

NOTE ON EXECUTION OF DOCUMENTS AT A VIRTUAL SIGNING OR CLOSING

1. Background

This note has been prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees (the **JWP**).

The purpose of this note is to record a (non-exhaustive) range of options available to parties when executing documents at 'virtual' signings or closings (i.e. where some or all of the signatories are not physically present at the same meeting).

This note is not intended to imply that virtual signings and closings cannot, or should not, be conducted in other ways. This note is simply intended to facilitate virtual signings and closings, in the light of the *Mercury* case. This note is relevant for virtual signings and closings of documents governed by English law.

Each transaction should be approached according to its own facts – including the countries of incorporation of the parties (and each party's domestic rules and internal procedures for execution of contracts), the content of board resolutions, whether the transaction requires individual contracts to take effect in a particular sequence, and whether a legal opinion is being issued on a given party's due execution of the documents. In cases where particular procedures or restrictions apply to the execution or delivery of a document by a party (for example, notarisation, escrow conditions or tax considerations), care should be taken to ensure that the signing Option chosen does not conflict with those procedures or restrictions.

In addition, it is important to take into account any relevant regulatory and tax implications (including in relation to stamp duty) before adopting any of the signing Options discussed in this note.

2. The Mercury Case

Some of the obiter comments of the judge (Underhill J.) in this case (*R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721) (*Mercury*) have led to discussion about the effectiveness, under English law, of the use of pre-signed signature pages and 'virtual' signings and closings where signature pages are sent/transmitted by email or fax. References in this note to the use of email include the use of fax, where appropriate.

In relation to deeds, the judge said (at paragraph 40 of his judgment) that "*the signature and attestation must form part of the same physical document*" when "it" (the deed) is signed.

As a more general proposition (applicable to all contracts, whether deeds or not), the judge said (at paragraph 39): "*The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing.....the requirement that a party sign an actual existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistake*".

The JWP has obtained detailed advice from Leading Counsel (Mark Hapgood QC) on the implications of *Mercury* in relation to the execution of documents. This note has been approved by Leading Counsel. It is the view of Leading Counsel and of the JWP that the Court of Appeal decision in *Koenigsblatt v Sweet* [1923] 2 Ch 314 (*Koenigsblatt*) remains the leading authority on the applicability of the principles of authority and ratification to the creation of legally binding written agreements, that *Mercury* (a first instance decision) should be viewed as limited to its particular facts and, to the extent inconsistent with *Koenigsblatt* (a Court of Appeal decision), the *Koenigsblatt* decision should prevail.

Even on a cautious assumption that *Mercury* may have wider application beyond its specific facts, the JWP considers that it is possible to demonstrate an alternative understanding and intention of the parties and/or to comply with this requirement for a "*discrete physical entity/authoritative version*" in cases where contracts are circulated for signature by email. Examples of some appropriate procedures are summarised below; these procedures (or permutations of them) are already often followed in practice. Variations of these procedures or other procedures may also work perfectly well.

This note has been developed to help parties who wish to take a cautious approach in the light of *Mercury*, where it is more convenient to have a virtual signing or closing. As such, the JWP has taken, as its starting point, a conservative view of the judge's comments in the case. The JWP nevertheless considers that the judge's comments in paragraphs 39 and 40 should be read narrowly, in the context of the facts of that case.

3. Relevant statutory and other legal requirements

3.1 Deeds

The judge in *Mercury* took the view that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 (**LPMPA**) requires a deed to be executed by an individual in its final version (see his remarks above). Section 1(3) LPMPA provides:

"An instrument is validly executed as a deed by an individual if, and only if-

(a) it is signed-

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed by him or a person authorised to do so on his behalf".

By analogy, the judge's approach could also apply in the case of execution of a deed by a company (see section 74A Law of Property Act 1925 and sections 44 and 46 Companies Act 2006 which also use the word "it" in relation to the document being executed).

Whilst Leading Counsel and the JWP take a different view to that of the judge on the interpretation of section 1(3) LPMPA, it is recognised that this is a question of statutory interpretation that was not addressed in *Koenigsblatt*. For this reason, the JWP considers that Option 1 (described below) represents a prudent approach in relation to the execution of deeds (whether by an individual or on behalf of a company) at a virtual signing or closing. However, it should be emphasised that Option 1 is not the only way to execute a valid deed at a virtual signing/closing.

3.2 Real estate contracts

In relation to real estate contracts, section 2 LPMPA provides:

"(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract".

Some contracts for the sale or other disposition of an interest in land may be included in a contract that is primarily about something else, e.g. an asset sale agreement may include (i) an agreement to transfer properties, along with other assets, or (ii) an agreement to share a site temporarily, by granting a lease on closing. Another example would be a mortgage, trust deed, mortgage debenture or other security document creating any security interest in real estate that might be acquired in the future.

