

Dentons DCM Quick Guides

Practical summaries of 2021 DCM Hot Topics, condensed to be digested alongside your morning coffee...

Lockdown Logistics: Witnessing documents under English law

As all those involved in DCM transactions will be acutely aware, the coronavirus pandemic has raised novel logistical challenges regarding the remote signing of transaction documents. On 6 January 2021, the Law Society published a Q&A which explains how to use electronic signatures and complete virtual executions, and contains useful guidance as to the views of the Law Society's Company Law Committee as to general practice in commercial and contract law, including witnessing signatures. This note is a brief summary of some of the considerations and practicalities for witnessing a signature under English law in a remote working environment.

This is a high-level summary only, and does not address other legal issues relating to signing, such as capacity and authority of the parties to a transaction, any internal policies parties may have or any further formalities required post-signing (for example, by the HM Land Registry or the HMRC).

When is a witness required?

Most agreements governed by English law can be made without any formalities, including signature. Although in practice most commercial contracts are signed by or on behalf of the parties, witnessing of those signatures is usually not required.

Witnessing most commonly arises when one or more parties is entering into a deed. Deeds are used for various reasons, including: (i) where they are required by law, e.g. on the transfer of real estate or the grant of a power of attorney; (ii) where there is a lack of consideration which will prevent a simple contract from being formed; (iii) being a preferred method of creating enforceable obligations in favour of an identifiable group or class of beneficiaries who are not a party to the deed (as in, for example, a deed of covenant in a bond issue); and/or (iv) in order to ensure a longer limitation period of 12 years (six years for simple contracts).

A deed involves a particularly high degree of formality, including making clear on the face of the document that it is a deed and its valid execution as a deed. As well as a signature (see also the Dentons DCM Note “Electronic signatures for English law documents” for more information), valid execution as a deed sometimes involves a witness “attesting” the signature – meaning that the witness observes the party applying their signature and then applies their own signature to confirm that they have done so.

The Law of Property (Miscellaneous Provisions) Act 1989 (**LPMPA 1989**) and the Companies Act 2006 (**CA 2006**) set out the formalities for the execution of English law deeds by various types of legal entity. These include (but are not limited to) the following which are more commonly seen in DCM transactions:

UK companies

Section 44 CA 2006: signature by two directors, by a director and a company secretary, or by a director in the presence of a witness who attests the signature.

A UK company is a company incorporated in England, Wales, Scotland or Northern Ireland.

Individuals

Section 1(3) LPMPA 1989: signature by the individual in the presence of a witness who attests the signature.

Non-UK companies

The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 which adapt and apply *Section 44 CA 2006*: signature by 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. A witness is not required.

Where a non-UK entity is executing an English law deed, the local law of the relevant entity’s jurisdiction determines whether one signatory (or more) is required to bind the company in question i.e. as to the question of authority. It is key to check this with local legal advisers. However, whether a signature needs to be witnessed or not is a question of formality rather

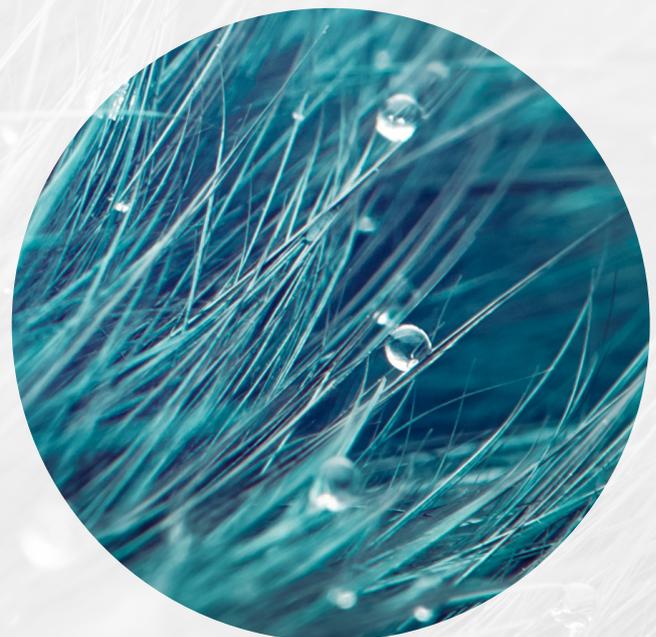
than of authority, and so is a question of English law when the party is executing an English law deed.

Branches

A branch or office does not have a separate legal personality. Therefore, where a company incorporated in a non-UK jurisdiction is acting through a UK branch, it should execute a deed as any other non-UK company would, with questions of authority determined by the law of the relevant non-UK jurisdiction.

Execution by attorneys

A party to a deed can also authorise another person to execute the deed on their behalf. This authority must be given by deed and is most commonly provided under a power of attorney. The attorney must execute the deed in accordance with the formalities that would apply if it were itself the party to the deed. So, an individual attorney must sign in the presence of a witness. To avoid one or more of their directors having to sign all deeds they enter into, UK financial institutions and other large corporates often appoint a wider range of their officers as attorneys to execute deeds on their behalf.



What does attestation by a witness involve?

Legislation does not specify how a witness should attest a signature. The usual practice is for the witness to: (i) witness (i.e. observe) the signatory signing; and then (ii) attest that they have witnessed the signature by signing their own name as witness, and printing their name and address (which may be the address of their place of work rather than their personal address). Sometimes, a witness adds their occupation. The address and occupation are there to aid in the later identification of the witness, should they ever be required to provide evidence as to the genuineness of the signature that they witnessed.

