

Execution of Contract

Types of contract

There are three ways in which a legally binding contract can come into existence:

- Oral
- Written (signed underhand)
- Written (deeds)

The pragmatic difference is that there are further requirements for the execution of a deed. Also an oral contract although perfectly legally binding in theory is notoriously difficult to prove in practice – adducing evidence as to the terms of an oral contract is not only fraught with difficulty but also a costly and timely process.

Why use a deed?

The use of a deed therefore implicitly infers that the parties have read and understood its terms so that the executed document is a clear unambiguous and undisputed record of the parties’ intentions at the time of execution.

When must a contract be a deed?

It is only obligatory to use deeds in the following circumstances, which you will note are not directly relevant in construction contexts:

- Conveyance of land
- Mortgage or charge of land
- Appointment of a new trustee
- The grant of power of attorney
- Release or discharge of a debt/liability
- Gift or voluntary assignment of tangible goods

However, in more complex construction deals such as PFI or development transactions, which involve such issues as assignments of the benefit of contractual rights, contracts for the sale of land or transfers of interest in land, transfers of shares and intellectual property rights, may demand that the construction documents are executed as deeds.

How must each type of contractual document be executed?

Contracts - In the case of an individual, company and partnership it is sufficient that the person executes the contract on behalf of the organisation. Where this involves a company, two of its officers, ie a director or the company secretary, must execute the contract for it to be binding. In the case of a partnership, one of the partners must execute the contract.

A company officer or partner, by holding itself out as having capacity and authority to bind its organisation, acts sufficiently for the other party to place reliance on that act and give binding legal effect to the document regardless of whether that capacity or authority actually exists.

Deed - The combination of common law rules and statute govern the formalities for the execution of deeds.

The main requirements are that you must make clear on the face that the agreement is intended to be a deed and to be delivered as such. This can be done by simply titling the document: "Deed of [state type of document] and at execution stating: "signed and delivered as a deed for an on behalf of [Company Name]"

Individual - For an individual to validly execute an instrument as a deed it must be: signed by him/her in the presence of a witness who attests his signature, or at his direction. When the deed is signed at the person’s direction, he must be present and there must be two witnesses. A witness must not be a party to the deed or benefit under it.

Companies - When a company incorporated under the Companies Acts executes a deed statute provides for two methods of execution. These are as follows:

- The affixing of its common seal; or
- The signature of a director and the company secretary or by two directors.

In either case the document should state that it is executed by the company as opposed to the individual.

Partnerships - One partner does not individually have authority to execute a deed on behalf of the partnership unless the partnership has expressly conferred that authority by deed in the first place. All partners should execute deeds unless one or more partners are given power of attorney to execute deeds on behalf of the partnership. Some partnerships specifically state that specified partners have the authority to do just that. Each partner's signature should be witnessed.

What does a deed do that a simple contract doesn't?

The main ramification of the document being a deed as opposed to a simple contract signed under hand in a construction context is that the limitation period is extended from six to 12 years. The limitation period is a period within which actions to enforce legal rights must be started either by the issue of a claim form or by serving notice of arbitration or adjudication. Therefore, making a deed extends the potential liability of the parties making promises by a further six years. The periods run from the time at which the cause of action accrues.

If a deed is improperly executed it will by default revert back to the status of a simple contract with a six year, instead of 12 year, limitation period. Therefore, to minimise the risk of ineffectual and inaccurate execution of deeds, it is now commonplace to insert a clause which expressly agrees in writing the limitation period which is to apply to the document within which it is contained.

When should and when shouldn't, a specialist contractor execute a contract as a deed?

Whether the document is executed as a simple contract or a deed is therefore a commercial decision to be taken by the party executing the document. Where possible specialist contractors are advised to limit and minimise their liability by executing documents as simple contracts, rather than as deeds where they are performing works for another party under that contract. By doing so the specialist contractor will also minimise his consequential insurance costs as the specialist contractor will usually be obliged to procure and maintain the insurances for a period which reflects the relevant limitation period under the contract.

Alternatively, if that specialist contractor is receiving performance from suppliers of either materials and/or labour, it will ideally want the 12 year limitation period for added protection.

It is acknowledged that in large transactions the overall client will wish all documents to be 'back-to-back' in this respect and consequentially a specialist contractor will often have little room to manoeuvre in negotiating in this regard.

Judge for yourself

The above guidance covers the three most common legal entities which are encountered within contractual relationships in the construction industry. However, it must be noted that other entities may have further requirements for execution, including corporation sole, foreign companies, parochial church councils, private trusts, unincorporated associations, charities, attorneys under a power of attorney, liquidators, administrators, administrative receivers, other receivers etc.

Judge for yourself whether the parties to your contract should be executing a written contract, if so whether it should be executed as a deed or not and if so, what the requirements are to ensure it is validly executed as a deed.

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