

COVID-19: Closing Leveraged Finance Transactions During Social Isolation

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The ongoing global COVID-19 crisis has given rise to an unprecedented change in working habits, with offices closed across jurisdictions and many people working from home. However, transactions still need to be completed during this time, whether they are ongoing matters or rescue transactions, and this has put pressure on the usual closing process. This article focuses on how we can continue to close leveraged finance deals during the current climate, although many of the issues explored will be of relevance in any banking and finance transaction where there is a formal closing and completion process.

Electronically Signing and Executing Documents

With many businesses around the world having to close their offices as part of government-mandated lockdowns, logistical obstacles may arise around the execution of transaction documentation. Signatories are mostly working remotely from home offices, and may not have all the resources available to them that they would in the office in order to ensure a streamlined signing process, including printing and scanning facilities and personal assistants.

Broadly, there are two methods of electronic execution of documents which may be used in this scenario: email execution and electronic signatures. Each is discussed in turn below.

Email exchanges of signed documents

Execution of documents by email has become widely accepted in the London legal market. Email execution involves relevant individuals signing, scanning, and exchanging PDF copies of signature pages via email in order that documents be executed without the need to handle “wet ink” (i.e., paper and pen) signatures.

However, certain issues relating to email execution warrant practical consideration, including the following:

- individual signatories must have the resources to print, scan, and circulate documents from home – as an alternative to plug-in scanners, smartphone “pocket scanner” apps, which photograph, flatten, and convert documents into PDFs, are permissible, but do not avoid the need to print;

- some documents, such as English law deeds, require a signature to be witnessed. With movements restricted under lockdown, designated signatories of such documents should have an appropriate witness at home. Under English law, by way of example, witnesses must be over the age of 18 with full mental capacity to sign the attestation clauses. They must be physically present at the signing (e., in the same room), cannot be a party to the document and, best practice suggests, should be independent of the signatory;²¹
- even with facilities at home, printing out a batch of transaction documents can be unwieldy and time consuming – where several documents are in need of execution, counsel can compile sets of PDF signature packs to be printed and signed in one batch for convenience (although see below in relation to deeds);
- deemed location of the document at the time of signing may give rise to inadvertent tax or stamp duty consequences – where signatories are working remotely in a different jurisdiction to where the document may otherwise have been signed, appropriate consideration, with specialist legal and tax advice, should be provided in advance of execution; and
- deeds must be physically whole (e., the signed PDF signature page must be sent together with the whole document) which can include hundreds of pages – the added difficulties over what must be signed and exchanged may make email execution more difficult in the context of deeds.

Electronic signatures

Electronic signatures, or “e-signing”, covers a wide range of methods for electronically signing documents, including the signatory typing their name on email intended as a signature, pasting a digital image of a signature into the relevant execution field and using a web-based e-signing platform.

In the UK, the Law Commission concluded in an authoritative report published in September 2019,²² which was endorsed by the Lord Chancellor in March 2020,²³ that a combination of the EU eIDAS Regulation,²⁴ domestic legislation and case law means that e-signatures are capable of being a legally valid form of execution under English law. On this basis, it is unlikely that a counterparty or third party could successfully argue that an e-signature in a document governed by English law is invalid as a form of execution in the absence of express agreement between the parties to use electronic signatures.

However, legislation in other jurisdictions—for example, the United States, Canada, and Hong Kong—provides that e-signing of documents is valid only where parties intend to sign and consent to sign electronically. Where the documentation for a transaction is governed by the law of such jurisdictions, parties should obtain consent by language in their agreements to the effect that e-signatures have the same effect as wet ink signatures.

Additionally, as with email execution, certain other issues can arise around the use of e-signing when working remotely. Parties should bear in mind the following:

- e-signing necessitates that individual signatories have access to, and familiarity with, the relevant technological resources;
- the Law Commission has concluded that witnessing cannot be done via video-link and witnesses must be physically present when the signatory signs the document, even where the witness attests the document electronically;²⁵
- the use of e-signing platforms, which often utilise cloud-based servers, carry degrees of security and privacy risks – parties should liaise with IT teams over additional security measures on devices used for e-signing, and ensure that any platform used includes authentication and traceability features to prevent fraud;
- e-signing may not be acceptable where a document requires filing or registration with a registry that accepts wet-ink originals only; and
- where transactions are cross-border, parties should liaise with counsel over the suitability of e-signing in view of local formalities and tax liabilities.

