# Execution of documents

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### How should written documents be executed under English law?

It depends on:

1. whether the document is a simple contract or a deed; and
2. the identities of the parties executing the document.

## SIMPLE CONTRACT OR DEED?

### Simple contracts

### What is the difference between a contract and an agreement?

None. It doesn't matter whether a document is called a contract, an agreement or by any other name. If the parties have the capacity and intention to contract; the terms are sufficiently certain; the purpose is not illegal; and there is valuable consideration; a document creating rights and obligations between the parties will be construed as a simple contract, unless either:

- it is a deed; or
- it expressly states that it is "subject to contract" and/or that it is not intended to create legally binding rights or obligations between the parties.

Care must be taken when drafting heads of agreement (also known as heads of terms, letters of intent, memoranda of understanding and term sheets), the purpose of which is to identify the principal elements of a transaction but **not** to create a binding contract. These are construed in accordance with their terms and it is not impossible for a court to find that a binding agreement exists, even where the document is marked "subject to contract", if the true construction of the document is that the parties intended to create a binding contract. Note that heads of agreement may also have tax consequences.

### Does a contract have to be in writing?

Not unless the law specifically provides that the contract or evidence of it must be in writing or by deed. Examples of contracts that must be in writing include:

- contracts for the sale of land (but note that conveyances of land must be by deed);
- declarations of trust over land;
- transfers of the legal title to shares;
- transfers of most intellectual property rights;
- legal assignments of the benefit of a contract;
- dispositions of equitable interests or trusts;
- guarantees (but see below).

### Deeds

### When is a document a deed?

A deed is a written instrument by which an interest, right or property passes or is confirmed or an obligation binding on some person is created or confirmed (Law Commission Consultation Paper No.143, November 1996, paragraph 2.6 Part II). It must be:

1. in writing;
2. clear on its face that it is a deed* (this can be done by the document describing itself as a deed or expressing itself to be executed as a deed or in some other manner);

3. validly executed*;
4. delivered.

At common law, a deed was required to be in writing on paper or parchment, executed under seal and delivered. The requirements marked with an asterisk were introduced by section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 ("**LPMPA**"). Former requirements that a deed be on paper or parchment only and that it be executed under seal were abolished by section 1(5) LPMPA.

### Why use a deed?

Some documents must be executed as deeds, for example:

- transfers of interests in land situated in England and Wales (section 52(1) Law of Property Act 1925 ("**LPA**"). (There are some exceptions, notably for leases taking effect in possession for a term of less than 3 years and some social housing tenancies (sections 52(2) and 54(2) LPA));
- powers of attorney and amendments to powers of attorney (section 1 Powers of Attorney Act 1971);
- the appointment of trustees, if advantage is to be taken of section 40 of the Trustee Act 1925 by which trust property is vested in a new trustee who is appointed by deed without the need for a separate conveyance.

The parties may want to use a deed:

- to take advantage of the longer limitation period applicable to deeds (12 years from the date on which the cause of action accrued compared with 6 years for a simple contract – sections 8 and 5 of the Limitation Act 1980);
- to ensure that a transaction is legally binding if either no valuable consideration is given or it is unclear whether valuable consideration is being given, for example a guarantee of an existing obligation. But note that the courts will not usually order specific performance of a voluntary obligation under a deed (as opposed to damages for breach).

### How is a deed witnessed?

A witness must:

- be present when the deed is signed;
- attest the execution by the party or parties: that is, sign a statement that s/he 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).

Attestation should be at the same time as signing by the party (Wright v Wakeford [1812] Eng R 56 and Netglory Pty Ltd v Carratti [2013] WASC 364).

There is no legal requirement for a witness to print his/her name or address next to his/her signature but this is often done to help trace the witness if any questions subsequently arise concerning execution. Note, however, that guidance notes issued by the Land Registry state that the Land Registry will not accept a deed unless the name(s) and address(es) of the witness(es) appear on it in legible form.

