

Key legal due diligence requirements for offshore structures in corporate and finance transactions

Service areas / [Corporate, Banking and Finance](#)

Legal jurisdictions / [Bermuda, British Virgin Islands, Cayman Islands, Guernsey and Jersey](#)

Date / [March 2020](#)

Market uncertainties

Current economic and market uncertainties and heightened concerns around liquidity require parties to ensure that appropriate legal due diligence is undertaken on counterparties prior to entering into commercial contracts.

We have received an uptick in enquiries relating to due diligence across a range of transactions, including:

- lenders assessing amendments or extensions to existing financing arrangements;
- borrowers seeking additional liquidity;
- issuers ensuring covenant compliance;
- lessors and lessees negotiating lease arrangements;
- investors in funds, joint ventures or pre-IPO structures;
- fund sponsors seeking to raise capital and debt; and
- investors and creditors assessing secondary transactions and potential enforcements.

Understanding the risks

A solid understanding of appropriate due diligence issues will help facilitate swift execution of transactions and mitigate against future risk. Some key legal questions to ask are:

- Does the counterparty have the power and capacity to enter into the transaction?
- What documents are publicly available?
- Who are the directors, officers, and shareholders?

- Are any specific authorisations or consents required from the board of directors, the shareholders or any committees (eg an investment committee)?
- Are there any other counterparty-specific issues to consider (eg are there any limits on how much the counterparty can borrow or guarantee)?
- Are the transaction documents enforceable against the counterparty?
- Has the counterparty executed the transaction documents properly? (in particular if electronic signatures are being used due to logistical difficulties with wet ink signatures)
- Is the counterparty in compliance with new (and existing) legal and regulatory requirements in the relevant jurisdictions?
- Is the counterparty in good standing and solvent or is it subject to an insolvency process or party to any litigation?
- Is credit support required (eg a guarantee or security)? How do I protect my security?
- Do any third parties already have rights in respect of the assets that I am seeking to acquire or secure as collateral?
- How do I sue on and enforce my rights against the counterparty?
- Are there any wider concerns (eg structural subordination, third party claims or cross defaults)?

It may be that, in view of current market uncertainties, an enhanced due diligence approach is required for certain types of transactions.

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Key legal documents to review

Parties should consider requesting the following legal documents at an early stage of a potential transaction:

- certificates of incorporation (or equivalent);
- governing documents (eg memorandum and articles of association / bye-laws or partnership agreements);
- register of directors and officers;
- register of members;
- register of charges (or equivalent);
- if a partnership, register of limited partnership interests and record of contributions;
- shareholder agreements;
- subscription agreements;
- private placement or offering memoranda;
- if a regulated entity, its licence (and any applicable conditions or directions); and
- side letters.

Public searches

Parties should undertake appropriate public searches before entering into transactions. These may include:

- company registry searches (to check that the counterparty exists);
- court searches (to check if the counterparty is involved in litigation or if any petitions have been filed for its winding-up); and
- regulatory searches (to check the regulatory status of a counterparty and what licences the counterparty holds).

Certificates of good standing should be obtained to confirm that the counterparty is in good standing with the relevant local registry, although it is important to check what “good standing” means in the relevant jurisdiction.

Due diligence process / selecting legal counsel

The approach taken on due diligence can have a significant impact on the speed, efficiency and success of transactions. This is vitally important in light of current market conditions.

We therefore strongly urge parties to start conversations early and engage counsel at the outset of structuring transactions. Real value can be added by instructing offshore counsel who: (i) have actual experience in all the relevant jurisdictions (eg Bermuda, BVI, Cayman Islands, Guernsey and Jersey); (ii) are able to advise on structures holistically and free from conflicts; and (iii) can provide seamless input on corporate, finance and restructuring issues.

Offshore counsel should provide legal opinions or memoranda of advice summarising due diligence findings and assist directors, credit committees or investor committees with any queries.

Continued

Key contacts

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We provide legal services in relation to all aspects of corporate and finance, trusts and private wealth, investment funds, insolvency, restructuring and dispute resolution.

Our clients include global financial institutions, investment funds, private equity and real estate houses,

multinational corporations, public organisations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

We work with leading onshore legal advisers on international transactions and cases involving our jurisdictions.

In the face of opportunities and challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with consistently high levels of client service, technical excellence and commercial insight.