Legal issues with electronic execution generally

As well as the practical and logistical issues discussed above, parties should be mindful of legal issues relating to electronic execution, including:

- **Jurisdictional matters** – electronic execution will be valid in most cases under English law as discussed above. In cross-border transactions, parties must be cognisant of different jurisdictional approaches depending on matters such as the governing law of the document and the laws of the place of incorporation of the relevant parties;
- **Tax and stamp duty consequences** – these matters should be considered in advance and will require specialist advice, especially for transactions across multiple jurisdictions where place of execution may attract various tax or stamp duty liabilities. However, the UK Stamp Office has produced a more relaxed regime for stamping without physical signatures;
- **Record-keeping** – wet-ink originals may be required for tax, audit, or other evidential purposes, including enforcement proceedings in certain jurisdictions (which may be unknown or may change in the future);
- **Internal** – some banks and other institutions may insist on wet-ink originals in accordance with their constitutional requirements or internal policies;
- **Confidentiality** – any spare copies or originals of confidential documents used as part of execution processes must be kept safe by the individual signatory and should be disposed of confidentially – this may be overlooked when signatories are working from home; and
- **Formalities** – there may be unavoidable statutory requirements for hard copy or physical posting of documents where purely electronic execution is insufficient.

In view of the practical, logistical, and legal issues discussed in the context of electronic execution, it is essential that parties plan ahead and tailor the execution pages of their documentation to the method chosen, in consultation with local counsel where necessary.

Notarisation and Legalisation

Documents may need to be signed before, and certified by, a notary, and may also require legalisation by apostille and/or consulate (the process of which can differ under different jurisdictions). In many jurisdictions, any such signature before a notary may need to be conducted in person. In these circumstances, signing electronically from a remote location, such as by the means discussed earlier, may not be sufficient for valid notarisation and legalisation.

When working remotely, potential issues around notarisation and legalisation of documents include:

- difficulties in arranging notaries to attend signings or even, in some jurisdictions, no access to notaries under lockdown restrictions at all;
- delays in accessing, or not being able to access, apostille and consulate services for legalisation; and
- notaries and legal certifiers taking a more conservative view than other transaction parties and refusing to certify or legalise documents that have been signed electronically.

In view of these issues, parties should practically consider the following:

- where a signature requires notarisation for execution, is the notary also under lockdown or are special dispensations in place? At the time of writing, public notaries are still operating in many European countries;
- can a document be notarised if the notary is not physically present at the signing? “Remote Online Notarisations” (RON) is permitted in almost every U.S. state, but is not currently permissible under English law;
- similarly, for legalisation of a document, is the relevant consulate accessible and dealing with “non-essential matters”? For example, the Foreign & Commonwealth Office (FCO) in the UK is at present offering limited legalisation and apostille services, but is operating at reduced capacity outside of London and prioritising healthcare and emergency travel documentation; and

- what impact will delay to notarising and legalising documentation have on the closing of the transaction? Parties should be cognisant of, and discuss with counsel, timing issues, and potential legal consequences thereof.

Original Documentation

As mentioned above, wet ink originals of certain documents may be necessary in order to comply with filing or registration requirements. In these circumstances, execution solely by electronic means may be unsuitable and the physical handling and positioning of wet ink originals at the relevant registries may be unavoidable.

Where this is the case, parties will face logistical issues in respect of the physical delivery of originals when offices are closed. In these circumstances, individual signatories will have to deposit original documentation with a courier whilst maintaining social distancing. How this can be best achieved will depend on the degree of restrictions on social interaction in the relevant signatory's location. Where possible, agreement should be sought between the transacting parties over what documents can be pre-signed in advance, and any potential delays as a result of delivery of originals should be factored into closing and completion timetables. Alternatively, it should be investigated with the relevant authority or registry as to whether they will, on an exceptional basis, be able to proceed with scanned copies of documents with originals to follow.

