4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Comments in response to the Consultation on 14th Programme of Law Reform by the law Commission – proposal regarding deeds and variations of contracts

The Consultation by the Law Commission on its 14th Programme of Law Reform puts forward deeds and variations of contract as a potential area for reform and asks the question "How do we modernise the law of deeds for commercial parties whilst still protecting vulnerable individuals? The Law Commission notes that any review would build on previous work on electronic execution, assess the current requirements for the execution of deeds (both in electronic form, and on paper) and make proposals for reform. The review should include careful scrutiny of the need to protect vulnerable people signing documents with significant legal consequences.

We believe that there is value in the use of deeds as a mechanism to extend the statutory period for bringing a claim and as a means of recording the terms of an obligation undertaken by a party where there is no valuable consideration for a promise to perform. This paper seeks to highlight those areas of legal uncertainty that we believe would benefit from the review proposed by the Law Commission. The comments in this paper are directed at commercial transactions involving corporate and other business entities only and do not extend to the wider question of how deeds and the formalities that surround their use can be used to protect vulnerable individuals.

Many of the suggested areas for reform have come to the fore as a result of recent (and rapid) changes in working practices due to the coronavirus pandemic. Commercial practices have needed to respond quickly to these changes and different ways of working have been adopted; prioritising the reform of this area will remove some of the barriers to the smooth running of transactions and serve to clarify those areas where the law is unclear.

	Issue / Area of uncertainty	Commentary / Considerations for reform
1.	A deed must be delivered to be valid. This is now an outdated concept as documents are rarely physically delivered.	Consider abolishing this requirement. Standard practice is for either deeds to provide when they are to be effective or for the parties to agree that executed deeds will be held in escrow or held to the parties' order until they are to take effect.
2.	The current law does not reflect the different formats that a deed can take.	To a large extent the law reflects an expectation that a deed will, at some point, exist in hard copy. Deeds are now increasingly created and executed in an entirely digital or electronic format and this has led to debate about what constitutes the original deed. This can be a particularly important question if an original or a certified copy of a deed is required for registration purposes (in the UK or abroad) or for notarisation. This issue is not limited to deeds but a document that requires registration is often a deed and so the question is raised more frequently in this context. Where deeds are created in an electronic format, it is not clear how late amendments to those soft-copy deeds should be documented. Practitioners have developed different methods of effecting such amendments leading to an inconsistency in approach.
3.	The need for the signature and attestation of a deed to form part of the same physical document in accordance with s1(3) Law of Property (Miscellaneous Provisions) Act 1989 and s 44 companies Act 2006 (amongst others) no longer reflects modern methods of execution	The requirement that a deed must be executed as a whole/complete physical entity reflects s1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and the judgment of Underhill J in the Mercury Tax Group case[1]. The requirement also applies by analogy to other types of signatory, for example, the execution of a deed by a company in accordance with s 44(2) Companies Act 2006. This requirement can create a barrier to using more modern methods of execution. For example: • Execution using email to send documents to a signatory for signing: Restrictions on capacity of email systems can mean that deeds that incorporate a number of schedules (construction documents or real estate contracts are examples) cannot be emailed as a whole • Execution using an electronic signing platform: where a deed requires a witness, systems are not currently configured to prevent a witness from viewing and retaining the entire document circulated for signature. This raises issues of confidentiality where a witness is not a person that is permitted to have access to a document.

[1] *R (on the application of Mercury Tax Group and another) v HM Revenue and Customs Commissioners and others* [2008] EWHC 2721

		• Execution of smart contracts and using distributed ledger technology: the requirement for a witness presents difficulties where a coded contract may be digitally signed (for example. by use of a private-public key pair). Further, where code is split across multiple execution files, it is unclear how the requirement for the signature and attestation of a deed to form part of the same physical document is satisfied. Difficulties can also arise on cross-border transactions when dealing with parties in jurisdictions where there is no equivalent requirement for the whole document to be signed. Reform to consider a means by which the execution page to a deed could be signed independently of the instrument and attached to the approved execution version of the deed by a person authorised to do so.
4.	The need for a witness to be physically present to attest the execution of a deed by a signatory	Witnesses must be physically present in order to attest to a person signing. Technological advances are such that, for commercial transactions, there is now scope to consider witnessing by means of an electronic visual link. A statutory presumption for the benefit of a party to a contract that he/she/it can assume that the execution and witnessing formalities have been properly observed by its contracting counterparties (absent express knowledge to the contrary) would also be beneficial and would serve to consolidate existing statutory and case law.[2]
5.	English law requirements for execution of a power of attorney as a deed can give rise to conflicts of law issues in cross-border transactions.	An English company has the power, under s47 of the Companies Act 2006, to appoint an attorney to execute deeds or other documents on its behalf. That appointment must be executed as a deed to be valid (s1 Powers of Attorney Act 1971). In cross-border transactions, companies frequently execute security documents governed by the law of another jurisdiction and which contain a power of attorney in favour of the secured party. Powers of attorney governed by a law other than English law are also sometimes required to be granted in favour of local lawyers for execution, registration or notarisation purposes. In many cases the local law will not include a concept of deeds resulting in the imposition of English law formalities for a valid deed (face value requirement; delivery; style of execution block) on a document governed by a law where such formalities have no meaning. In some cases, due to conflicting local law requirements, it will not be possible to execute the power of attorney as a deed.

