Execution of documents

19 key questions and answers to have at your fingertips
Contracts can be made orally or in writing. Often to ensure certainty as to terms, contracts will be in writing. In addition, certain contracts may need to be in writing in order to comply with legal or registration requirements. As well as getting the drafting of any written document right, it is essential that they are executed correctly. Last minute issues with the execution of documents can cause significant problems and potentially undo the intended result of lengthy negotiations. This guide sets out the key points to be aware of when executing documents as well as some practical tips to ensure powers of attorney are effective.
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This briefing only applies to documents under the laws of England and Wales. Other legal systems will have their own rules (for example in Scotland and Jersey the term ‘deed’ does not seem to have a technical meaning – see eg Low & Bonar plc v Mercer Ltd [2010] CSOH 47 and Oakley v Osiris Trustees Ltd [2008] UKPC 2).

Who is signing?

When entering into a contract or deed, the legal status of the relevant party can be vital. English law distinguishes between:

• execution of a deed by an individual (eg a trustee); and

• a limited company (eg a trustee company or a corporate employer), incorporated under the Companies Act 2006 (CA 2006) (or its predecessors).

The following should also be noted.

• Limited liability partnerships (LLPs) are treated in the same way as limited companies.

• Unincorporated associations (eg partnerships or clubs or charities) can raise special issues.

• Special rules can apply to statutory bodies (eg the Pensions Regulator or PPF).
1. How are written contracts executed under English law?

It depends on the identity of the party (eg an individual or a form of corporate entity) and whether the agreement is a simple contract or a deed. Documents are most commonly executed as simple contracts.

2. How do companies enter into written contracts?

For English companies, simple contracts can be executed:

(i) on behalf of the company by the signature of a person with express or implied authority (s.43(1)(b) (CA 2006)); or

(ii) by the company by:

(a) the signature of two directors or a director and the secretary – s44(2)(a), CA 2006 (under s280, CA 2006 an individual can’t sign in two separate capacities for one company, eg as director and secretary);

(b) the signature of a director in the presence of a witness – s44(2)(b), CA 2006; or

(c) by writing under its common seal (if it has one – this is no longer required for English companies) – s43(1)(a), CA 2006.

3. How do individuals enter into written contracts?

Usually a contract is entered into by the individual signing it. But an agent can often sign on behalf of the individual, provided they have the appropriate authority (see 4 below).

A deed may be needed for a scheme amendment. It may be used to take advantage of the longer limitation period – 12 years, compared with six for a simple contract.
4. When can third parties sign contracts on behalf of others?

A contract can be signed by an agent on behalf of another. Unlike deeds where a power of attorney is needed (see 12 below), the agent’s authority need not be in writing.

Authority can be actual, implied or ostensible. For example, a trustee signing a contract on behalf of all the trustees should usually be authorised by a prior trustee resolution to sign. Authority may be given retrospectively in some cases.

An agent signing a contract gives an implied warranty of authority to the other parties that he or she is duly authorised to sign (unless this is expressly excluded): *Starkey v Bank of England* [1903] AC 114.

5. Why use a deed?

Some documents must be executed as deeds, for example:

- formal scheme amendments (if the amendment provision specifies a deed);
- powers of attorney or any amendment to one (see further 13 below);
- transfers of land in England and Wales; and
- the appointment of trustees (if the appointment rule provides for this or the statutory provision in s39, Trustee Act 1925 is used). A deed is often used for appointment or removal of trustees so that the statutory vesting of trust property in the new trustees under s40, Trustee Act 1925 can apply.

Stock Transfer Forms do not need to be executed as deeds.

A deed may also be used:

- to take advantage of the longer limitation period (12 years for a deed compared with six for a simple contract);
- to reduce enforceability issues in contract cases where it is unclear if valuable consideration is being given, eg in a guarantee; and
- to add to the formality of the document (eg if a member is being asked to consent to an action).
6. What are the formalities for a deed?

A deed must:
- be in writing; and
- be clear on its face that it is a deed; and
- be validly executed by
  - the individual in the presence of a witness; or
  - by the company (see 8 below); or
  - in either case, by a person appointed by the individual or company under a power of attorney (see 13 below); and
- delivered (see 11 below).


The requirement for an attesting witness was new in the LPMPA 1989. Deeds executed by individuals before 31 July 1990 did not require to be witnessed.

7. How does an individual enter into a deed?

An individual must:
- sign the deed;
- before a witness; and
- the witness must attest the signature of the individual.