### Who can witness a deed?

A party to a deed cannot witness signature by another party (Freshfield v Reed [1842] 9 M&W 404 and Seal v Claridge [1881] 7 QBD 516). A witness need not be independent, however, and the signature of a party can be witnessed by an employee, agent or director of that party (Peace v Brooks [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)). There is also no prohibition on a spouse or civil partner of a party witnessing that party's signature or of a minor acting as a witness. In practice, given that the purpose of requiring signatures to be witnessed is to provide unbiased evidence of what was signed by whom and when, witnesses should always be independent.

### When is a deed delivered?

A deed is deemed to be delivered by a party when s/he expressly or impliedly acknowledges, by words

or by conduct, a clear intention to be bound by it. Physical delivery is not necessary.

There are rebuttable statutory presumptions that:

1. a deed is delivered by a company when it is executed (section 46(2) Companies Act 2006 ("CA")); and
2. in favour of a purchaser, a deed is delivered by a corporation aggregate (such as a local authority) when it is executed (section 74A(2) LPA).

Both presumptions can be disapplied, for example by not dating the deed and adding a provision that the deed may only be treated as having been delivered when it is dated.

Where a party executes a deed and sends it to his/her lawyer to hold pending other signatures, this will not usually constitute delivery. Where a conveyancer purports to deliver a deed on behalf of a party to the disposal or creation of an interest in land, there is a conclusive presumption in favour of a purchaser that the conveyancer is authorised to deliver it (section 1(5) LPMPA). The guidance notes issued by the Land Registry state that the Land Registry will assume that a deed has been delivered unless there is some indication to the contrary, such as the words of execution having been modified to provide that delivery has not taken place or that delivery is not to be presumed until some condition has been fulfilled.

Delivery is irrevocable unless the deed includes an express right of revocation, but it may be conditional. Where a deed is delivered subject to the fulfilment of conditions, it is said to be delivered in escrow. Such delivery is irrevocable (Beesley v Hallwood Estates Ltd [1961] Ch 105) but the deed will not become effective unless and until the escrow conditions are satisfied. It will then take effect from the date it was delivered in escrow, unless the parties agree that it should only take effect from the date which the conditions were satisfied (Alan Estates Ltd v WG Stores [1982] Ch 511). From 6th April 2013, where a company creates a registerable charge and delivers it in escrow, the charge is deemed to be created on the date of delivery into escrow regardless of any contrary provision, and the charge must therefore be registered within 21 days of this date.

Note that the Land Registry may not accept deeds for registration unless they comply with the requirements set out in Land Registry Practice Guide 8 - Execution of Deeds which can be found at

https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds

These requirements may exceed the strict legal requirements relating to valid execution of deeds.

## THE PARTY EXECUTING THE DOCUMENT

### Individuals

#### How does an individual execute a simple contract?

Usually by signing or making his/her mark on it. There is no requirement that the individual's signature be witnessed. An agent can sign on an individual's behalf provided the agent has appropriate authority. The agent's authority need not be in writing and may be actual, implied or ostensible (see below). An agent signing a contract gives an implied warranty to the other parties that s/he is duly authorised to sign unless this is explicitly excluded (Starkey v Bank of England [1903] AC 114).

#### How does an individual execute a deed?

Generally, an individual must sign or make his/her mark in the presence of a witness who must attest the individual's signature. If an individual is physically incapable of signing, s/he can direct that it be signed in his/her presence and the presence of two witnesses who must both attest the signature (section 1(3)(a)(ii) LPMPA).

### Companies

#### How does a company execute a simple contract?

The common law rule is that unless there are specific statutory provisions applicable to a body corporate, it must execute all documents by affixing its common seal in the manner prescribed by its constitution. Companies incorporated in England and Wales need no longer have a common seal and a simple contract can be executed:

1. by the company; or
2. on behalf of the company by a person with express or implied authority to sign on its behalf (section 43(1) CA).

The company can execute the contract:

- by affixing its common seal (if it has one)(section 44(1)(a) CA); or
- by two directors or one director and the secretary signing the contract (section 42(2)(a) CA) (but note that one individual cannot sign as both director and secretary (section 280 CA); or
- by one director signing the contract in the presence of a witness (section 44(2)(b) CA).

A person signing a simple contract on behalf of more than one company must sign for each company (section 44(6) CA).