By analogy, the judge's approach in relation to section 1(3) LPMPA could apply also to section 2 LPMPA. For this reason, where it is decided to execute a real estate contract or contracts containing real estate provisions 'virtually', rather than by following the traditional methods of executing such contracts with 'wet ink' signatures, the JWP considers that the most prudent course of action is to follow Option 1 (described below).

Many real estate contracts will be subject to an exchange utilising one or other of the Law Society Formulae for exchanging contracts by telephone. If this is the case, solicitors in possession of a contract other than with 'wet ink' signatures will need to make this fact clear to the other party and obtain prior approval to its use.

Solicitors should also take account of any need for the future availability of documents with 'wet ink' signatures for registration purposes (as mentioned in paragraph 4.1), or where so agreed, and appropriate undertakings may be required, so that the documents with 'wet ink' signatures are available for those purposes. However, in some such cases (in particular residential conveyances) it may not be appropriate to conduct a virtual signing or closing.

3.3 Guarantees

Section 4 of the Statute of Frauds 1677 requires a guarantee (or a memorandum or note thereof) to be in writing and signed by or on behalf of the guarantor. Guarantees include undertakings by a party to procure that other parties (e.g. subsidiaries) perform their obligations.

Signature, for this purpose, has a relatively wide meaning. In the case of *N Mehta v J Pereira Fernandes S.A* [2006] EWHC 813 (Ch) (*Mehta*), the judge made it clear that, even in the case of a guarantee, an email can be a sufficient "*memorandum or note*" of the guarantee, for purposes of section 4, as long as it shows an intention to contract (as opposed to being a mere statement of expectation), and provided the name of the guarantor appears in the e-mail, with the intention that it constitutes a signature (in fact the guarantor in that case had not put his name anywhere in the e-mail, so the guarantee was not upheld). Attaching a signature page to a final approved version of a document with the specific authority of the signatory is considered to be a "signature" within the wider meaning above; it would also satisfy the test laid down in *Mehta*.

Guarantees are sometimes executed as deeds (in which case the comments in paragraph 3.1 above apply). Frequently, guarantees are also included in simple contracts (e.g. credit agreements); in such cases, it is considered that Option 1 or Option 2 (described below) can be followed. Option 3 (the use of pre-signed signature pages) may also be available, provided that there is clear evidence (e.g. an exchange of emails) that the signatories (or their lawyers or someone else authorised by the signatory) have authorised the attachment of their signatures to the final version of the relevant guarantee. Firms issuing legal opinions in relation to guarantees should bear in mind the distinction, in section 4, between a guarantee and a memorandum or note thereof. When Option 2 or Option 3 is used, the legal opinion could refer to the guarantee as a "legally binding guarantee", as opposed to a "contract of guarantee".

3.4 Simple contracts

A simple contract (which does not include a contract for the sale or other disposition of land or a guarantee) can, as a general rule, be formed without any signature (e.g. by an exchange of emails) provided the essential elements of a contract are present. The judge's remarks in *Mercury* about the need for a "*discrete physical entity/existing authoritative version of the contractual document*" seem to relate to an understanding in that case that, if a contract provides for signature, a party is not bound until it has signed a final version of the contract.

It is considered that Option 1, Option 2 or Option 3 (described below) can be followed in relation to simple contracts signed at a virtual signing or closing. It should, however, be recognised that they will carry different levels of risk and should be balanced against any potential evidential problems. Particularly in the case of Option 3 (the use of pre-signed signature pages), there should be clear evidence (e.g. an exchange of emails) that the signatories (or their lawyers or someone else authorised by the signatory) have authorised the attachment of their signatures to the final version of the relevant contract; this is prudent in order to avoid any evidential concerns of being able to show an intention to be legally bound and certainty of contractual terms.

4. Three possible Options for virtual signings and closings

Set out below are three possible options when conducting a 'virtual' signing or closing:

4.1 Option 1 – pdf/Word document signed by each party (for deeds, real estate contracts, guarantees and simple contracts)

The suggested steps under Option 1 are as follows:

1. Before signing/closing the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.
2. When the documents are finalised, the final execution copies of the documents are emailed (as pdf or Word attachments) to all absent parties and/or their lawyers (as agreed). For convenience, a separate pdf or Word document containing the relevant signature page may be attached.
3. Each absent signatory prints and signs the signature page only (there is no need to print off the full document).
4. Each absent party then returns a single email to its lawyers or to the lawyers co-ordinating the signing/closing (as agreed) to which is attached: (a) the final version of the document (pdf or Word); and (b) a pdf copy of the signed signature page. In the case of deeds, the arrangements will also need to make clear when delivery is to take place or, alternatively, to make clear that a deed has not been delivered merely because it has been signed and the steps set out above followed.
5. At or shortly after signing/closing, to evidence the execution of the final document, a final version of the document, together with copies of the executed signature pages, may be circulated by one of the law firms.

