



The Wondering Boy No. 2 by Du Feichen

THE GERMAN SCHULDSCHEIN

Neither fish nor fowl, or the best of two worlds?

KING & WOOD
MALLESONS
金杜律师事务所

The German Schuldscheindarlehen (SSD) is essentially an assignable loan placed with professional investors. It offers borrowers a financing option that combines elements of syndicated loans with improved transferability. SSD are a well-established financing tool that allows borrowers to tailor the terms and conditions of the loan to the specific situation. Typically, one lender is acting as arranger, and transfers portions of the loan to other lenders post-closing.

OVERVIEW – TYPICAL FEATURES

Below we have highlighted features typically seen in SSD. Depending on the financing needs of the borrower and the targeted investor pool, the flexibility of SSD provides borrowers with the opportunity to negotiate individual terms for the SSD Loan Agreement.

Medium to Long Term Loan, with a Volume of 5m to 1bn, Floating or Fixed Rate

SSD are typically denominated in Euros but other currencies are possible and USD, GBP, and Swiss franc SSD have been issued.

“Covenant Light”

Covenants are technically possible, but the instrument is ultimately not designed for extensive covenants, i.e. “covenant light” (pari passu, negative pledge, limited reporting) rather than a full high-yield package. Typically, we see incurrence covenants rather than maintenance covenants.

Can be issued in ESG Form

SSD can be (and have been) issued as “green” or “social” instruments. In 2021 a number of German market participants have developed a new label “Green Schuldscheindarlehen” to certify a green quality standard for SSD, based on the EU taxonomy. Other ESG certifications and ratings are equally available.

Lean Documentation

The documentation is fairly standardized, consisting of a SSD Loan Agreement (typically agreed with one institution acting as arranger) and a Form of Transfer Certificate (for transferring portions of the loan to the lenders). Though the documentation is relatively slim, it is underpinned by German civil law provisions including the German Civil Code (BGB) and such provisions as termination rights. No prospectus or offering circular are required*.

Can be issued in ESG Form

SSD can be (and have been) issued as “green” or “social” instruments. In 2021 a number of German market participants have developed a new label “Green Schuldscheindarlehen” to certify a green quality standard for SSD, based on the EU taxonomy. Other ESG certifications and ratings are equally available.

No Public Offer, no Listing

No prospectus or listing documentation is required*, there are no inherent public disclosure requirements. The arranger will initially offer the SSD in a private placement to potential lenders based on the terms agreed between arranger and borrower. Thereafter SSD are tradeable intra-bank over-the-counter. SSD do not necessarily have a rating, but the instrument (and the borrower) is usually expected to be investment grade.

Limited Reporting Obligations

No listing rules apply, so reporting obligations are limited to the obligations vis-à-vis the lenders, mainly the provision of annual financial statements to the lenders; interim reports will be included mainly if they are prepared for other purposes already.

No Creditor Coordination – Restructuring is difficult

Once the placement of portions of the loan with the creditor/lender group is completed, there is no lead arranger or agent who acts on behalf of the creditor/lender group. There is no majority lender concept. In an event of default, each creditor decides for itself whether or not to terminate its portion of the loan, with the result that some creditors may terminate.

AUS Withholding Tax Exemption

SSD can be issued in a manner that takes advantage of an exemption from Australian interest withholding tax that is available under section 128F of the Income Tax Assessment Act 1936.

Foreign Debt Classification/Exchange Control

For Chinese borrowers, an SSD will be classified as foreign debt and the corresponding foreign exchange control rules will need to be complied with. Chinese borrowers have accessed the SSD market and there is clear precedent how to navigate the registration and filing process. Borrowers from other jurisdictions with foreign exchange control restrictions will need to confirm applicable regulatory requirements. While others do not; the same applies for waivers.

May be guaranteed but other Security unusual

While parent guarantees are fairly typical, asset security is highly unusual.

Investor Base: German Institutional

The typical investor base consists primarily of regulated entities: Banks, insurance companies, pension funds, and investment management vehicles.

German Law Governed, Jurisdiction of German Courts

This ensures greater legal certainty due to an established court practice.

WHOM THE SSD SHOE (BENE) FITS

SSD are usually raised for general corporate purposes or working capital purposes but may also serve to finance investments, acquisitions, real estate, projects or core current assets. For the borrower, they offer flexibility in a number of respects: in addition to adapting the size and duration of the loan to the individual financing needs, the way SSD are arranged (through usually one arranger who then places the loan through private placements) gives the borrower greater control over the investor pool and the relationships to the individual investors while at the same time providing the opportunity to tailor the terms of the SSD Loan Agreement to the borrower’s specific needs.

Borrowers are usually expected to be investment grade or high-quality non-rated entities (though the market may gradually be opening for higher-risk borrowers).

Thanks to the largely standardised and lean documentation, SSD transactions can be set up in a fairly speedy manner and at competitive transaction costs, especially compared to a syndicated loan or a bond issuance. SSD can also be used in conjunction with other types of financing options, representing one of the capital market components of the overall funding structure. However, it is difficult and therefore highly unusual to include SSD lenders in intercreditor arrangements, limiting the universe of potential borrowers.

IN BRIEF

SSD are a well-established and flexible instrument that enables borrowers to gain easy and inexpensive access to medium to long-term financing from capital markets investors (banks, insurers, pension funds, investment management companies) that cannot always be reached through bank financings.

WANT TO KNOW MORE? TALK TO US!

We, the Schuldschein Working Group at King & Wood Mallesons Frankfurt, are able to guide you through SSD, either as a standalone borrowing or as part of a more complex financing structure for international borrowers and investors who wish to gain access to this unique investment instrument.

*Please note: While not classed as securities under German law, it is possible that SSD may be classed as ‘Securities’ for the purposes of the US Securities Act 1933 and this assessment will need to be made on a case by case basis





CONTACTS



RUDOLF HAAS

PARTNER
FRANKFURT

TEL +49 69 505029 318
MOB +49 172 666 2884
EMAIL rudolf.haas@eu.kwm.com



MIRJAM GOSS-KUDO

COUNSEL
FRANKFURT

TEL +49 69 505029 338
EMAIL mirjam.goss-kudo@eu.kwm.com

ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 2000 lawyers in 30 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

With 30 offices across Asia, Europe, North America and the Middle East we are strategically positioned on the ground in the world's growth markets and financial centres.

We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

Asia Pacific | Europe | North America | Middle East

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See kwm.com for more information.

www.kwm.com

© 2022 King & Wood Mallesons

JOIN THE CONVERSATION



SUBSCRIBE TO OUR WECHAT COMMUNITY.
SEARCH: KWM_CHINA