For companies incorporated overseas, a simple contract can be executed by the company:

- by affixing its common seal; or
- in any manner permitted by the laws of the territory in which is incorporated;

and on the company's behalf by any person with express or implied authority to sign on its behalf (sections 43, 44, 46 and 49 CA as modified by regulation 4 of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009).

### How does a company execute a deed?

A company incorporated in England and Wales can execute a deed in the same manner as it can execute a simple contract, that is:

- by affixing its common seal; or
- by two directors or one director and the secretary signing the deed; or
- by one director signing the deed in the presence of a witness.

However, the only person who can execute a deed on behalf of a company is a duly authorised attorney who must sign the deed in the presence of a witness (where the attorney is an individual) or execute it in the prescribed manner (where the attorney is a company). Note that where a director ceased to hold office between the dates of execution and delivery of a debenture, the debenture was held to be validly executed in accordance with the requirements of section 44 CA (Re Armstrong Brands Ltd (In Administration) [2015] EWHC 3303 (Ch)).

For companies incorporated overseas, a deed can be executed by the company in the same manner as a simple contract.

### What if an attorney or director or secretary is also a company?

If the company is incorporated in England and Wales, the same rules apply whether it is executing a document in the name of or on behalf of another person or it is executing a document in its own name and on its own behalf (section 44(8) CA). If the company is incorporated overseas, advice from local lawyers should be sought.

## Local Authorities

### How does a local authority execute a simple contract?

A local authority is not a company within the meaning of the CA but it is a body corporate. As already stated, the common law rule is that unless there are specific statutory provisions applicable to a body corporate, it must execute all documents by affixing its common seal in the manner prescribed by its constitution. For simple contracts, the rule was modified by section 1 of the Corporate Bodies' Contracts Act 1960 under which any person with express or implied authority to do so can sign a contract on behalf of a body corporate.

### How does a local authority execute a deed?

Except for provisions relating to parish councils, there are no specific provisions in the Local Government Act 1972 ("**LGA**") governing the use of a local authority's seal (although the LGA does provide that use of the seal may be dealt with in standing orders made by the local authority (section 99 and Schedule 12 LGA)). A local authority should therefore execute a deed under its common seal in accordance with its constitution.

When considering the execution of a deed by a local authority, it is essential that an up-to-date copy of the local authority's constitution should be considered.

Parish and community councils need not have a common seal (sections 14(3), 33(3) and (4) LGA). Where such a council has no seal, it can execute a document by two of its members signing and sealing the deed on its behalf. It would appear that the members must execute the deed under seal (rather than simply signing in the presence of a witness).

## Charities

### How do the trustees of a charitable trust execute a simple contract?

A charity commonly takes the form of a company (usually a company limited by guarantee or a community interest company) or that of a trust. Where it takes the form of a trust, the charity trustees can, subject to the trusts of the charity, authorise two or more of their body to execute documents in the names and on behalf of all the trustees. A document executed pursuant to such an authority has the same effect as it would have if it had been executed by all the trustees (section 333 Charities Act 2011 ("**ChA**").

Such an authority can be:

- general or limited in such manner as the charity trustees think fit;
- conferred on any two or more of the trustees or restricted to named persons;
- be given in writing or by resolution passed at a meeting of the charity trustees.

Once conferred, the authority has effect, subject to any restrictions contained in it, until revoked.

If no authority has been granted under section 333 ChA, the provisions of the charity's governing document (trust deed, declaration of trust or Charity Commission Scheme) govern the manner in which documents can be executed by the charity trustees.

### How do the trustees of a charitable trust execute a deed?

Section 333 ChA applies to the execution of documents, that is both contracts and deeds. Charity trustees can therefore execute a deed in the same manner as they would execute a simple contract.

## Authority to sign

### How do I know whether a person has express or implied authority to sign for a company or a local authority?

Express authority may be given under the company/local authority's constitution or by a resolution of its governing body or its members, and can be evidenced by a certified copy of the relevant provision or resolution.

Implied (sometimes called usual) authority is trickier! It arises where a person holding a particular office usually has power to enter into the contract in question. For example, the managing director of a company normally has power to enter into contracts with suppliers and customers in the course of the company's day-to-day business. Because it is implied, there is no documentation evidencing such authority. If there is any doubt, it is advisable to ensure that the director/officer/member has been given express authority to execute the contract in question.

