



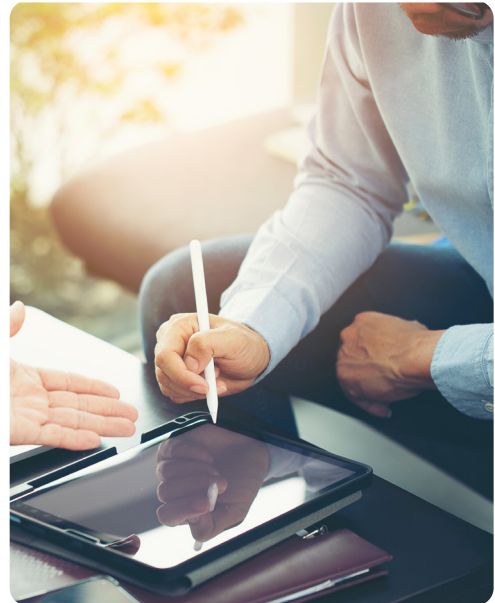
ELECTRONIC SIGNATURES

A Quick Guideline on the Use and Validity of
Electronic Signatures under Swiss Law

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Electronic signatures simplify the process of collecting signatures significantly. However, one has to be careful when using electronic signatures. Mistakes can happen quickly and remain unnoticed, which in the worst case can hinder a contract from being validly concluded. Errors in the use of electronic signatures can easily be avoided by following the instructions provided herein. The purpose of this guideline is to outline the possibilities of signing documents electronically under Swiss law, and in particular when and how to use qualified and non-qualified electronic signatures.



1. Different Form Requirements under Swiss law

Swiss law provides for three different types of form requirements regarding the execution of contracts. These types of formal requirements are (i) the requirement of drawing up a contract in the form of a public deed, (ii) the requirement of concluding a contract in written form and (iii) the complete absence of any form requirements (meaning, for example, that verbally concluded agreements are permitted). As electronic signatures are used in cases of the last two categories, only these two will be discussed in this guideline.

2. Written Form and Qualified Electronic Signature

According to statutory Swiss law, certain contracts have to be executed in writing and with signatures of all contractual parties in order for such contracts to be valid. Contracts which require written form under Swiss law must be signed either (i) by handwritten signature (i.e. wet-ink signature) or (ii) by so-called "qualified electronic signature".

Handwritten Signature

As a rule, Swiss law requires that signatures must be handwritten (i.e. wet-ink signatures) by the parties to the contract in case written form is prescribed by law. Few exemptions are possible for people with physical impairment such as blindness or physical inability to sign documents by hand. Documents that must be signed by hand in order to be valid are, for example (this is not an exhaustive list):

- Application form to the commercial register
- Assignment of rights (e.g. especially the assignment of registered shares)
- Subscription forms regarding the subscription of newly issued shares
- Pledge of claims
- Contracts in which the parties have agreed to "written form" without the parties further specifying such written form requirement
- The promise of a gift
- Incorporation of an association
- Waiving of the prescription defence
- Contract of surety (only if the surety is not a natural person or the sum of the liability does not exceed CHF 2'000.00)
- Agreements on contribution in kind
- Transfer declaration of registered securities
- Transfer declaration of uncertified securities

Qualified Electronic Signature

As an alternative to the handwritten (wet-ink) signature, Swiss law provides for a special qualified electronic signature combined with an authenticated time stamp which is deemed equivalent to a handwritten signature. The qualified electronic signature needs to be distinguished from the simple electronic signature and the advanced electronic signature which are offered additionally by some providers. Nonetheless, only the qualified electronic signature is considered equivalent to the handwritten signature according to the Swiss Code of Obligations. This means that all of the abovementioned examples of contracts and documents can validly be executed by using the qualified electronic signature. A non-qualified electronic signature on the other hand would not be sufficient for the valid execution of said documents.

In case of a statutory or contractual written form requirement, it is possible to sign a power of attorney to authorize a proxy to sign a document that is subject to a form requirement. For example: The subscription form to subscribe for new shares requires handwritten signature or qualified electronic signature. In practice we often see that the original subscription form might not be delivered in time. Therefore, we recommend adding a power of attorney to the subscription form in order to authorize a proxy to sign the subscription form in his/her/its name if the subscription form is not available in the original, but signed as a PDF file, on the day of the capital increase.

«ONLY CERTIFICATES FROM PROVIDERS ACCREDITED IN SWITZERLAND FOR QUALIFIED ELECTRONIC SIGNATURES ARE PERMITTED.»

Only certificates from providers accredited in Switzerland for qualified electronic signatures are permitted. At present, only the following four services are listed: Swisscom (Schweiz) AG, QuoVadis Trustlink Schweiz AG, SwissSign AG and the Federal Authority for Information and Communications Technology (BIT). However, the application provided by BIT is only available for the state administration.

