Appointing a Process Agent in Cross-Border Transactions

In today's global economy, transactional attorneys and paralegals are seeing an increase in the number of multi-jurisdictional, cross-border transactions and in the resulting number of detailed requirements for closing. One of the requirements that is often overlooked until the last minute is the appointment of a process agent. Understanding the role of the process agent and what is involved in appointing such an agent will help ensure that this important item on the closing checklist does not cause costly delays in international transactions.

Cross-Border Agreements and Closing Requirements

Cross-border agreements serve as the basis for international transactions involving parties from different jurisdictions. Forms of international agreements vary greatly from country to country, but a typical provision included in many international agreements is the appointment of an agent for service of process or commonly known as a "process agent". The process agent designation may be included in the section of the agreement entitled "Consent to Jurisdiction", "Governing Law" or some variation of those titles.

In addition to completing all the pre-closing issues, careful attention needs to be paid to the formal, but necessary, details required for completion of the transaction. These include, but are not limited to:

- Execution of agreements and supporting documents across time zones.
- Obtaining required signatures.
- Correctly following multi-location closing procedures.
- Coordinating wire transfers through international banks.

Ensuring that the process agent appointed for all required parties delivers its acceptance to serve as process agent.

While coordinating the appointment of the process agent is only one of many closing requirements, its importance requires advance planning and an understanding of the choice of law and venue (sometimes referred to the jurisdiction or court) that the parties agree will govern the transaction.

Types of Transactions That Require a Process Agent

Process agents are typically appointed as part of cross-border financial transactions involving commercial banks, sovereign states, multilateral lending agencies, export credit agencies and corporate entities.

A process agent appointment is often required in global transactions, including credit financing, aviation leasing/financing, debt/equity capital market offerings, Rule 144A, Regulation S offerings and private placements. Types of agreements that include the appointment of a process agent include Loan and Credit Agreements, ISDA Master



Agreements, import/export financing agreements, Indentures, Stock Purchase Agreements, Intercreditor Agreements and others. In addition, a U.S. process agent is required to be named in certain SEC filings; for example, certain foreign registration statements such as SEC Forms F-1 to F-6 series and SEC Form F-X, which is filed concurrently with several SEC filings, including Form CB in connection with a tender offer, rights offering or business combination.

Choice of Law For International Agreements: New York and the United Kingdom (UK)

Parties to an agreement negotiate a choice of law clause that specifies that any dispute arising under the agreement shall be determined in accordance with the law of a particular jurisdiction. While the choice of law can vary depending on the country of origin of the parties to the transaction, New York and the UK are commonly chosen due to their established bodies of commercial law and precedents applicable to commercial agreements. Attorneys drafting international agreements often choose New York or UK law as the governing law even when the underlying transaction may have minimal contact with those jurisdictions.

The choice of either New York or UK law to govern an international agreement can be driven by the jurisdiction of the parties engaged in the transaction. For example, parties in Latin American countries often choose New York as the governing law for their cross-border transactions and parties in European countries frequently choose the UK (however, this is not always the case and is dependent on other parties to the agreement).

In Asia, international agreements for transactions in Tokyo and Hong Kong may designate New York as the choice of law. In a transaction where there is a syndicate of lenders from varied global jurisdictions, the decision on choice of law will be negotiated among the parties.

Purpose and Role of the Process Agent

A process agent is appointed under the terms of an international agreement to serve as a point of contact in a country where the actual parties may not have a presence so that legal process may be served in any suit, action or proceeding arising out of the agreements. The role of the process agent is to act as a representative upon whom court papers may be served on behalf of

certain parties to international agreements and to deliver such court papers to the process agent's contact on record. Proper service of process establishing personal jurisdiction over the party or parties served and proper venue are two examples of the initial important first steps of the litigation process.

In a single financing transaction, the process agent may be named in multiple international agreements. For example, a Brazilian entity entering in to a loan agreement with a New York bank or syndicate of banks may be required to appoint a New York process agent under the terms of the loan agreement. The Consent to Jurisdiction sections of the Credit Agreement, the Guaranty and the Security Agreement often include a provision to appoint a New York process agent by any party that does not have a presence in New York. Therefore, in this type of transaction, the Borrower and all Subsidiary Guarantors will appoint a New York process agent in the Consent to Jurisdiction sections of each of the operative agreements supporting the loan transaction.

