country-specific commentary on *Practice note, Loan signing and drawdown (CP) checklist: Cross-border* and forms part of *Cross-border loan financing*.

Checklist, Loan facility agreement signing: Cross-border

1. Is it necessary or customary for the parties (or their lawyers) in your jurisdiction to attend a meeting at which the facility agreement and other documents are signed and exchanged between the parties?

This practice is not necessary in Ireland. The usual practice is for the facility agreement to provide that it can be executed in counterparts. Lawyers for the respective parties then co-ordinate signature by their clients. In theory, the governing law might affect the matter of counterparts, but a choice of jurisdiction is unlikely to. Documents can be signed in advance of a closing meeting, in which case 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 closing meeting if dictated by the logistics as to the execution of deeds by an Irish company.

2. If a meeting is not required, how are facility agreements and other documents signed and brought into effect? In particular, is there any requirement for one and the same document to be signed by all the parties, and can signed "signature pages" be added to the rest of an agreement to form a signed agreement?

A facility agreement is usually signed under hand, rather than as a deed. A contract becomes binding at the point when the parties expressly or impliedly agree to become bound by it. A deed becomes effective in accordance with its terms when it is delivered to each contracting party. "Delivery" for this purpose means the parties confirming an intention to be bound by the deed. The *Mercury* decision of the courts in England and Wales has been discussed

in Irish case law and the Law Society of Ireland (the solicitors' regulatory body) has issued guidelines for virtual closings. The Law Society of Ireland recommends three options:

- A pdf version of the entire signed agreement is sent to the counterparty's solicitors for signature by the counterparty. (This option must be followed where the document is a deed.)
- A pdf of the signed signature page is exchanged with authority to append it to a final agreed version of the agreement.
- Obtain a signature page, in advance, of the final agreed version of the document with authority to append it to the agreement.

(Options two and three are only available where the document is not a deed.)

3. What is the date on which an agreement comes into effect under the laws of your jurisdiction?

An agreement usually comes into effect no earlier than the date of signature. The backdating of an agreement is never appropriate and can amount to fraud (*Law Society of Ireland v Herlihy* [2017] IEHC 122; Part 4, *Criminal Justice (Theft and Fraud Offences) Act 2001*). It is possible, however, for parties to enter into an agreement that provides for certain obligations to be effective from a date in the past. Therefore, a lender and borrower could, for example, sign an agreement today providing for interest to be paid by reference to a date in the past.

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No partnership or agency

4. If a facility agreement is subject to the law of your jurisdiction, would the agreement typically contain a set of conditions which need to be satisfied before drawdown of a loan under it. Would any such set of conditions typically be set out in a list attached to (or forming part of) the agreement?

Yes, a facility agreement would typically contain these conditions, referred to as "conditions precedent". These would typically be set out in a separate clause or schedule of the agreement.

5. Might a company seal, or a notary, be needed in the context of a secured financing transaction involving the law of your jurisdiction or a party incorporated in your jurisdiction?

Security must be created by an Irish company (as defined under the Irish Companies Act 2014) under seal except where the document is executed under a power of attorney. The seal, produced by a mechanical device, is an embossed image with the company's name on it and it is best practice for the seal to be applied to a coloured disk stuck on to the execution block so that it is immediately visible. 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 and, therefore, can create security under hand. A notary is not required under Irish law for the execution of loan or security documents.

6. Are there any specific requirements as to the form in which a facility agreement or security document is prepared for signature?

There are no specific requirements for the form of a contract under Irish law.

7. What public registers normally need to be checked by a lender in the context of a secured financing, and are any fees payable? Are there any arrangements for protecting a lender who has checked a register prior to entering into a facility agreement, so that the lender is not affected by a subsequent registration?

In the context of secured financing, a lender's solicitor will check the following registers:

- Companies Registration Office to ensure that, where the borrower is a company:
 - it has not been struck off;
 - it is not subject to a winding up or examinership order;

- no receiver has been appointed to some or all of its assets; and
- no prior charges have been registered and not discharged.

- A bankruptcy search at the High Court Central Office for individuals.
- A search in the High Court to check for any unsatisfied judgments, winding up or bankruptcy petitions of the borrower.

It is market practice for liability reasons to outsource these searches to professional searchers, who will charge a fee.

There is no system in Ireland for preserving priority merely by checking a register. However, it is possible to submit a form to the Irish Property Registration Authority to apply for a "Priority Entry" to prevent intervening registrations for a period of 44 days in respect of registered land.

8. What checks does a lender need to make in relation to the corporate status and powers of a borrower, guarantor or security provider incorporated in your jurisdiction, and in relation to the authority of the signatory signing on behalf of such a borrower, guarantor or security provider?

A Companies Registration Office (CRO) search shows whether or not a company:

- Has been struck off the register of companies.
- Has had a liquidator or examiner appointed to it, or if a receiver has been appointed in respect of some or all of its assets.

Although the Companies Act 2014 has effectively abolished the doctrine of ultra vires, it is customary to check a company's constitution to ensure it has power to enter into the transaction. A lender is not affected, however, if the borrower does not have the appropriate power.

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

9. What filing or registration requirements apply to security given by a borrower, guarantor or security provider incorporated in your jurisdiction, and to security created over real property or other assets located in your jurisdiction?

No filing requirements are required for a guarantee. Where a company creates security over its assets (with the exception of certain financial assets such as cash, a bank account or securities) particulars must

be registered with the Companies Registration Office. 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 to preserve its priority over potential claims by the Irish Revenue Commissioners against the chargor for unpaid value added tax and employee taxes. Charges over other types of asset require additional asset-specific registration, such as:

- Land.
- Aircraft.
- Ships.
- Certain types of intellectual property.
- Agricultural produce or stock.

A non-possessory security created by an individual or partnership over moveable chattels must be registered with the High Court as a bill of sale. Bills of sale are seldom, if ever, seen in practice.

10. Are there any matters which would normally form part of the practicalities of signing and drawdown and which are specific to your jurisdiction?

No particular matters arise in this regard under Irish law.

Checklist, Drawdown condition (CP): Cross-border

11. Are CP checklists utilised in your jurisdiction? If so, what would a typical CP checklist look like and, in relation to a borrower (or guarantor) incorporated in your jurisdiction, what items would normally be included?

CP checklists are used in Ireland. *Checklist, Drawdown condition (CP) checklist: Cross-border* contains most of the typical items. Other bespoke conditions precedent may be included to cater for particular features of the transaction or of the parties.

12. Are there any items which are typically included in a CP checklist in your jurisdiction but which would not normally be listed within a facility agreement, and if so what are they?

A CP checklist is usually more detailed than the conditions precedent listed in the facility agreement. For instance, a CP checklist may address issues such as:

- Obtaining signatures.
- Holding meetings.
- Preparation of board minutes and corporate certificates.

It would be unlikely for these to be specifically itemised to the same level of detail in the facility agreement.

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