TRAVERS SMITH

Execution of documents – the validity of electronic signatures and other FAQs

Document execution sounds like a dry topic, but last-minute problems with execution can derail the most carefully-negotiated and documented transactions. In this increasingly digital age, the validity of electronic signatures is top of our list of FAQs, but more traditional questions as to the manner of execution never seem to go away. We hope you find our list helpful.

1. Electronic signatures – are they valid?

Under UK law, electronic signatures are widely defined and can include a pdf or image file of a signature which is sent by email as a substitute for the signatory actually signing the contract in person, or even the addition of a person's name or initials at the end of an email (if it is clear that this is intended to indicate their personal authorisation of the email and all the other elements of a contract are present). In short, all these methods would potentially be valid means of executing a document (under the Electronic Communications Act 2000) but there are risks associated with them, such as:

- **Impersonation:** it is easy for someone to steal an image file or make their own copy, and pretend to be the signatory.
- **Tampering:** e-mail messages can be intercepted and it is easy to tamper with an electronic document without leaving any traces behind.
- **Evidential considerations:** in view of the above, there may be problems establishing that the signature is genuine and also that the signatory intended to be bound, should you need to rely on it in court.

To overcome these problems, there are commercial electronic signature products which make use of encryption technology and authorisation certificates, but these are not yet widely used.

If a "virtual" signature is required for timing or other practical purposes, it is safer to follow the Mercury guidance on virtual completions from the Law Society – click here.

"electronic signatures are ... potentially valid ... but there are risks associated with them"

2. Separating execution and delivery

Extra care should be taken with deeds signed in advance of a virtual signing. Unless otherwise indicated, deeds are deemed delivered (and therefore take effect) on execution, so a deed executed in advance may unintentionally take effect immediately, unless there is suspensory wording in:

- the testimonium clause (*e.g. "executed as a deed by [●] and delivered on the date appearing on page* [●]")
- an escrow letter or agreement - the existence and nature of an escrow condition(s) should be clearly outlined in a letter or agreement signed by all parties to the document to be delivered in escrow; and/or
- the board minutes authorising execution on behalf of a corporate party.

"a deed executed in advance may unintentionally take effect immediately"

3. Document signed but not dated

Unless the dating of a deed is explicitly made an escrow condition, the absence of a date on a deed purportedly signed "in escrow" does not of itself make it revocable or invalid. Whether dating of the deed is an escrow condition will be a question of fact. If there is no written agreement documenting an escrow arrangement, there would have to be objective evidence of an understanding that the deed is not to be treated as coming into effect before a certain date or until satisfaction of a certain condition.

"the absence of a date on a deed purportedly signed "in escrow" does not of itself make it revocable or invalid"

4. Who can act as a witness?

By common law, one party to a contract should not act as a witness to the signature of another party to the same contract. There is no case law on the point, but it is also inadvisable for a director of a corporate party to witness the signature of another party.

Nor is there a statutory requirement of independence for a witness to a signature, but it is preferable for the witness to be someone other than the spouse or other relative of the signatory so that the independence of the witness cannot be called into question should the circumstances in which the document was signed ever be challenged in court. Similarly, a child should not act as a witness as there may be a question as to their capacity to act as such. In some cases, statute or regulation requires the witness to be a professional person.

"one party to a contract should not act as a witness to the signature of another party"

It is more of a convention than a requirement for the witness to print their name, address and occupation but it provides a useful record should the witness need to be called upon to verify a signature.

5. After-the-fact problems with attestation

Where attestation is required, the witness must actually be present when the signatory signs, although by common law, the doctrine of estoppel may prevent a party relying on the fact that the witness was not physically present, if the parties acted on the assumption that the deed was properly executed.

A document which purports to be a deed but was not properly executed as such (e.g the signature of a company director was not witnessed) may only take effect as a simple contract if it satisfies all the other criteria for a contract, and a deed was not required (e.g for a power of attorney).

6. Missing signatures

If there is a signature block for a party but no signature, then unless that person's execution of the document is a condition of validity (which will be a question of fact/construction) the document may be valid as between those parties who have signed it. If the party who has not signed is the obligor, however, it cannot take effect unless a court would be satisfied that, by going ahead with performance of the obligations, the obligor has indicated acceptance through its conduct (and any requirement for signature has been waived). If the document is required by law to be executed as a deed in order to be valid, lack of signature will be fatal, but if not, it could potentially still take effect as a simple contract (see above).

"it could potentially still take effect as a simple contract"

7. One director/secretary signing for several corporate parties

Opinion is divided on whether a single director/secretary can sign once for several corporate parties, or whether a separate signature is required for each company. Our interpretation of section 44(6) Companies Act 2006 is that separate signatures are required, but it seems that the Land Registry will accept a single signature as long as it is clear on whose behalf the individual director or secretary is signing. See the Land Registry guidance here (para 4.5).

"separate signatures are required"

8. Alternates and attorneys

An alternate who is either expressly authorised by the board, or who is on the record as a director at Companies House and the company's articles extend all powers of directors to alternates, may sign contracts on behalf of the company. However, it has always been a matter of some debate as to whether a director can appoint an alternate or attorney to sign a *deed* on his or her behalf as a director. We share the view that this is inadvisable since the word "by" in Section 44(2) of the Companies Act 2006 indicates a personal

obligation (s44(2) provides that a deed will only be validly executed by a company if it is signed *by* a director in the presence of a witness or two authorised signatories). The better route is for the *company* to appoint, by deed, an attorney to execute on its behalf.

An individual executing a deed as attorney on behalf of a company must have his or her signature witnessed as if he or she were executing a deed in their personal capacity.

"The better route is for the company to appoint, by deed, an attorney"

9. Overseas companies

Overseas companies may validly execute an English law document either:

- by writing under the common seal of the overseas company;
- in any other manner permitted by the law of the territory in which the overseas company is incorporated; or
- if the document is expressed to be executed by the overseas company and signed by a person or persons acting under the authority (express or implied) of the company, in accordance with the laws of the territory in which the company is incorporated.

It is advisable to obtain a legal opinion on the local law requirements on valid execution, which also covers any restrictions contained in the constitutional documents of the foreign company.

"It is advisable to obtain a legal opinion on the local law requirements "

10. Invalid execution

So what is the best way to cure a defect in the execution of a document? The answer depends on the nature of the defect. If, for example, a director has executed a document without board authority, board ratification may be an option, or shareholder ratification under Section 239 of the Companies Act 2006, if the default also amounts to a breach of the director's duty to the company. If the document is a deed, ratification would also need to be by way of deed. In either case, if ratification is possible, the document may stand with its original date. Rectification is not always an available option. The Court will order rectification only in very limited circumstances, particularly if the parties are not in agreement as to whether the contract properly reflected their common intention, and in any event, rectification may be inappropriate if the defect is such that no contract exists and there is nothing to rectify. Otherwise, re-execution may be needed, and the effective date will become the date of re-execution, with all the unwinding implications this carries with it.

"if ratification is possible, the document may stand with its original date"

If you have any questions on any of the issues raised in this briefing, please contact either Ian Shawyer or Jim Renahan or your usual contact at the firm.

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