Our non-contentious engineering and construction experts provide their top ten tips for executing documents.

1 Who needs to sign?

Only those parties to a document that have obligations under the document generally need to sign it. For example, only the warrantor needs to sign a collateral warranty (where there are no step-in rights) and only the party allowing reliance needs to sign a letter of reliance.

2 What type of 'entity' is signing the document?

The type of 'entity' signing the document will dictate who should sign it. The most common forms of 'entity' are:

- individuals, often trading under a particular name;
- companies formed under the Companies Act 2006;
- partnerships; and
- limited liability partnerships (LLPs).
3 Is it a deed or a simple contract?

The document is likely to be either a deed or a 'simple' contract. Generally, claims for breach of a 'simple' contract can be brought up until six years from the date of the breach. Claims for breach of a deed, however, can be brought up until twelve years from the date of the breach.

Whether it is a deed or a 'simple' contract will dictate how the document should be signed in order for it to take effect as a 'simple' contract or deed. The table below summarises what is generally required for the different entities listed above to validly execute a simple contract and a deed.

<table>
<thead>
<tr>
<th></th>
<th>Individual</th>
<th>Company formed under Companies Act 2006</th>
<th>Partnership</th>
<th>LLP</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Simple contract</strong></td>
<td>Signed by the individual or an authorised agent.</td>
<td>Affixing common seal; or signed on behalf of the company by a person with express or implied authority; or signed by two Directors or one Director and the Company Secretary or signed by one Director and witnessed.</td>
<td>Signed by a partner.</td>
<td>Affixing common seal; or signed on behalf of the LLP by a person with express or implied authority; or signed by two Members; or signed by one Member and witnessed.</td>
</tr>
<tr>
<td><strong>Deed</strong></td>
<td>Signed by the individual</td>
<td>Affixing common seal and signed by two Directors</td>
<td>Signed by all the partners and witnessed; or</td>
<td>Affixing common seal and signed</td>
</tr>
<tr>
<td>Individual Company formed under Companies Act 2006</td>
<td>or one Director and the Company Secretary; or signed by one Director and witnessed.</td>
<td>signed by one or more partners who have been granted authority by deed to execute on behalf of the partnership and witnessed.</td>
<td>signed by two LLP Members; or signed by two Members; or signed by one Member and witnessed.</td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
</tbody>
</table>

The above table is subject to any particular execution formalities of the contracting entity (such as may be contained in a company’s articles of association). For example, where a company uses its common seal (now a rarity), its articles will usually specify that directors or other officers must sign to attest the sealing. There may also be other specific circumstances where a particular form of execution is required in order to form a binding agreement.

There is, however, a (non-rebuttable) presumption of due execution by a company (or LLP) which executes documents broadly in line with the above table. This presumption exists to protect innocent third parties from a failure by the company to comply with its own internal execution provisions. It applies broadly in favour of those buying property, goods or services, including tenants and mortgage lenders.

In addition to valid execution, in order to take effect as a **deed, a document**:

- must be in writing;
- must be clear 'on the face' that it is intended to take effect as a deed; and
- must be delivered as a deed.

Also, the wording required in the signature blocks in the document will depend on whether the document is being signed **by or on behalf** of the relevant entity.

Note also that there is a rebuttable statutory presumption that a document executed as a deed by a company or LLP is delivered on execution, unless a contrary intention is proved.

The presumption can be rebutted by the use of specific wording in the deed such as "this deed is delivered on the date written at the start of this deed" or by making it clear in writing that the intention is that the document may only be treated as having been executed and delivered as a
deed if it has been dated. Given that a deed is irrevocable following delivery, the statutory presumption of delivery could have important practical implications.

4 Does the individual signing the document have authority?

This should usually be a straightforward question to answer but be careful as, for example, the title "director" does not necessarily mean the individual is a director authorised to act on behalf of the company. The term "director" in the context of signing documents generally means a statutory director. Whether or not an individual is a statutory director can be checked via the Companies House website.