[2] See, for example, s44(5) Companies Act 2006 and Shah v Shah [2001] EWCA Civ 527

6.	The need for commercial parties to execute deeds using two signatories that are in different locations.	Excluding the situation in which a signature must be attested by a witness, in commercial transactions parties expect to be able validly to execute documents via email or otherwise electronically when the method of execution requires two signatories on behalf of a party and those signatories are in different locations. The absence of a specific statutory provision to this effect, for example confirming that each signatory may execute a separate counterpart of the document in question, has resulted in uncertainty amongst practitioners as to how this is best achieved.
7.	There is a lack of clarity as to the execution requirements for an overseas entity that wishes to enter into a deed governed by English law.	The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 provide that an overseas company may execute a deed in any manner of execution permitted by the laws of the territory in which the company is incorporated. There are aspects of the execution of deeds by overseas entities that remain unclear, for example: • The Regulations apply to overseas companies (defined in the Companies Act 2006 as a company incorporated outside the United Kingdom). It is not clear how this might apply to an overseas entity that is not a "company" as defined in the Companies Act 2006. • Some practitioners are of the view that overseas companies are not bound by the English law formalities applicable to deeds, such as the requirement to execute the whole instrument (above). Others consider that the Regulations merely specify that the relevant overseas law will govern the question of who may execute and how, the Regulations do not affect the other formalities for creating a valid deed. • There is some doubt over whether the signature of a person signing on behalf of an overseas company under power of attorney should be witnessed (in accordance with s7(1A) Powers of Attorney Act 1971 and s 1(3) Law of Property (Miscellaneous Provisions) Act 1989).
8.	The law requiring that a particular instrument be executed as a deed is found in numerous different statutes or common law. This results in it being difficult to identify and the requirements are easily missed. Common law requirements are subject to further judicial interpretation and may not provide sufficient certainty, particularly for situations involving a different fact-pattern.	Consider the introduction of legislation setting out in one place the circumstances in which a deed is required or may be used to achieve a particular result (for example, a binding agreement where there is no consideration; an extension from 6 to 12 years of the limitation period for claims). It would be helpful to establish the rationale for the use of a deed under English law. The current position is such that there is no consistency in approach. High value commercial contracts such as share purchase agreements, guarantees and facility agreements do not need to be executed as deeds but low value, short term leases do.

		Legislation could also address the issues raised in *Rock Advertising v MWB Business Exchange Centres Ltd*[3] so as to establish the basis on which an agreement between commercial parties may be varied in writing without consideration. As an adjunct, a statutory statement confirming that an agreement in writing that is not a deed may be used to vary or amend a deed would be helpful to businesses and practitioners alike. If thought appropriate, such legislation to abolish the requirement for a deed in specific circumstances.
9.	Can a failed deed take effect as a simple contract	There is conflicting case law[4] on the question of whether, when a document intended to be a deed fails to meet all the requirements to take effect as a deed, it can nevertheless take effect as a simple contract (assuming the requirements to create a valid contract are met).

[3] [2018] UKSC 24

[4] *R (on the application of Mercury Tax Group and another) v HM Revenue and Customs Commissioners and others* [2008] EWHC 2721 casts doubt on earlier case law however the Mercury Tax Group decision was not followed in *Signature Living Hotel Limited v Sulyok* [2020] EWHC 257 (Ch) ;

THE CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Individuals and firms represented on this committee are as follows:

Dorothy Livingston (Herbert Smith Freehills LLP) (Chairman)
Penny Angell (Hogan Lovells International LLP)
James Bresslaw (Simmons and Simmons LLP)
Charles Cochrane (Clifford Chance LLP)
Matthew Dening (Baker & McKenzie LLP)
David Ereira (Paul Hastings (Europe) LLP)
Mark Evans (Travers Smith LLP)
Edward Fife (Slaughter and May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Dechert LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell LLP)

Secretary: Rachael MacKay (Herbert Smith Freehills LLP)