

COVID-19 Corporate Update: Signing and Closing Considerations for English Law Transactions

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Corporate

At a time when many companies have been forced to close their offices and have almost all of their employees working remotely, the standard procedures for the execution of documents and addressing signing and closing matters have come under pressure. Below are some practical issues that can arise in the signing and closing of deals which are subject to English governing law (for example, a private M&A transaction or equity investment round), accompanied by some suggestions on navigating these smoothly.

Given that “email execution” (whereby the parties to a transaction can avoid the need for a physical signing meeting via the exchange of PDFs of the original wet-ink signature pages) has become widely accepted in the London legal market, the inability to hold a physical meeting due to the current movement restrictions need not be an obstacle to signing or closing.

However, the flexibility of email execution does not always go far enough for the current circumstances. For example:

- Internal policies at banks and other institutions may insist upon the use of wet-ink originals when signatories working remotely do not have access to printers or scanners;
- Foreign law documents may need to be notarised or apostilled, for which process a physical original may be required; or
- There may be an unavoidable statutory requirement for a document to be filed in hard copy or physically posted to other parties.

These matters highlight the importance of considering the practicalities of signing and closing early in the transaction process, so that any particular steps which may be required are identified and the relevant mechanics agreed with other parties and their counsel.

1. Electronic Signatures

In lieu of printing and scanning a wet-ink signature, an obvious alternative is the use of electronic signatures, (or “e-signatures”). These terms are used interchangeably to refer to a number of methods of applying signatures electronically, namely (and among other possibilities):

- i. the use of .jpeg image signatures which can be inserted into a word or pdf document signature blocks; or

- ii. the signing of documents using an electronic signature platform.

The Law Commission's [September 2019 report on the "Electronic Execution of Documents"](#) has provided recent and authoritative guidance on the validity of e-signatures under English law. In the Statement of Law contained in that report, the Law Commission confirmed, among other things, its views that:

- i. an electronic signature is capable in law of being used to execute a document (including a deed) provided there is intention to authenticate and any execution formalities are followed;
- ii. an electronic signature is admissible in evidence in legal proceedings; and
- iii. where an electronic signature is used to execute a deed, the requirement for a deed to be signed "in the presence of a witness" requires the physical presence of the witness.

As a result, there is greater comfort as a matter of law that e-signatures are available as a tool to sign English law documents, and the Lord Chancellor also expressed agreement with the conclusions of the [Law Commission Report](#) in a Ministerial Statement in March 2020. In the current environment, the availability of electronic signatures may prove particularly valuable.

Nonetheless, there are considerations to bear in mind when considering an e-signature, in particular:

- The legal analysis as to validity varies from jurisdiction to jurisdiction: if a transaction has a cross-border element and involves agreements subject to governing law other than English law or non-UK incorporated parties, it is recommended to consult with local counsel to ascertain the prevailing views as to the validity and enforceability in that market (and obtain an opinion or other comfort if necessary). This is in addition to the usual step of seeking comfort that overseas signatories are properly authorised.
- Place of execution may require consideration in order to avoid inadvertent tax or stamp duty consequences.
- If notarisation/apostilling of the document is likely to be required, bear in mind that notaries may take a more conservative view than other transaction parties and could refuse to notarise/apostille documents signed electronically.
- Electronic signing platforms often use cloud based servers and as such attract attendant risks. It may be possible to use security measures, such as a password and/or PIN provided separately to the signatory, to reduce the risk of a cyber-security breach and third party access but different parties may have different views and approaches in respect of any residual security risk.
- Not all parties to a transaction may be familiar with electronic signing: as a result, signatories may be unfamiliar with the processes involved, and additional time may need to be factored in pre-signing to explain and demonstrate the steps required and to ensure that all signatories have access to the necessary technology when needed.

2. Deeds and Witnessing

The execution of deeds may prove particularly challenging in the current circumstances where the statutory requirement for signature "in the presence of a witness" applies. As mentioned

above, the Law Commission Report confirmed that this involves the physical presence of the witness and that witnessing via a video-link or similar technology was not presently feasible.

- It is therefore prudent when drafting to consider whether it is actually necessary to make the relevant document a deed in the first place. Parties may wish to consider, for example, whether the main advantages offered by a deed (namely the longer limitation period and lack of requirement for consideration) are relevant to their particular document and transaction, and if not, consider providing for execution as a simple contract. Where statute requires a document to be executed as a deed, the document will have to remain in that form.
- If it is absolutely necessary for the document to be a deed, then consider execution by way of electronic signature. Some electronic signature platforms include adaptations to facilitate witnessing and legal advisers may also be able to agree on alternative protocols to ensure signing formalities are complied with. In addition, where a company is signing a deed, signature by two directors is valid and may be preferred over signing by one director and a witness.
- It should be borne in mind that there is no statutory or common law prohibition which prevents a spouse from being a witness, notwithstanding that it is best practice from an evidentiary perspective to ensure that any witness is independent. Many London firms are now taking a pragmatic approach to this issue, with witnessing by family members being considered acceptable unless there are extraneous reasons to suggest this would be inappropriate. If it is envisaged that this may be required, it is recommended to raise this with other advisors as early as possible, to allow all parties sufficient time to get comfortable with the position.