Special rules can apply if the individual is unable to sign but instead directs signature on his or her behalf. Two attesting witnesses are needed in this case – s1(a)(ii), LPMPA 1989.
8. How do companies enter into deeds?

Deeds can be executed by a company incorporated in England and Wales under the Companies Acts by:

(i) affixing its common seal – s44(1)(a), CA 2006. Often the company’s articles require the seal to be affixed in the presence of two directors or a director and the secretary (there is a presumption of due execution in these cases under s74, Law of Property Act 1925); or

(ii) the signature of two directors, or one director and the company secretary, on behalf of the company – s44(2)(a) CA 2006; or

(iii) the signature of a director in the presence of a witness – s44(2)(b) CA 2006.

Deeds may also be executed on behalf of a company by an attorney acting under a power of attorney (see 14 below).
9. How do overseas companies enter into deeds?

The rules related to the execution of deeds by a company which is not incorporated in England and Wales are set out in the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI 2009/1917, as amended). Regulation 4 of the 2009 Regulations modifies and applies the execution provisions of sections 43, 44 and 46 of the Companies Act 2006 to overseas companies.

In order for an overseas company to validly execute a deed, the deed must be executed and delivered by the company – s46, CA 2006, as modified by Reg 4, 2009 Regulations.

The deed may be executed by an overseas company in any of the following ways:

(i) by affixing its common seal; or

(ii) in any manner permitted by the laws of the territory in which the overseas company is incorporated for the execution of documents by such a company – ss44(1)(a) and (b), CA 2006, as modified by Reg 4, 2009 Regulations; or

(iii) by the signature of a person who, in accordance with the laws of the territory in which an overseas company is incorporated, is acting under the authority (express or implied) of the company, and is expressed (in whatever form of words) to be executed by the company – s44(2), CA 2006, as modified by Reg 4, 2009 Regulations.

There is a statutory presumption in favour of a good faith purchaser for value that a document purported to be signed in accordance with the requirements above has been duly executed – s44(3), CA 2006, as modified by Reg 4, 2009 Regulations.

It would often be prudent to seek a legal opinion from local counsel to confirm the method of execution by the overseas company.

A power of attorney will generally be construed strictly by a court.
10. How is a deed witnessed?

The witnesses must actually be present when the relevant deed is signed. The witness should sign to show that he or she ‘attests’ the execution by the party – ie signing a statement that he or she was present and saw the deed being signed: *Re Selby-Bigge* [1950] 1 All ER 1009 and *Shamu Patter v Abdul Kadir Ravathan* [1912] 28 TLR 583.

There is no legal requirement for a witness to print his or her name and address next to its signature but this is often done in case any questions subsequently arise concerning execution.

A party to a deed cannot be a witness to another party: *Freshfield v Reed* [1842] 9 M&W 404 and *Seal v Claridge* [1881] LR 7 QBD 516. So a trustee’s signature should not be witnessed by another party – eg another trustee. But the witness does not need to be independent. Witnessing by an employee, agent or director of another party is acceptable: *Peace v Brookes* [1895] 2 QB 451; *Northern Bank Ltd v Rush* [2009] NICH 6 and *Log Book Loans Ltd & Nine Regions Ltd v OFT* [2011] UKUT 280 (AAC).

It is almost certainly acceptable for a witness to be a spouse or civil partner of a signatory (see Halsbury’s Laws, Vol 32 (2012), ‘Deeds’ at paragraph 236).

Attestation (ie signing by the witness) should be at the same time as the signing by the party – *Wright v Wakeford* [1812] EngR 56 and *Netglory Pty Ltd v Caratti* [2013] WASC 364.
11. When is a deed delivered?

Deeds must also be delivered in order to be legally effective.

A deed is deemed delivered by a party when he or she demonstrates an intention to be bound by it. This may be by physical delivery, but this is not required and there is a rebuttable statutory presumption that a deed is delivered by a company when it is executed – s46(2), CA 2006.

This can be significant as delivery is usually irrevocable (unless a conditional delivery in escrow has been specified). If appropriate, this presumption can be disapplyed when executing deeds in advance, eg by making it clear to the counterparties that the documents have not been delivered by not dating the deed and by removing the words 'and delivered' from the relevant signature blocks before signing.

Under English law the general practice is that a deed is only dated as and when all signatories have duly executed it and it has been agreed to be delivered. (So a party executing a deed in advance and sending it to that party’s lawyer to hold pending other signatures will not usually count as delivery.)

Deeds executed by an individual trustee or by a company by one director need to be witnessed. The witness should not be another party to the deed.
12. Any other practical points to remember when executing documents?

