

Unsigned contracts: can they be binding under Swiss law?

By Thomas Widmer and Simon P. Quedens

Under Swiss law, contracts do not always need to be signed to be considered legally binding. Parties negotiating agreements should therefore take measures to ensure their intentions are clear to avoid potential disputes.

Under Swiss contract law, as in many other legal systems, only specific contracts must be signed to be valid, be it in the form of a private deed (simple written form), using an official form (qualified written form) or before a public notary. Common examples include: (i) real estate transfers; (ii) deed of assignment of claims; (iii) the promise of a gift; (iv) surety contracts; and (v) the assignment of certain intellectual property rights (trademarks, patent and designs – but not copyright).

Almost all other contracts, including sales contracts of movable assets, employment contracts, agency contracts, licences, share purchase agreements, shareholders' agreements, NDAs, etc., are not subject to a particular form and do not need to be signed to be legally binding. These contracts can be validly entered into orally, by email or through conclusive acts.

In practice, parties will often want to have their agreements set out in writing and signed, even if they do not have to. This may result in the parties exchanging written draft contracts which eventually remain unsigned, thus potentially causing disputes over whether these unsigned drafts are nonetheless legally binding and enforceable.

The starting point for resolving the issue of whether an unsigned contract is legally binding and enforceable contract exists relates to the **parties' intention**: that is, did the parties intend to be bound by a signed agreement only?

- Such an intention may be explicit, e.g., when the draft versions exchanged by the parties during negotiations include the wording “*not binding unless signed*”.

- It may also implicitly derive from the actions or conduct of either party, e.g., if one of the parties provides the other with copies of a written contract asking for signature.
- Also, where the parties negotiate the conclusion of a complex agreement, involving significant undertakings by both parties (such as the acquisition of a medical office), this may signal the parties' intent to have a signed agreement in place.

If the parties' intention to be bound by a signed agreement can be established, the follow-on question is: **why** did the parties wish to have a signed agreement? Was it a condition of the agreement's validity or was it for mere evidentiary purposes? In other words, did the agreement have to be signed to be valid or would it have merely been "nice to have" the parties' signatures to prove that an agreement was reached?

Swiss contract law presumes that when the parties wish to be bound by a signed agreement, they only intend to be legally bound when the agreement is actually signed. However, this presumption may be reversed, for instance, where the parties act as if they feel legally bound even though they have not signed the agreement. In other words, parties may render an unsigned contract binding through their conduct *despite* their initial intention to be bound only by a signed contract.

The most common example of this is where the parties perform the undertakings contained in an unsigned contract. This is because, where a transaction is performed on both sides, one can usually conclude that the parties intended to enter into legal relations regardless of the existence of a signed contract. A similar conclusion may be drawn if either party has confirmed the existence of an agreement, be it to the counterparty or to a third party, or if a party declares the "termination" of an unsigned contract. Logically indeed, only an existing contract can be terminated!

Takeaways and practical recommendations:

Parties negotiating a written contract should:

- when sending or receiving draft contracts, consider expressly declaring their intention not to be bound until the contract is actually signed, e.g., by inserting specific wording such as "*not binding unless signed*" at the top of their drafts;

- avoid acting in accordance with an unsigned contract if they take the view that no agreement has been reached yet.

For further questions or comments about this topic, please contact the authors:



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