

Executing Documents in the UK Following the Court Ruling in the “Mercury Case”

Quick Reference Guide (QRG) on the execution of documents following the court ruling in Mercury Tax Group Limited and Darren Neil Masters v. HMRC, the Crown Court, James Michael Preston and David Cook (2008) EWHC 2721 (the Mercury Case)

In May 2009 The Law Society's Company Law Committee and The City of London Law Society's Company Law and Financial Law Committees (the Law Committees) prepared and published a joint guidance note called “Guidance on Execution of Documents at a Virtual Signing or Closing” (the Guidance). The Guidance (which is non-binding) was published in response to the Mercury Case (details below) and suggests various procedures to follow in relation to virtual signings. This QRG summarises the Mercury Case and sets out how deeds, real estate contracts, guarantees and simple contracts should be executed in accordance with the Guidance.

The Mercury Case

In the Mercury Case the arrangers of a legal tax avoidance scheme detached signature pages from an earlier version of documents and attached them to the final. The court held that the documents were not properly executed. The judge stressed the common understanding that documents must exist as a discrete physical entity, whether in a single version or in counterparts, at the moment of signing.

The Guidance

In response to the Mercury Case, the Guidance suggests three possible procedures when conducting a “virtual” signing or closing:

Option 1: Deeds, Real Estate Contracts, Guarantees and Simple Contracts

1. Execution versions of the contract are circulated (by email or fax) to all parties listed therein. The Guidance also states that, for convenience, a separate PDF/Word document containing only the signature page may be attached.
2. Each party to the contract prints and signs its respective signature page.
3. Each party circulates by email (i) the final version of the document and (ii) the executed signature page to its respective lawyers or to the lawyers coordinating completion.
4. On or after completion, to evidence the execution of the final document, a final version of the document and all executed signature

pages may be circulated by one of the law firms involved.

Option 2: Guarantees (Not Executed as Deeds) and Simple Contracts

1. Execution versions of the contract are circulated (by email or fax) to all parties listed therein. The Guidance also states that, for convenience, a separate PDF/Word document containing only the signature page may be attached.
2. Each party to the contract prints and signs its respective signature page.
3. Each party then emails a PDF copy of its executed signature page to its lawyers granting authority to attach it to the approved version of the document.
4. On or after completion, to evidence the execution of the final document, a final version of the document and all executed signature pages may be circulated by one of the law firms involved.

Option 3: Alternative for Guarantees (Not Executed as Deeds) and Simple Contracts

1. Prior to closing, the signature page relating to each document still under negotiation is circulated to all parties. Each signature page should clearly identify the document to which it relates.
2. Each party signs its respective signature page and emails the same to its respective lawyers to be held until the signatory gives permission to attach it to the agreed-upon document.
3. After the negotiated document(s) is approved, the law firm coordinating the signing (i) emails the same to each party and (ii) requests permission to attach its respective executed signature pages to the agreement.
4. On or after completion, to evidence the execution of the final document, a final version of the document and all executed signature pages may be circulated by one of the law firms involved.

Deeds

Under the Guidance the Law Committees state that only Option 1 is the prudent approach in relation to the execution of deeds by individuals and companies. Please note that under English law additional formalities are required. Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989

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(LPMA89) states that “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 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.” The Guidance states that, by analogy, this view could also apply if the execution of the contract is by a company because of certain provisions of the Companies Act 2006 and the LPMA89.

Guarantees

The Guidance suggests that for Guarantees contained in simple contracts (and not deeds), Options 1 and 2 should be followed. Option 3 may be used provided there is a clear paper trail from each signatory which clearly authorises the signature pages to be annexed to the final form version. With regards to Guarantees executed as deeds, the Guidance states that only Option 1 should be followed. As an additional requirement, English law requires that any form of guarantee must be in writing and signed by or on behalf of the guarantor (Section 4 of the Statute of Frauds 1967).

Real Estate Contracts

Virtual signings of real estate contracts are subject to stricter restrictions due to Section 2 of the LPMA89, which provides that:

(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.

These issues will also be relevant to contracts which mortgage or charge an interest in land and possibly loan agreements (because of the reference to the provision of security) and covenants in mortgages to and charges for further advances (because “disposition” is defined by reference to the Law of Property Act 1925).

The Guidance advises that only Option 1 should be followed for real estate contracts but acknowledges that some law firms may prefer to arrange for each party to print off the contract in full, execute the signature page and then email back a PDF copy of the executed signature page.

Simple Contracts

Except for agreements that do not include a contract for the sale/disposition of land or a guarantee, the Guidance advises that Options 1, 2 and 3 are suitable procedures for the execution of a simple contract. However, it should be recognised that each procedure will carry different levels of risk and each should be balanced against any potential evidential problems. For example, with regards to Option 3, there should be clear evidence (i.e., a paper trail) that the signatories to a simple contract have authorised the attachment of their signatures to the final form contract.

Caveat

This QRG is intended only to provide a general overview of the issues covered. Accordingly, legal advice should be obtained with respect to your unique facts and circumstances.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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