Swisscom (Schweiz) AG as well as QuoVadis Trustlink Schweiz AG set up a local signing hub for the customer, on which the documents to be signed are then uploaded and signed. On the other hand, Swisscom (Schweiz) AG does also work with partners regarding signature application services, such as Skribble AG for example, which do not offer a local signing hub for the customers. Rather, the contract is uploaded directly to the platform offered by Skribble AG. All providers of qualified electronic signatures have in common that the identification requirements are high and, therefore, the provider has to identify each signatory once face to face or online via video conference. Thereafter, documents may be signed anytime by the signatory by using a TAN number or something similar. Due to the costs and the high identification requirements, the qualified electronic signature has not yet become commonly established in practice amongst private persons. In contrast, non-qualified electronic signatures are currently more common. The identification requirements for non-qualified electronic signatures are much lower and in general, only an e-mail address and/or a phone number is required for identification.

3. Alternatives to the Qualified Electronic Signature

As an alternative to the procedures mentioned in section 2 above, it is possible that each party prints out the signature page individually, signs it by hand and sends it back by scan. This procedure is possible if Swiss law does not require the document to be signed by hand or with a qualified electronic signature and if all parties agree to this procedure. In cases which require many parties to sign the document, this procedure might actually be quicker for the execution of the document to be concluded than the signing with a qualified electronic signature.

Another possibility arises in particular if documents have to be submitted to authorities, such as the commercial register. Many of the major auditors deliver their audit reports electronically and with a qualified electronic signature. This means that the document only has the increased credibility due to the qualified electronic signature if it is available electronically. If the document is printed out and brought, for

example, to a notarisation process for a capital increase, the requirement for qualified (electronic) written form is no longer fulfilled. In such case, however, the notary can certify a printout of the document to ensure that the content of the printout is identical to the electronic document. In this case, the credibility is again enhanced and the formal requirements are met. However, this procedure is only possible if the notary is in possession of the document electronically. It is therefore recommended that the notary accompanying such a transaction is not only provided with all documents printed out but also delivered in electronic form. This procedure is generally accepted by the commercial register authorities in Switzerland. Finally, it is still possible to submit the document signed with a qualified electronic signature directly to the commercial register electronically.

4. No Form Requirements and Non-Qualified Electronic Signature

Unless the law requires a particular form to be complied with by the parties for the signature of a contract, the parties may choose any form they wish. They can also agree on a form which is not laid down by law or they can combine various forms provided for by law. As a consequence, parties to a contract which is not subject to statutory form requirements may also define the requirements of a non-qualified electronic signature. However, this procedure is only permissible where the law does not require a stricter form to be complied with for the execution of the contract (see section 2 above). Agreement on form requirements may also be reached implicitly: The exchange of signature pages without any further agreements on form requirements of the specific contract can be understood as an agreement on form in writing. As laid out above, only qualified electronic signatures meet the requirements for the written form. The possibility of the contractual form requirement (be it explicit or implied) that a document needs to be signed in writing is therefore an important issue in the context of electronic signatures: If the parties agree to conclude a contract in written form and the contract is subject to Swiss law, a simple electronic signature would not satisfy this form requirement.

In particular, documents such as the Investment Agreement, Shareholders' Agreement and resolutions of the board of directors or shareholders' meeting (depending on the agenda) or other corporate documents can be signed by a non-qualified electronic signature which must be distinguished from qualified electronic signature (see section 2 above).

When using a non-qualified electronic signature, we highly recommend due to the issues described above adding a separate clause regarding the use of non-qualified electronic signatures in the agreement, e.g.: *"The parties acknowledge and agree to be legally bound to this agreement in case a party signs it electronically with a non-qualified electronic signature."*

5. Applicability of Qualified Electronic Signatures in Foreign Jurisdictions

The qualified electronic signature has the potential to simplify the signing of documents enormously. This meets a growing need of clients, as shown in this Guideline, especially as soon as a cross-border matter is involved. This Guideline, however, deals exclusively with the validity of (qualified and non-qualified) electronic signatures under Swiss law and the assessment by Swiss courts. Depending on the design of the contract, in particular in the absence of a jurisdiction clause, it is possible that other, non-Swiss courts may assess the admissibility of the electronic signature under their domestic law, in which case the electronic signature under Swiss law may not be sufficient. A recent case, for example, showed that the train manufacturer Stadler Rail initially lost a public tender contract worth several billion Euros with the Austrian Federal Railways because the contracts were signed with a qualified electronic signature under Swiss law, which may not meet the requirements of Austrian law.



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