

COVID-19: GOVERNANCE: PRACTICAL ISSUES AROUND SIGNING AND COMPLETION (UK)

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Legal Briefings

Given the current restrictions on interaction which have been imposed by the UK Government and with a large number of people now working from home, it is not always possible to adopt the usual methods for signing and completing deals. We have summarised below some practical points to ensure compliance with the necessary legal formalities whilst these measures remain in place.

DECISION MAKING

How can we pass shareholder resolutions in the current situation?

In the case of a private company consider using a written resolution following the statutory procedure under section 288 of the Companies Act 2006 (“2006 Act”). Remember that a member just needs to signify agreement to the written resolution – this can be by electronic means (eg, email) and does not require a hard copy signature.

Public companies cannot use written resolutions so will need to address the practicalities of holding a shareholder meeting in the current circumstances as well as the usual considerations such as notice and quorum.

How can the board make decisions now that it can’t convene an in-person board meeting?

Check the company's articles of association for provisions around board meetings without the directors meeting physically. For example the 2006 Act Model Articles for public and private companies permit board meetings of directors in different places, provided that they can communicate with each other. The articles may also make provision for other forms of decision-making by the directors - for example, under the 2006 Act Model Articles for private companies unanimous decisions may be made without a formal board meeting, or even without a formal resolution, if the directors indicate to each other by any means that they share a common view (eg, by email). The 2006 Act Model Articles for public companies do not permit such informal decision-making but they do set out a procedure for written resolutions of the directors.

Our company needs to have its board meetings in a certain jurisdiction for regulatory or tax reasons? How can we make sure that is achieved?

The presence of some board members, for example, in the UK for a limited period may not immediately lead to the company acquiring UK residence. Similarly, a single board meeting in the UK may not give rise to UK tax residence. That said, we consider it unlikely that HMRC and the financial services regulators will adopt a flexible stance in this context if restrictions persist so we advise seeking specialist advice.

SIGNING AND COMPLETION

How can we get contracts signed now that everyone is working remotely?

As a starting point, it is worth remembering that a simple contract does not necessarily need to be in writing and can be made orally or by conduct. A contract can also be entered into by means of an email exchange.

However in the case of a written document which is to be signed by the parties, the contract should be emailed to the signatories who should print out the signature page, sign it and then email back a scanned version of the relevant page. This way of "virtually" signing documents is commonly used in normal circumstances to avoid the need for signatories to a document to be physically present in the same place. Provided that the signatory has access to a printer and a scanner (or a smart phone with a scanner app or even a camera) the same means can still be used in the current circumstances. If the signatory does not have access to a printer, consider whether it is possible to courier the document which the signatory can then sign and email back a scanned version.

Please note that this means of signing documents - signing in wet ink and then scanning and emailing the signed document - is different to the concept of an "electronic signature" and "electronic signing" where the signing process is entirely electronic and requires no scanning of wet ink signature pages.

Remember also that real estate contracts or contracts containing real estate provisions must satisfy the requirements of section 2 of the Law of Property Miscellaneous Provisions Act 1989, namely they must be in writing, incorporate all the terms that the parties have expressly agreed in one document and be signed by or on behalf of each party.

Is it possible to execute deeds using the same “virtual signature” method that we use for contracts?

Yes, provided that the following steps are taken:

- Once documents have been agreed, the final execution version of the whole document is emailed to the parties.
- For convenience, a separate extracted signature page may also be attached to the email, but this is not necessary.
- Each signatory prints and signs the signature page, if necessary in the presence of a witness who then attests the signature.
- The signature page is then scanned (including by way of a smart phone scanner app) and returned by email together with the whole document previously emailed to the signatory.

These steps are set out in Option 1 of a guidance note issued following the decision in the *Mercury* case¹ which requires that a deed must be executed as a discrete physical entity at the moment of signing in order to be effective. The guidance note² provides a non-exhaustive range of options available to parties when executing documents at signings at which not all the signatories were physically present to ensure that such documents comply with the decision in *Mercury*.

Who can witness a deed?

In normal circumstances it is best practice to have an independent witness although this is not a legal requirement (save in limited particular circumstances which are unlikely to arise in a commercial context). So, whilst not ideal, a witness can be a family member, spouse or co-habitee, provided they are not party to, or a beneficiary of, the document being witnessed. Also, sensibly, a witness should be over 18, of sound mind and not visually impaired.

How can a deed be witnessed if the signatory lives alone or is self-isolating?

At the present time “in the presence of a witness” still requires the physical presence of the witness. However, we believe that witnessing through a window would be sufficient if the circumstances prevent the witness from being in the same room as the signatory. In this case, if it is possible to pass the document between parties, the witness should sign the same counterpart as the signatory and the signatory should then email a scanned version of the relevant page (with the whole document also attached to the email where it is a deed, as per the *Mercury* guidance referred to above).

If it is not possible to pass the document between the signatory and witness, we suggest that the witness sign a separate counterpart and note that the signatory’s signature was witnessed through a window and a separate counterpart was signed by the witness because of the circumstances of COVID-19. We believe that this could still constitute valid execution between the parties, but this has not been tested and is unlikely to satisfy the necessary requirements when filing documents with third parties.

If a document is to be signed by two directors or a director and a company secretary do they have to sign the same counterpart?