**Execution in advance.** Following *R (on the application of Mercury Tax Group Limited) v HMRC* [2008] EWHC 2721, parties must pay close attention when exchanging electronic (eg PDF) copies of pre-signed documents. Further details on this can be found in the Law Society’s guidance, ‘Execution of documents by virtual means’: https://www.lawsociety.org.uk/advice/practice-notes/virtual-execution-of-documents

In respect of deeds, the guidance broadly states that a deed may be executed in counterparts by virtual signing if the final version is circulated by email and each signatory:

(i) prints and signs the signature page; and

(ii) sends back a single email attaching a copy of the entire final version of the document and a scan of the executed signature page.

Care is needed in situations where a ‘wet ink’ signed document is required, eg original Stock Transfer Forms must be sent to HMRC for stamping and certain real estate documents must be sent to the Land Registry for registration.

**Composite execution clauses.** Companies from the same group may have a common director or authorised signatory who is keen to speed up the execution process by using one execution block on behalf of all the companies involved. This is not now permitted (s44(6), CA 2006) – he or she must sign separately in each capacity. Authorised signatories were not prohibited from doing this under the Companies Act 1985, so don’t be alarmed if you see this in documents signed before 6 April 2008.

**Counterparts clause.** Where parties are not signing the same copy of a document, ensure it contains a provision allowing it to be executed in counterpart. A counterparts clause can also confirm that delivery by email is an effective mode of delivery.

**Witnesses.** Remember that a party to a deed probably cannot be a witness to execution by another party: *Seal v Claridge* [1881] LR 7 QBD 516.

**Place of execution.** Don’t forget to check whether executing a document in a particular jurisdiction has any tax consequences.

**Use of attorneys.** Where there may be an issue with a signatory being available, consider the use of an attorney.
13. How is a power of attorney executed?

If it is not possible or practicable for a signatory to sign a deed, then a power of attorney will need to be granted by that party in favour of an attorney, who can sign on behalf of the signatory.

A power of attorney must be executed as a deed – s1(1), Powers of Attorney Act 1971 (POAA). Other formalities may also need to be complied with when granting a power of attorney, eg when dealing with transfers of property which are to be executed by an attorney, different rules could apply.

Trustees are not generally able to delegate their powers (save for administrative acts). An express power to delegate would be needed in the relevant trust deed or the delegation needs to be authorised by statute (eg s25, Trustee Act 1925, although this involves notice of the delegation being given to the other trustees).

14. How do attorneys execute documents?

The formalities for execution when an attorney signs are the same as would apply were the attorney executing the document as principal (eg an individual or a company). This is the case irrespective of whether the donor is an individual, a company or an LLP.

For example, in respect of a deed:

- **Individual.** Where the attorney is an individual, he should comply with the requirements for execution by individuals and have his signature witnessed – s1(3), LPMPA 1989. An individual attorney may either sign in his own name or the name of the donor – s7(1), POAA.

- **Company.** Where the attorney is a company, it should comply with the requirements for execution by companies in its jurisdiction of incorporation ie for English companies: (i) the signature of two directors, a director and the secretary, or a director in the presence of a witness; or (ii) by affixing its common seal (see 8 above).

Correct drafting of execution blocks is key. Check the local law requirements where non-English companies or partnerships are executing under a power of attorney as different procedures may apply. Where appropriate, consider seeking an opinion from local counsel as to the due execution of documents.
15. What happens if a power of attorney or other deed is not properly executed by one party?

Under English law, a document purporting to be a deed will generally not be effective as a deed if one of the formalities is not carried out properly. For example, a document which fails to be a deed will not give rise to a valid power of attorney. However, there may be circumstances where the donor could be estopped from denying the validity of a power of attorney which was not properly executed as a deed (TCB Ltd v Gray [1986] Ch 621). This looks unlikely to apply if there has been a complete failure to comply with a requirement for a deed – Briggs v Gleeds [2014] EWHC 1178 (Ch).

A document which fails to be a deed may still be effective as a simple contract or written instrument – eg a failed power of attorney could still establish an agency relationship: Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] Ch 375. But there are important differences between the two, eg while agents may have authority to sign simple contracts on behalf of a principal, they cannot execute deeds, as this power can only be granted by a power of attorney: Phoenix Properties Ltd v Wimple Street Nominees Ltd [1992] BCLC 73.

16. What happens if a multi-party deed is not validly executed by one party?

The relevant document may still take effect as a deed against those parties who have properly executed as deeds. But where all parties need to have executed as a deed, this may not be enough to save the document – for example in Briggs v Gleeds [2014] EWHC 1178 (Ch), a series of documents executed since 1990 (when LPMPA 1989 came into force) were held not to be deeds executed by the employer (in Gleeds this was a partnership) as not all the partners had signed and there was no witness.