Using the example above, the Consent to Jurisdiction section setting forth the parties' agreed to venue for any disputes arising out of each of the operative agreements to a loan transaction may read as follows:

> Consent to Jurisdiction
> Each of the Borrower and the Subsidiary Guarantors agrees that any action or proceeding relating in any way to this Agreement may be brought and enforced in the state courts sitting in the Borough of Manhattan, City of New York, New York, United States of America or in the United States District Court for the Southern District of New York to the extent permissible under applicable law and provided that all formalities and requisites are fully observed in this regard.
>
> Each of the Borrower and Subsidiary Guarantors hereby irrevocably appoint Cogency Global Inc., 122 East 42nd Street, 18th Floor, New York, NY 10168, as its process agent to receive for and on its behalf, and forward to it, service of copies of the summons and complaint and any other process that may be served in any such suit, action or proceeding brought in the State of New York.

Similar venue language is sometimes combined with the Choice of Law provisions. The above example is illustrative only of certain types of transactions. As with all transactions, the drafting attorneys will include language that is specific to their current deal.

Since the credit crisis of 2008, there has been a significant increase in the number of international contracts where the process agent is named irrevocably. Some lenders have indicated that this more stringent standard is to prevent the process agent from resigning and to ensure that the process agent is bound for the full term of the contract. As a result, process agent fees are paid in advance for the full term of the appointment. This provides comfort to both the lender and to the client that the process agent provision of the agreement will remain in full force and effect throughout the term. Further, it alleviates the administrative burden on the entities appointing a process agent of having to pay annually for such service which, in some countries, can be cumbersome and time consuming. For example in China, a renewal invoice for process agent services, even for a small amount, may require approval by multiple parties including the Board of Directors of a Chinese state-owned enterprise.

The process agent will typically review each section of all documents in which it is being appointed to ensure the language describing its role and responsibility is within the scope of the service it is authorized to provide. Great care by the process agent must be taken to ensure it is not mistakenly being named to serve as a legal representative, provide power of attorney or inadvertently named as any type of trustee or transfer agent.

Who Can Act as Process Agent and Advantages of Professional Process Agent



While almost any person or business entity may legally act as a process agent as long as they have an address in the jurisdiction that is required under the international agreement, a professional process agent is knowledgeable about the various types of legal proceedings and understands the urgency and steps that must be taken upon receipt of such proceedings. Typically, the lender in a large commercial financing arrangement will require that the Borrower and all Guarantors appoint a process agent to receive and forward to the Borrower and Guarantors any legal process commencing a lawsuit if there is a default under the Loan Agreement. While some lenders will permit a Borrower of Guarantor to appoint a branch of their office in New York or UK to serve as the process agent at their local address, lenders often prefer or require having a professional process agent named.

When choosing a professional process agent, it is not only important to engage a company that will respond to your request quickly to set up the initial appointments, but one that understands their role once appointed. A professional process agent will provide immediate notice of receipt of any legal proceeding in accordance with the terms of the international agreements and will maintain an accurate database of its process agent appointments and current contact information. Appointing a professional process agent generally gives all parties to the transaction more confidence that there won't be missed or mishandled legal proceedings resulting in a default judgment. Moreover, a professional process agent will keep confidential and not disclose any information related to its appointment or the underlying transaction without seeking the express permission of the appointing party.

Steps to Appoint a Process Agent

In addition to all of the other necessary details that must be addressed in advance of closing international transactions, ensuring delivery of the acceptance of the appointment by the process agent for all required parties is a condition precedent to closing. Choosing the right professional process agent is critical to ensure your deal gets done without the "eleventh hour fire drill" when there are other more substantive deal issues to be addressed. Any delay in such receipt of acceptance could cause a delay in your SEC filing for your ADR offering or funding of your loan resulting in significant cost to your client or company due to changes in interest rates and market conditions.

Once the process agent is chosen, the following steps will need to be taken:

Communicate the following information to the process agent, even if the terms of the deal are not finalized:

- Number of appointing parties and term
- Closing date
- Provide name of contacts who should receive any service of process.
- Deliver all agreements in which process agent is to be named.
- Draft or coordinate with process agent to draft the appointment letter.

Timing is important for the many tasks mentioned above that are required in advance of the closing date, especially when time zone restrictions in international transactions are considered. Engaging the right process agent as



early as possible in advance of your closing date will ensure that their written acceptance of the appointment is received by the closing date, thus preventing costly and frustrating delays.

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