Where another entity is signing a document on behalf of another party you need to be sure that the other entity has the requisite authority to so act. Where a deed is being signed, the authority must be granted by way of a deed, for example, powers of attorney are often used. It is best practice to obtain a copy of the document authorising the other entity to act and to keep a copy with the document being executed.

Also, the entity granted authority should sign in accordance with the requirements applicable to it and not the party that they are acting on behalf of e.g. if the authorised entity is an individual and they are signing a deed, their signature would require a witness.

5 Foreign company

Where a foreign company is entering into the document, in order to be valid under the law of England and Wales, the company can execute:

- utilising its common seal; or
- in a manner permitted by the local law applicable to the territory in which the company is incorporated; or
- by an authorised person, provided that the authorisation is granted in accordance with that local law.

In some cases a legal opinion as to whether the document is being validly executed by the foreign company may be necessary, for example, if it is a land transaction. Where it is not essential, it may still be sensible to obtain such an opinion, particularly where validity in other jurisdictions may be required (e.g. for enforcing the decision of the English courts).

6 Incorporation of contract documents
Where these are not securely bound into the document, it is best practice for the front page of each contract document (but not necessarily every page) and each drawing to be initialled on behalf of each party by an individual that has signed the document on behalf of the relevant party.

Where contract documents and/or drawings are included on, for example, a CD-Rom, the CD should be initialled and a copy of the contents page prepared, printed out and initialled.

7 Counterparts

In order to speed up the process of signing a document, the document may be signed 'in counterpart'. This is where a copy of the document is produced for each party signing. The parties then each sign one of the copies rather than all of them, which, when brought together, form a complete executed document.

The document does not need to include a counterpart clause in order for it to be signed in counterpart. The inclusion of a counterpart clause however reduces the risk of one of the parties arguing that, for example, as not all of the parties have signed the document, the document is not binding.

8 Changes to documents executed but not dated

In some instances, changes need to be made to a document after it has been executed but before it has been dated. Such changes can be evidenced by appending to the document clear evidence that such changes have been agreed and made by a person authorised by the parties, for example, their legal representatives.

9 Is there a contract?

Just because a document has not yet been dated and/or signed by the parties does not mean there is no contract in place. The basic requirements for a contract are:

- offer;
- acceptance;
- consideration;
- intention to create legal relations; and
- certainty of terms.

The absence of a properly signed document does not necessarily mean that the above
elements have not been satisfied.

10 Deeds of variation

Once a document has been signed and dated, it may be the case that the document needs to be varied. A deed of variation must be used where the document is a deed or where a debt, liability or obligation is being released. In all other cases, but subject to the terms of the document (which may contain an express clause detailing how variations can be made), a simple agreement in writing signed by all parties could be used, provided that it includes some form of consideration e.g. the payment of £1.

Special rules apply where a third party has the right to enforce a term or terms of a document. Also, varying a document may affect the protection provided by any guarantee entered into in relation to the document. It will be necessary to check whether a third party's consent is needed before a document can be amended, for example, the surety guaranteeing performance of the document, the beneficiary of any collateral warranty relating to the document.

Summary

So when it comes to signing documents, ask yourself the following questions:

1. What is the document intended to be: a deed or simple contract?
2. What entity is signing?
3. Who needs to sign the document and how do they sign?
4. Are the requisite authorities in place?

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

Related  Construction & Engineering

Author(s)
Gowling WLG is an international law firm comprising the members of Gowling WLG International Limited, an English Company Limited by Guarantee, and their respective affiliates. Each member and affiliate is an autonomous and independent entity. Gowling WLG International Limited promotes, facilitates and co-ordinates the activities of its members but does not itself provide services to clients. Our structure is explained in more detail on our Legal Information page.

© 2020 Gowling WLG International Limited. All rights reserved.