The same witness may witness more than one individual signature. However, each signature should be separately attested, unless express wording on the face of the attestation makes it absolutely clear that the witness is witnessing all signatures in the presence of the named signatories.

Who can witness?

UK legislation does not specify who may witness the signature of a single director or an individual. It is therefore necessary to use common sense supported by case law where relevant. The issue of the preferred identity of the witness (other than in relation to the first bullet point below where there is clear precedent) is one of evidential weight. Remember that a witness to a signature may be required to testify that the document was signed by the signatory in their presence and it is possible for the reliability of the evidence presented by certain witnesses to be diminished. For example, would an eight-year-old be a reliable witness?

In summary, general practice and precedent dictate whether it would be acceptable for the following categories of persons to act as witness to a signature (subject to the express terms of the document in question):

- **Unacceptable:** Another party to, or beneficiary under, the deed.
- **Avoid:** A minor, a person who is bankrupt or of unsound mind or frail/infirm/elderly.

- **Acceptable:** The witness should be a disinterested, reliable person, who may, in unusual circumstances, such as COVID-19 lockdowns, be a spouse or a close relative of the signatory (subject to the criteria in the two bullet points above).
- **Best practice:** A disinterested, reliable person who is not a close relative of the party signing the deed, such as a solicitor (for either party or independent), a neighbour or a colleague of the signatory (subject to the first two bullet points above).

Is it possible to witness an electronic signature?

There is no legislation or case law confirming unequivocally that an electronic signature can be witnessed under English law.

However, the Law Commission's September 2019 report entitled "Electronic execution of documents", which has been endorsed by the UK government (the **Law Commission's 2019 Report**), concluded that it is possible for an electronic signature to be witnessed, provided the witness is physically present (i.e. standing over the shoulder and observing the signatory) when the signature occurs.

In addition, in July 2020 the Land Registry stated that "until further notice" it would accept witnessed electronic signatures for certain registrations (please note, additional formalities are also required for documents registrable at HM Land Registry and this article does not speak to these).

Electronic signing platforms, such as DocuSign, offer functionality for electronic signatures to be attested by a witness, who also signs with an electronic signature. As expanded upon in the following section, the witness of an electronic signature should still be physically present to witness the signature – it is simply that the witness attests in the form of an electronic signature rather than a "wet-ink" signature.

Is “virtual” witnessing permitted?

A witness must: (i) be physically present in person at the location of the signing; and (ii) observe the act of signature by the person signing the deed.

The Law Commission’s 2019 Report confirmed that, whether the signing of a deed is taking place physically (using a “wet ink” signature) or electronically (whether via an electronic signature platform or an equivalent method), the witness must be physically present in the same place. This is the case even where both the person executing the deed and the witness are executing/attesting the document using an electronic signature. The observance of the signatory signing the relevant document cannot be done remotely, e.g. via video link or another form of technology.

In the Law Society’s Q&A published in January 2021, the Law Society suggests that where individuals are required to socially distance, in order to comply with the requirement for a witness to be physically present, practical solutions can include witnessing: (i) through a window (open or closed); (ii) at a distance; or (iii) in an outside public space. The key factor is that the witness is still physically present and able to see the signatory sign the document; as a result, these are all considered valid methods of witnessing.

While the requirement for a witness to be physically present also applies to “wet-ink” signatures, the risk of a virtual witnessing taking place is arguably lower in this context. Given continued travel and work restrictions due to the pandemic, there is a risk that a signatory may attempt to involve a witness who is virtually, rather than physically, present. Therefore, best practice when a signing is taking place electronically is to add a confirmatory statement into the attestation clause, stating that the witness is physically present.

Is there an alternative to involving a witness?

Due to the requirement for physical presence, witnessing a signature (electronic or physical) in person can add an element of complexity to the signing process. If there is an obvious alternative execution method that does not involve witnesses, this may be preferable. For example, a UK company can execute a deed by the signature of two directors, or a director and the company secretary (in each case without a witness), rather than by the signature of a single director with a witness.

Will the position change in the near future?

For “presence” to mean anything other than “physical presence” in the context of witnessing signatures on a deed in a DCM transaction, it will require: (i) developments in case law or statute; and (ii) further consideration to be given to the technical aspects, logistics and reliability of the potential alternative “virtual” methods of witnessing.

The Law Commission’s September 2019 report makes various recommendations for reform, including suggesting that an industry working group should consider potential solutions to the practical and technical obstacles to video-witnessing of electronic signatures on deeds and attestation, following which the UK government should consider legislative reform to allow for video-witnessing.

Key Contacts

This note is an overview of a complex topic. It is not legal advice and no person should take any specific action on the basis of its contents. Please contact the Dentons Debt Capital Markets team if you want to discuss the logistics of lockdown. We are happy to chat, on the phone or via video-conference.

Dentons Debt Capital Markets team is led by **David Cohen**. Other members of the team include **Nick Hayday, Neil Dixon, Alex Roussos, Victoria Wyer,** and **Cameron Half**. The partners are supported by Senior Associates **James Osun-Sanmi** and **Brian O’Leary**. **David Ferris** is the team’s Managing Practice Development Lawyer. **Adam Pierce** is the Knowledge Partner of the Dentons Banking and Finance Practice in London.



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