The view of the Leading Counsel and of the JWP is that the pdf (or Word) final version of the document and the pdf of the signed signature page (both attached to the same email) will constitute an original signed document and will equate to the "*same physical document*" referred to in *Mercury*. One or more additional originals may be created by printing off the final execution copy of the document and attaching to it the pdf copy of the signed signature page.

If there is a need to file a signed original of the document with a registry or some other authority (e.g. Companies House or the Land Registry), it will be necessary, as a practical matter, to make arrangements for another original of the document containing original 'wet ink' signatures to be obtained.

4.2 'Option 2 – print off and sign signature page from final document (for guarantees (not executed as deeds) and simple contracts)

The suggested steps under Option 2 are as follows:

1. Before signing/closing, the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.

2. When the documents are finalised, the final execution copies of the documents are emailed (as pdf or Word attachments) to all absent parties and/or their lawyers (as agreed). For convenience, a separate pdf or Word document containing the relevant signature page may be attached.
3. Each absent signatory prints and signs the signature page only (there is no need to print off the full document).
4. Each absent party then emails its signed signature page (as a pdf attachment) to its lawyers or to the lawyers co-ordinating the signing/closing (as agreed) with authority to attach it to the final approved version of the document. The degree of formality required for this authority to be given will depend on the circumstances. Where the authority is to a firm that is not acting for the party represented by the signatory, a greater degree of formality may be appropriate.
5. At or shortly after signing/closing, to evidence the execution of the final document, a final version of the document, together with copies of the executed signature pages, may be circulated by one of the law firms.

In this case, a print-off of the execution version of the document with the attached signed signature pages will constitute an original signed document. The only difference between Option 1 and Option 2 is at step 4, in each case.

4.3 Option 3 – pre-signed signature pages collected before documents are finalised (alternative for guarantees (not executed as deeds) and simple contracts)

The suggested steps under Option 3 are as follows:

1. Before signing/closing, the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.
2. In sufficient time before signing/closing, the law firm co-ordinating the signing/closing emails (or circulates hard copies of) the signature pages relating to the documents still being negotiated to each person who will not be present at the closing or to his lawyers. Each signature page should, as a matter of good practice, clearly identify the document to which it relates (e.g. Credit Agreement – signature page).
3. The signature page is executed by each of the signatories and returned to his lawyers or to the law firm co-ordinating the signing/closing (as agreed) by email (as a pdf attachment) or by courier, to be held to the order of the signatory (or his lawyers) until authority is given for it to be attached to the document to be signed.
4. Once each document has been finalised, the law firm co-ordinating the signing/closing emails the final version of the document to each absent party (and/or its lawyers) and obtains confirmation from it (or its lawyers) that it has/they have agreed the final version of the document and authorising the relevant law firm to attach the pre-signed signature page to the final version and to date and release the document. The degree of formality required for this authority to be given will depend on the circumstances. Where the authority is to a firm that is not acting for the party represented by the signatory, a greater degree of formality may be appropriate.

In this case, the final approved version of the document with the pre-signed signature pages that have been attached with the prior approval of the parties (or their lawyers) will constitute an original signed document.

4.4 Execution – Summary of Options

The table below summarises the relevant Options, according to the type of document:

Type of Document	Option 1 – Return PDF/Word document plus signature page	Option 2 – Return signature page only	Option 3 – Advance pre-signed signature pages
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

5. Signatories – availability and authorisation

For each of these Options, where a contracting party cannot attend the signing/closing meeting in person, it is recommended that such party is made aware of the need for someone suitably authorised to be available remotely (and, where appropriate, online) at the time of the virtual signing/closing: (a) in order to receive (or otherwise be made aware of the content of) and approve final versions of the documents; (b) in order to sign the relevant documents under Options 1 and 2; and (c) in order to authorise the release of the pre-signed signature pages under Option 3. Signatories will need access to a pdf scanner in the case of Option 1 and Option 2.

The Joint Working Party

May 2009 (including minor amendments – February 2010)

DISCLAIMER:

This note was developed by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees and has been approved by Leading Counsel. The aim of this note is to make suggestions only and not to give definitive advice. No liability whatsoever is accepted by those involved in the preparation or approval of this note, or the firms or organisations that they represent, to any company or individual who relies on material in it.