To deed or not to deed?


NOT ALL CORPORATE BORROWING DOCUMENTS NEED TO BE – OR, INDEED, SHOULD BE – DRAWN UP IN THE FORM OF DEEDS, AS **DAVID CAMPBELL** AND **MICHAEL GREEN** EXPLAIN.

Treasurers often ask lawyers whether a document relating to a corporate borrowing transaction has to be a deed. There is a temptation to answer "yes" out of an abundance of caution, but there are, in truth, relatively few circumstances in which a deed is necessary.

Making a document a deed can cause practical problems because deeds have additional signing formalities. However, there are some benefits in making a document a deed. For example, the limitation period for deeds is longer than that for simple agreements (i.e. documents that are not deeds), and a deed is enforceable even if there is no consideration. Consideration and limitation periods are explained in more detail later in this feature, but let's start by taking a look at whether the documents most commonly encountered in a corporate borrowing transaction need to be deeds.

First, though, a word of warning: this article is not a comprehensive review of all circumstances in which a document needs to be a deed; it focuses only on the most common situations in borrowing transactions. One should always consider the contents of a document before deciding whether it needs to be a deed.

THE ORIGINAL FINANCE DOCUMENTS

■ **The credit agreement** A credit agreement generally does not need to be a deed. While it often includes a guarantee, there is no general rule that a guarantee must be a deed. The only formal requirements for a guarantee are that the guarantee, or a note of it, must be made in writing and signed by the guarantor. These requirements are clearly satisfied by a guarantee in a credit agreement. A credit agreement may also include a security trust and other trusts, but there is no general rule that a document creating a trust must be a deed.

■ **The intercreditor agreement** An intercreditor agreement often needs to be a deed, usually because it includes a power of attorney authorising the security agent to do certain things on behalf of an obligor or a junior creditor.

Under the Powers of Attorney Act 1971, a power of attorney must be signed as a deed by the person appointing the attorney. This requirement applies whether the power of attorney is separate or embedded in another document, and is sometimes overlooked in practice. If an intercreditor agreement contains a power of attorney, it should be a deed.

Some intercreditor agreements do not include a power of attorney, and so may not need to be deeds. An intercreditor agreement typically includes subordination provisions and various trusts, but neither of these things means that it needs to be a deed.

■ **The security agreement** A security document almost always needs to be a deed. There are a number of reasons for this:

□ Many security agreements include a legal mortgage of land (or interests in land), for which a deed is legally required.

□ A well-drafted security agreement typically includes a power of attorney in favour of the person taking security (e.g. to back up a "further assurances" clause).

□ The person taking security generally wants the statutory power to sell the secured property and appoint a receiver (even though those powers are often varied by the security agreement and supplemented by express powers). A mortgage or charge of any property must be a deed for the mortgagee or charge to have those statutory powers.

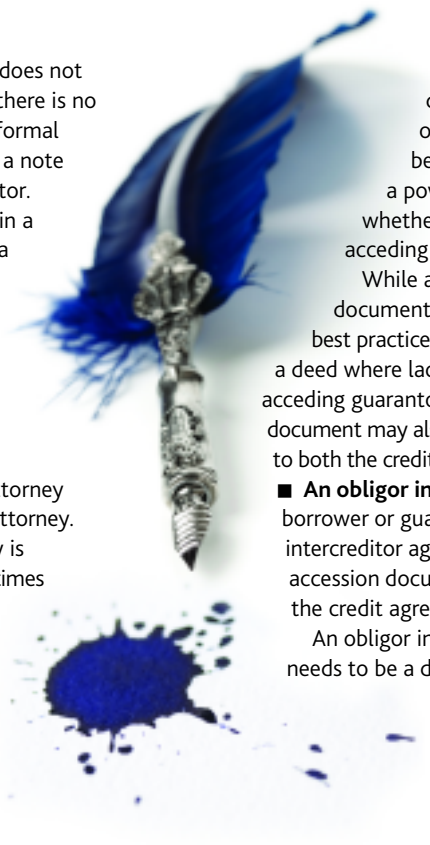
CHANGES TO THE OBLIGORS

■ **An obligor credit agreement accession document** Many credit agreements allow new borrowers or guarantors to become parties to the credit agreement by signing an obligor accession document. An accession document needs to be a deed only if the acceding party takes on obligations or grants rights which have to be by deed (e.g. if the acceding party grants a power of attorney), or there is concern about whether consideration has been provided for the acceding party's obligations.