A company director cannot have actual (that is, express or implied) authority to act in a way which he does not consider, in good faith, to be in the company's interest (LNOC Ltd v Watford Association Football Club Ltd [2013] EWHC 3615 (Comm)).

### What if the person signing on behalf of a company or a local authority doesn't have actual authority to do so?

A company/local authority will be bound by a contract which an officer/member purports to make on its behalf if s/he acted within his/her ostensible or apparent authority. It will also be bound if a presumption of due execution applies. Note that in these cases, although the contract will be binding on the company/ local authority, the other contracting party or parties will not be bound.

## Ostensible or apparent authority

When an officer/member either:

1. purports to exercise wider powers than s/he has actually been granted; or
2. has not been validly appointed;

the company/local authority will be bound by a contract which s/he purports to make on its behalf if s/he acted within his/her ostensible or apparent authority.

Such authority can arise in two ways:

- where an office carries implied authority to enter into certain types of contract on behalf of the company/local authority, a third party is entitled to rely on this, even if the officer is expressly restricted from entering into such contracts, for example contracts in excess of a certain value. The company/local authority will be bound if the officer enters into a contract in breach of the restriction, unless the other party to the contract knew of or should have suspected the lack of authority;
- where a company/local authority or its governing body holds an officer/member out as having authority and a third party contracts with the company/local authority in reliance on this assurance, the company/local authority may be estopped from denying the officer/member's authority even where there has been no valid appointment (Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2QB 480).

## Presumptions of due execution

1. Section 44(5) CA provides that in favour of a purchaser, a document is deemed to have been duly executed by a company if it purports to be signed in accordance with section 44(2) CA (that is, be signed by two directors or one director and the secretary or by one director in the presence of a witness). A "purchaser" means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property. In a recent case it was held that a party lacks good faith only where the circumstances are such that any belief by it that the director has actual authority would be dishonest or irrational (Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (In Liquidation) [2010] HKCFA 63).

2. Section 335(5) ChA provides that where a document purports to be executed in pursuance of section 335 ChA, then in favour of a person who (then or afterwards) in good faith acquires for money or money's worth:

- an interest in or charge on property; or
- the benefit of any covenant or agreement expressed to be entered into by the charity trustees;

it is conclusively presumed to have been duly executed under section 335 ChA.

3. Section 74(1) LPA (as amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005) provides that in favour of a purchaser, an instrument shall be deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation's seal purports to be affixed to the instrument in the presence of and attested by:

- two members of the board of directors, council or other governing body of the corporation, or
- one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.

A purchaser is defined for these purposes as a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property". Valuable consideration includes marriage or civil partnership but excludes "a nominal consideration in money" (section 205(xxi) LPA).

4. At common law, where a person seeking to rely on a deed can show that the seal of a corporation has been affixed by those with legal custody of the seal, the burden of proving that it has not been affixed with the necessary authority is on the other party (Clarke v Imperial Gas Light and Coke Co [1832] 4B & Ad 315).

These notes do not deal with execution of documents by partnerships, LLPs, unincorporated associations or corporate bodies other than local authorities.

## EXECUTION OF DOCUMENTS BY VIRTUAL MEANS

### Can signature pages be pre-signed or exchanged by email?

The Law Society has issued a practice note which considers three options:

- scanning the entire document including the signature page and returning it by email;
- scanning only the signed signature page and returning it by email;
- sending a pre-signed signature page in advance of the document being finalised.

The table reproduced below summarises the Law Society's advice on which option can be used for the types of document listed.

| **Type of document** | **Option 1 -** Return entire document plus signature page | **Option 2 -** Return signature page only | **Option 3 –** send pre□signed signature pages in advance |
|---|---|---|---|
| Deeds | Yes | No | No |
| Real estate contracts | Yes | No | No |
| Guarantees (stand-alone or contained in simple contracts) | Yes | Yes | Yes |
| Simple contracts (not incorporating any of the above) | Yes | Yes | Yes |

For further details see the Law Society's Practice Note on Execution of Documents by Virtual Means which can be found at

http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-documents-by-virtual-means/

**If you have any queries relating to this guide or wish to seek legal advice, please contact:**
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