

PRACTICALITIES AND PITFALLS OF REMOTE EXECUTION

- While remote execution has been commonplace in many practice areas for some time, the construction industry, perhaps due to the sizeable and complex nature of the contracts it deals with, has predominantly retained a preference for "wet-ink" signatures.
- The global shift to working remotely that has been brought about by Covid-19, combined with technological advancements in electronic forms of signature, has encouraged an increase in remote execution and placed a spotlight on the practicalities of the processes available.
- The physical process of remote execution comes with its own challenges and it is key for both parties to ensure that any documents executed under such circumstances are legally binding and are subject to the intended limitation period for the making of claims under them.

GUIDANCE FOR REMOTE EXECUTION AND PITFALLS TO BE AVOIDED

The 2008 case of *Mercury Tax Group (and another) v HMRC* has become the key source of guidance for those seeking to execute remotely, with the case and subsequent guidance providing some clear rules depending on the form of document that is to be executed. The Law Society has produced a comprehensive guidance note for any parties that are considering this option, however the process is far from straightforward and the following common pitfalls should be avoided:

- Check the type of document being signed as the Mercury procedure is not appropriate to all types of documents, i.e. documents to be registered at the Land Registry may require wet-ink signatures.
- Do not re-use signature pages for a single transactional document, for example:
 - holding signature pages 'in escrow' and then attaching these to the final form of the document; or
 - making manuscript or electronic amendments to a new version of the document and then attaching the previously signed signature pages.
- If signing occurs by an authorised signatory, ensure written confirmation of their authority to do so is obtained prior to signature. The usual rules for valid execution of deeds still apply regardless of the method of remote execution.
- Be very clear in advance if a Mercury procedure is being used as distinct from an electronic signature platform method of execution – having a clear audit trail in the lead up to signing is essential.
- Virtual execution protocols can be used for the execution of building and engineering contracts as deeds so long as the protocol is very clear as to where the technical documents are stored e.g. on a data site which the parties have checked with a link to the data site included in the protocol. During the lockdown we arranged the signing and completion of international engineering contracts, tripartite domestic contracts and other building contracts using this method.
- If executing electronically via DocuSign (or a similar platform) be aware of the security and IT issues that can arise.
- Electronic execution of contracts (including building or engineering contracts) which are not a single document does not yet appear feasible if the contract is to be validly executed as a deed.

COMMON FAQs

- **Witnessing** - the witnessing of documents during remote execution by family members or friends is permissible providing the individual physically witnesses the Mercury protocol or electronic signing and is not party to the document or biased with regard to the transaction.
- **Potential costs** - The additional costs incurred for managing virtual execution protocols and electronic signature completions need to be factored into budgets. Don't underestimate the effort and accuracy needed to get virtual or electronic execution right.
- **Security** - concerns remain surrounding the evidential issue of electronic signatures in comparison to handwritten ones.

NOW WHAT?

With new working practices and the increase in technological advancement, remote execution is here to stay. However this does not change the fact that the procedures surrounding it are complex and that it is far from an easy (or cheap) option.

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