While an obligor credit agreement accession document generally does not need to be a deed, it is best practice to make the guarantor accession document a deed where lack of consideration is a concern for an acceding guarantor. An obligor credit agreement accession document may also need to be a deed if it effects an accession to both the credit agreement and an intercreditor agreement.

■ **An obligor intercreditor accession document** A new borrower or guarantor usually becomes a party to an intercreditor agreement by signing an obligor intercreditor accession document. Sometimes this is combined with the credit agreement accession document.

An obligor intercreditor accession document often needs to be a deed because the acceding borrower or



guarantor grants a power of attorney under the intercreditor agreement, or because of concerns about lack of consideration.

AMENDMENTS AND WAIVERS

■ **An amendment or a waiver of the credit agreement** Credit agreements are hardly ever deeds, so an amendment or a waiver of one needn't be a deed unless there are concerns about consideration.

■ **An amendment of the intercreditor agreement** Intercreditor agreements are often deeds, and a document that amends an operative part of another document required by law to be a deed must also be a deed. However, a deed can be amended by a simple agreement so long as there is consideration for the amendment and the deed itself does not require the amendment to be made by deed. In short, you need to use a deed to amend an intercreditor agreement which includes a power of attorney or is a deed for some other legal reason, but you can use a simple agreement to amend an intercreditor agreement that does not need to be a deed (even if it actually is one).

RELEASE OF SECURITY A release of a legal mortgage over land (or an interest in land) must be a deed. Technically, a release of any security other than a legal mortgage over land (or an interest in land) does not need to be a deed so long as there is consideration for the release. However, market practice is to use a deed to avoid any argument about lack of consideration and to ensure any third party dealing with the security provider can be confident the release is effective.

SOME PRACTICE POINTS

■ **Consideration** Broadly speaking, the legal concept of consideration refers to some form of benefit to the party who makes a promise under a contract, or some form of detriment to the party receiving the promise. Generally, it is an essential element of an enforceable contract. However, a contract made by deed is enforceable even if there is no consideration, which is often why people choose to use deeds. A contract should be made by deed whenever there is any doubt about whether a party has provided consideration.

■ **Limitation period** The limitation period for an action under a deed is 12 years, rather than six years for an action under a simple agreement. Sometimes a party to a document may want it to be a deed to take advantage of this extended limitation period.

■ **Not all the parties to a deed need to sign it as a deed** A document can be a deed even if it is not signed as a deed by all the parties, so long as it is clear from the document that it is intended to be a deed and all the parties that need to sign it as a deed do so.

■ **Better safe than sorry – but remember the practicalities** People often make documents deeds when they may not need to be, sometimes out of caution and sometimes because the time and trouble of working out whether something needs to be a deed is more than the time and trouble of just signing as a deed anyway. There will be occasions when this course of action is appropriate.

However, the additional signing formalities for deeds can cause practical problems. For example, signing authorities for some financial institutions may not authorise an individual holding a particular position to sign a deed on behalf of the institution. As a result, making a document a deed can lead to delays in completion, particularly if a party is not consulted about the signing requirements until the documents are finalised. Making documents deeds may also mean it is more difficult for transactions to be completed by electronic means, an issue which is particularly important for the secondary market. Practitioners should bear these practical factors in mind when considering whether to make a document a deed.

The table below summarises the guidance in this article.

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Who needs to execute common finance documents as a deed?

	Borrower	Guarantor	Lender	Facility agent	Security agent
	Always consider consideration and limitation period				
Credit agreement	✘	✘	✘	✘	✘
Intercreditor agreement	✔[1]	✔[1]	✘[2]	✘	✘
Security agreement	✔	✔	-	-	✘
Obligor credit agreement accession document	✘/✔[3]	✘/✔[3]	-	-	✘[4]
Obligor intercreditor accession document	✔[1]	✔[5]	-	-	✘
Credit agreement amendment or waiver document	✘	✘	✘	✘	✘
Intercreditor agreement amendment document	✔[1]	✔[1]	✘	✘	✘
Security release document	✘	✘	-	-	✔

Notes:
1 Assumes that the obligors grant a power of attorney under the intercreditor agreement.
2 Assumes that the lenders do not grant a power of attorney under the intercreditor agreement.
3 If the accession document includes intercreditor accession mechanics and the obligors grant a power of attorney under the intercreditor agreement, or there is doubt about consideration.
4 The security agent may sign an obligor credit agreement accession document if it includes intercreditor accession mechanics.
5 Assumes that the obligors grant a power of attorney under the intercreditor agreement, or there is doubt about consideration.