3. Closing: Filings and Deliverables

Restrictions on travel and the widespread closure of non-essential business facilities have the potential to make ordinarily routine matters quite challenging. Below are some common completion tasks which may require a different approach:

- **Board Meetings and Shareholder Resolutions:** if any board meetings are required, a company's articles should be checked carefully to ensure that it's permissible to hold the relevant meeting by telephone or VTC. Consideration should also be given to where the meeting is considered to take place if there are any sensitivities regarding tax jurisdiction of the company. If a shareholder approval is required, the articles should be reviewed to confirm whether members have consented to the receipt of electronic communication. If not, hard copies of resolution will need to be dispatched on the circulation date to ensure compliance with the Companies Act¹.
- **Stock Transfer Forms:** until very recently, HMRC has strictly required the submission by post to the Stamp Office of an original wet-ink signed stock transfer forms for the purposes of dealing with stamp duty. However, as of 25 March 2020, the Stamp Office will now only accept electronic submission of stock transfer forms, which may be scanned to them as pdf from the wet-ink copy or, in an exceptional change of practice, signed with e-signature. Similarly, HMRC has confirmed that stock transfer forms will now not be physically stamped. Instead, once they have checked the form and

¹ Practical Law contains a useful summary of the steps required to take advantage of the electronic communications regime [here](#).

confirmed receipt of payment they will send an email attaching a letter that (i) confirms receipt of stamp duty; (ii) details the transactions HMRC are confirming receipt for and the reference codes; and (iii) provides assurance that HMRC will not pursue a penalty against the company registrar for registering the new ownership of the shares, thereby allowing the register of members to be updated².

- **Data Room USBs:** posting electronic copies of the documents comprising the virtual data room (VDR) to other parties and their lawyers is a customary completion action and has been typically completed by exchange of pre-loaded and security taped USBs for some time. This approach may now prove difficult, given interruptions to standard office services. If speed is important to the exchange of the VDR, consider asking the other legal advisors involved whether their access to the online VDR is accepted in satisfaction of the relevant completion obligation.
- **Companies House Forms:** office closures and restrictions on non-essential services can make the physical posting of these documents to Companies House challenging. If a company is registered for e-filing, then this service should be used to make any required filings online. However, if a company is not registered for e-filing, signing up now may be of limited assistance (authentication codes required to use the system will be posted to the registered office) and there may be no alternative to postage.
- **Share Certificates:** there is a general expectation that hard copy originals of share certificates will be posted to an investor or purchaser on completion, at the same time as a scan of this original is provided. Share certificates are required either to be sealed or, as is more common for private companies, executed on behalf of the company³. Given the difficulties in arranging execution of documents and disruption to postal services and difficulties in accessing these, consider whether it may be appropriate to negotiate a longer period for receipt of the original document.
- **Statutory Books:** though the maintenance of company records in electronic form is permissible under the Companies Act 2006⁴, many companies will maintain their books in hard-copy form. If these are located at a company's registered office, as is common practice, there are likely to be practical difficulties in updating these statutory books to record any changes in ownership.
- **Certified Copies:** if any certified copies of documents are required, consider how these will be dealt with well in advance. If a wet-ink or other original document needs to be certified, the person certifying the document will need to have sight of the original which could involve significant lead-time due to postal disruption, and this will need to be factored in to post-closing timelines.
- **Registration of Charges:** the registration of a charge requires a certified copy of the original charge instrument⁵. Companies House will accept an electronic filing of a pdf copy of the charge instrument with an appropriate certification, which should speed the process in most instances. Timely filing of charges remains important, and filing must occur within 21 days to avoid serious consequences (including, most significantly, a loss

² The full HMRC update is available [here](#).

³ ss. 769 and 45 Companies Act 2006

⁴ s.1151 Companies Act 2006

⁵ s.859A Companies Act 2006

of priority and the need to apply to court to register the charge out of time). Given possible delays both in postal services and to processing times at Companies House, electronic filing of charges is likely to be a useful and preferred option.

4. Pressure Points

Whilst many of the issues identified above can be addressed by pragmatic workarounds agreed between the parties and their legal advisors, there remain areas in which there are currently limited solutions:

- **Documents to be filed at HM Land Registry:** HM Land Registry has [announced a change in practice](#) so that land charges applications may now be made via email, attaching pdf copies of relevant documents, in certain circumstances. The application of those circumstances will need to be checked, however, and there may be other documents for which only a wet-ink signature is acceptable. HM Land Registry is also suffering disruption and delays to a number of services which may be relied upon to complete transactions.
- **Statutory Declarations:** required in a wide range of circumstances, including when placing a company into administration or a voluntary liquidation, a statutory declaration needs to be sworn before a solicitor, commissioner for oaths or notary. At this time no clear workaround to this requirement is available.

The approach to executing and delivering transactions will continue to be under pressure for the foreseeable period and different transactions may require unique solutions. Further updates will be circulated from time to time to reflect any additional governmental measures or general market practices adopted to facilitate transactions during the COVID-19 outbreak.

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