Other Closing Matters

Leveraged finance transactions are complex and involve many moving parts. Other issues that parties may be confronted with whilst trying to close a transaction during the COVID-19 crisis include the following:

Issuing legal opinions

A legal opinion provides a legal conclusion and/or legal analysis by counsel as a pre-condition to advancing a loan to a borrower and forms a condition precedent in many finance transactions. Often, the issuing of a legal opinion will require a search of applicable corporate registries to be made. Such searches may not be possible if the registry is closed, or may take more time than usual.

Accordingly, it is recommended that parties conduct pre-searches as close as is practicably possible to the closing date (for example, if searches are taking a week, start that process a week prior to the closing date). This ensures that, at the very least, a legal opinion can be issued on the basis of a registry search which is as minimally out of date as possible. Lenders will also need to be made aware of any issues as to timing of searches (or, indeed, whether searches can even be run) and any qualifications that are to be included in legal opinions as a result of out-of-date or no searches. The lenders may need then to take a commercial view on this.

Letters of credit

In the event that a letter of credit (LoC) is issued by a bank as part of a transaction (for example, as security or in lieu of maintenance reserves), the beneficiary will usually want to be in possession of the original LoC immediately on closing, or at least ensure that its counsel is in possession of the LoC. COVID-19 safeguards may prevent or hold up the issue of the LoC. This may be where the issuing bank has decided to suspend its business and/or its key staff are working in self-isolation, or where the LoC has been issued but cannot be couriered to the relevant counsel to hold pending closing.

In addition, in the event of any form of default or enforcement process, drawing down on the LoC may necessitate in-person attendance at the relevant bank (and, frequently, at a specified branch of that bank) with the beneficiary required to serve the original LoC in-hand. However, banks across the globe have temporarily closed branches, or are operating reduced opening hours with fewer staff and services. Whether the beneficiary can draw down under the LoC will therefore differ on a case-by-case basis, based upon the COVID-19 policy of its relevant bank.

Furthermore, in the context of enforcing an LoC, retrieving the original from the records of the beneficiary and transporting it to its legal representatives in the relevant jurisdiction may be onerous or impossible in view of

current lockdown restrictions. Beneficiaries should check the status and whereabouts of their LoC in advance of needing to make a demand, and potential hurdles should be factored into any enforcement strategy in good time.

Banking restrictions

Parties should be cognisant of banking restrictions generally in relevant jurisdictions affecting their ability to close. For example, in some jurisdictions, banks are closed completely with parties unable to make bank transfers. This will affect the closing payment mechanics. Certain jurisdictions have implemented restrictions on the amount of U.S. dollars a party can transfer in one day (for example, restrictions of \$20,000). Accordingly, parties may be impacted in terms of their ability to make closing payments (or indeed any payment of ongoing hire or debt amortisation). This will need to be reviewed in each transaction and alternate payment mechanics may need to be considered.

Physical meetings

Although it is less often the case now, physical meetings do still take place and are sometimes required as part of an aviation finance transaction. This may include attendance at a registry to lodge documents. Restrictions on the physical ability to sign documents like bills of sale, or to hand over undated bills of sale until funds have been received, will need to be considered in advance and managed by the relevant parties.

This article has explored issues around closing and completing financing transactions when individuals work in social isolation as a result of the COVID-19 crisis. As the situation and government policy responses to COVID-19 across the globe are dynamic and evolving, the foregoing does not purport to be a comprehensive or definitive guide to all such issues. However, the importance of forward-thinking and planning ahead cannot be overemphasised, especially around methods of execution and the use of service providers, like notaries and banks, which may be operating at reduced capacity or not at all.

Please do not hesitate to contact our London team, or your regular Winston relationship lawyer, if you have any questions, or if we can assist in any manner:

^[1] While there is no statutory provision under English law as to a witness's independence, the purpose of having a witness is so that they can provide unbiased evidence of what was signed and by whom, should such evidence be required in the future. Accordingly, best practice dictates that a witness is independent.

^[2] Law Commission, "Electronic Execution of Documents" (4 September 2019) – <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf>

^[3] Ministerial Statement of 3 March 2020 – <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-03/HLWS135/>

^[4] Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market.

^[5] Law Commission, "Electronic Execution of Documents" (4 September 2019), pgs. 77–85; 89.

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