In our view, if two authorised signatories (which, in the case of deeds, means a director or company secretary) sign separate counterparts this should constitute valid execution. This view is supported by the opinion of leading counsel but has not been tested in the courts.

The prudent view is therefore that the signature of both signatories should appear on the same document rather than each signatory signing a separate counterpart. So in practice and in accordance with Option 1 of the *Mercury* guidelines referred to above:

- The final execution version of the whole document is emailed to the first authorised signatory and for convenience, a separate extracted signature page may also be attached to the email.
- The first authorised signatory prints, signs and scans the signature page and then emails it with the whole document to the second authorised signatory.
- The second authorised signatory prints, signs and scans the signature page which now has signatures from both authorised signatories. The page is then returned by email with the whole document.

This method has not been tested in the courts either.

In relation to documents which subsequently need to be submitted to the Land Registry best practice is to avoid this means of execution. The Land Registry had previously advised that where an entity has multiple signatories signing a registrable document all signatories must "sign" the same document. Recent guidance from the Land Registry on the execution of documents using Option 1 of the *Mercury* guidance (see below) does not address this point.

Can the company execute a document using an attorney?

Yes, provided that:

- the attorney has been properly appointed under a Power of Attorney executed as a deed;
- the power has commenced and remains in force; and
- the attorney is acting within the scope of his or her authority.

Although there are some statutory protections available to third parties dealing with an attorney where the power has, unbeknown to them, been revoked, those do not absolve the third party from making sensible investigations as to the position. It is therefore advisable to seek a letter of non-revocation from the attorney if the relevant Power of Attorney was entered into more than 12 months earlier.

A company cannot use a simple agency arrangement in order to execute a deed – the attorney must be appointed by a Power of Attorney which is itself executed as a deed by the company.

Also remember that a director cannot exercise his or her duties by appointing an attorney. Appointing an alternate director would be the correct route, as long as permitted by the company's articles of association.

Can an existing attorney appointed under a Power of Attorney appoint a substitute?

Many companies already have attorneys appointed to execute documents on their behalf. It is therefore worth checking whether the express terms of any Power of Attorney already in place empowers that attorney to either delegate (a delegate acts as an attorney's deputy) or appoint a substitute (a substitute acts as an attorney's replacement).

Please be aware however that this option is **not** available where the relevant attorney has been appointed by a trustee.

Can I use electronic signatures?

In contrast to virtual signings (using wet ink signatures, scanning and emailing as discussed above), electronic signings occur entirely electronically.

There are a number of forms which an electronic signature can take (including a type-written signature, electronically pasting an image, using a stylus pen or even an automatically generated signature at the end of an email) and, so long as the relevant formalities and practical steps are taken, such signatures can ensure that a document is validly signed and has equivalent enforceability to a wet ink signature.

The use of electronic signatures is generally acceptable under English law. Both simple contracts and deeds are capable of being e-signed provided the formalities are complied with. However, as noted above, at the present time “in the presence of a witness” still requires the physical presence of the witness.

For further information about electronic signatures please refer to our detailed briefing available [here](#).

POST-COMPLETION

How should Companies House filings be made?

It is possible to make most filings electronically using the WebFiling service at Companies House. Further information about the online filing service is available [here](#), including a list of the forms and other documents which can be filed online and details of how to register for WebFiling. A personal account is required to use the Companies House WebFiling service (details available [here](#)) and anyone filing on behalf of a company will also need the company’s authentication code.

Companies House has confirmed that it will accept the following forms of signatures (as well as the original) on forms and resolutions:

- images of signatures pasted into a document;
- digital signatures provided by DocuSign or similar providers; or
- a font type keyed in word processing packages - understood to mean a signature typed in a cursive font.

The offices of Companies House and the telephone contact centre are now closed. Any queries should be sent by email to enquiries@companieshouse.gov.uk. Note that there are likely to be delays in answering any queries and also in dealing with any filings or applications.

What about getting documents stamped?

HMRC has published details of a new process which must be followed for stock transfer forms and payment of stamp duty, in light of COVID-19.

In brief, stock transfer forms should no longer be posted to HMRC. Instead, an electronic copy of the form or instrument of transfer (eg, a scanned PDF) should be emailed to HMRC at stampdutymailbox@hmrc.gov.uk. The form must be fully completed, signed, witnessed (where necessary) and dated.

How should hard copy company books be updated?

Companies which keep required registers in hard copy format may currently be unable to access them to make any necessary updates. As a workaround we suggest completing soft copies of the company's registers which can subsequently be added to the physical book.

What about sending documents to the Land Registry?

The Land Registry has recently changed its approach and will now, until further notice, accept for the purposes of registration a transfer or other dispositional deed signed in accordance with Option 1 of the *Mercury* guidance as outlined above. For further information please see the Land Registry's updated guidance - [Practice guide 8: execution of deeds](#).

How should we ensure compliance with notice provisions in contracts?

Contracting parties should take reasonable steps to ensure that the notice comes to the other party's attention and should also comply, to the extent possible, with the contractual notice provisions. So, for example, if a contract requires a notice to be delivered to the registered office address of a company, the notice should still be sent to that address (even though there is a high likelihood that no-one will be there to deal with it) and the notice should also be emailed to any relevant contacts at the company.

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1. *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721
 2. The Law Commission's 2018 [Consultation Paper](#) on the electronic execution of documents contains further details of the *Mercury* case and the subsequent guidance.

[More on COVID-19](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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