In some cases (eg a guarantee or security document) a document may be ineffective (even as against the parties who have validly executed) if the document is expressly or impliedly limited so that it does not take effect until it has been validly executed by all parties. This is most likely to apply if execution by the other parties impacts on those who have signed (for example in a guarantee, each guarantor impliedly gives a right of contribution to the others, so failure by one to sign will usually mean that the guarantee fails in full, unless the document itself expressly provides that it does not – Harvey v Dunbar Assets plc [2013] EWCA Civ 952).
In other cases it may be enough if, for example, a majority of trustees executes a deed. For example, if the trust deed and rules governing the scheme allow majority decisions at trustee meetings and that a document signed by a majority of trustees binds the trustee body, this may be enough to save a document executed by a majority – *Re Equiticorp International plc* [1989] 1 WLR 1010. Or if the deed has been approved by all the trustees, the doctrine that ‘equity deems that to be done that ought to be done’ may apply: *HR Trustees Ltd v Wembley plc* [2011] EWHC 2974 (Ch).

If a trustee is named in the document, but has ceased to act before the document is signed and delivered this may still allow the document to take effect eg if all the other trustees have signed: *Davis v Richards & Wallington* [1990] 1 WLR 1511.

**Interpretation.** When drafting or reviewing a power of attorney remember that the acts it authorises the attorney to do is a question of construction of the document and that it will generally be construed strictly by a court: *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

**Identity of donor.** While the directors as a board may, subject to the company’s articles of association, be able to appoint an attorney to act on behalf of the company (eg to enable an individual to execute documents to which the company is a party on its behalf), the office of a director (or trustee) is personal. He or she cannot delegate his or her powers and responsibilities as a director (or trustee) to an attorney unless this is specifically permitted by the articles (or trust deed). However, remember that a director (or trustee) may, if permitted by the company’s articles (or the trust deed), appoint an alternate to act in his or her absence.

**Scope.** Once a power has been granted, the donor cannot extend the attorney’s powers informally. Consider the scope of the attorney’s powers upfront, in particular whether the attorney should or should not have the power to agree amendments or variations to relevant documents. An attorney is only permitted to delegate his or her power (or to appoint a substitute to exercise the power) if this is expressly permitted by the terms of the power of attorney.
**Duration.** If it is silent as to duration, a power of attorney will generally continue until renounced by the attorney or revoked by the donor or a sole attorney. If it is expressed to be irrevocable and given to secure a proprietary interest of the attorney, or the performance of an obligation owed to the attorney, then for so long as the attorney has that interest or the obligation remains undischarged, the power will remain in force unless the attorney consents to its revocation (s4(1), POAA). This formulation is often seen in security documents or joint venture agreements where a shareholder grants a power of attorney to the company to enable it to transfer its shares in accordance with the terms of the agreement in the event that it defaults on its contractual obligations.

**Multiple attorneys.** If more than one attorney is appointed, the power of attorney should expressly state whether it is a joint or joint and several appointment. Unsurprisingly, if appointed jointly, then the authority must be exercised collectively and the acts of one attorney cannot bind the other(s) or the donor: *Brown v Andrew* [1849] 19 LJQB 153.

Where an English law governed power of attorney is to be exercised abroad it may also need to be notarised, legalised or apostilled (see 18 and 19 below). It is therefore prudent to take local advice to avoid any delays.

18. **What is notarisation?**

In many civil law jurisdictions (including Germany, France, Belgium and the Netherlands) some documents must be signed before a notary to be legally effective. A notary is a person authorised to perform certain legal formalities, including authenticating contracts and other documents and certifying their due execution. The time taken and costs of notarisation vary (costs may be a proportion of the contract value so could be substantial) so take local advice early.
19.
What is legalisation and apostilling?

Sometimes notarised documents must also be 'legalised' or 'apostilled' in order to be enforceable.

In the UK, ‘legalisation’ generally refers to the process whereby a notary’s signature and seal are certified as genuine (usually by the appropriate foreign embassy) in order that it can be recognised and used abroad. To avoid the often cumbersome process of legalisation, various states (including the UK) have ratified the Hague Convention of 1961 pursuant to which a notary’s signature and seal can, instead, be certified as genuine by the competent authority of the state in which the document was executed (eg the Foreign and Commonwealth Office in the UK) – a process called ‘apostilling’. Local advice is needed to establish if this is required.