REMOTE SIGNINGS UNDER AUSTRALIAN LAW

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PART A – THE BACKGROUND TO THIS PAPER

1. INTRODUCTION

As the more mature members of the BFSLA will recall, signing ceremonies for financing transactions used to be events of some pomp and circumstance. Parties and their legal advisers would gather at the appointed time at the offices of the co-ordinating law firm, and stand around the edges of a large conference room admiring the orderly stacks of carefully-labelled documents on the conference table before them, while waiting for their turn to move up to the table and sign their documents. Once all parties had done this, the partner or senior lawyer in charge of co-ordinating the signing would announce that execution was complete and that on that basis the transaction was now closed. This would trigger a round of mutual complimenting and congratulatory handshakes followed, in the case of particularly significant transactions, by the arrival of a drinks trolley bearing bottles of champagne.

This type of event, sadly, is now largely a matter of history. Face-to-face signings have become quite rare, and it is now common, if indeed not usual, for documents in a transaction to be signed by the parties from a number of separate locations, often in different countries, and for the execution form of the documents to be distributed to the remote parties by email rather than in hard copy. This is commonly referred to as a virtual or remote signing.

This change in approach has produced a number of new challenges for Australian finance lawyers. When all parties signed the same documents at the same time and in the same place, it was relatively easy for the lawyers to be able to advise their clients that the documents appeared to have been adequately executed as a matter of Australian law, and in turn to issue their closing opinions.

This is not so straightforward when documents in a transaction are executed remotely. Despite this, the lawyers still need to be able to advise their clients that the documents are effective as a matter of Australian law, to the extent that Australian law is relevant. They also still need to be able to issue their closing opinions.

Perhaps surprisingly given the prevalence of remote signings in modern commercial life, there is as yet no generally-accepted protocol in Australia for the conduct of remote signings, and no set of rules that are generally accepted by Australian legal practitioners as being sufficient to enable them to form the view that documents signed remotely have been properly executed as a matter of Australian law.

This absence in Australia of a generally-accepted set of procedures for the conduct of remote signings has concerned a number of practitioners for some time. As a result, a group of five firms[1] joined forces in 2013 to agree on a set of protocols that they are

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[1] Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright. The protocols discussed in this paper are the joint work product of all these firms.

A number of practitioners from those firms also generously gave of their time to provide comments on this paper. The author's thanks go in particular to Diccon Loxton from Allens. The views expressed in this paper are however personal to the author, and do not necessarily reflect the views of those other practitioners, or of any of the five firms.

prepared to accept in the ordinary course for the effective remote execution of documents, in the hope that this would then lead to a broader market consensus on the topic. Those protocols are the subject of this paper.

It is important to note that the procedures set out in the protocols are not necessarily the only ways in which documents can be signed remotely under Australian law. Other approaches may also be adequate. What the protocols set out are some "safe harbours": approaches that the firms involved will be prepared (once the protocols have been finalised) to accept in the ordinary course, in order to smooth the process for remote signings in which our firms are involved. They are not intended to close the door to alternatives.

2. THE US APPROACH

Remote signings have been a feature of commercial practice in the United States for some time. In the United States, it is common for signatories to sign separate signature pages, and send them in to the co-ordinating law firm before the documents to which they relate have been negotiated. When the content of the documents has been finalised and the transaction is ready to complete, the co-ordinating law firm "releases" the signature pages, upon agreement to that effect by the parties or their lawyers on a multi-party "closing call", and the transaction is then taken to have closed. At some stage after closing, the co-ordinating law firm attaches those signature pages to the agreed form of the documents, and distributes the compiled documents to the parties for their records.

Australian law firms that are involved in transatlantic financing transactions often come under pressure to close transactions in this way. As will be seen from the discussion below, however, this very flexible approach to signing documents will often struggle to accommodate some of the formalities that are required for certain types of documents by Australian law.

3. DEVELOPMENTS IN THE UK

Remote signing processes came under the spotlight in the United Kingdom some six years ago as a result of the decision in *R (on the application of Mercury Tax Group and another) v HM Revenue and Customs Commissioners and others*[2] (***Mercury Tax***).

Mercury Tax involved an application to quash search warrants that had been served on a number of entities in relation to an alleged illegal tax avoidance scheme. The scheme generated tax deductions through a series of interconnected dealings, some at an undervalue, in "gilt strips" – being the right to receive a specific payment of principal or interest under a UK Government debt liability, or "gilt".

The transaction was effected by a number of documents that were expressed to be executed as deeds. However, the scheme promoter's document management processes left a good deal to be desired. While the promoter did arrange for its clients to sign documents in relation to the scheme, the clients signed the documents before the terms of the transaction had been finalised, so that the clients only signed incomplete drafts. Later, once the documents had been finalised, the promoter removed the signature pages from the back of the signed incomplete drafts, and

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[2] [2008] EWHC 2721.

stapled them to the finalised form of the documents instead. There were some substantial differences between the initial and final forms of the documents.

The scheme promoters, who were the claimants in the proceedings, did not dispute these facts. They maintained however that this procedure was "ordinary office practice and wholly unobjectionable". The defendants in the proceedings argued to the contrary that the procedure rendered the purported deeds invalid, and that the use of this procedure gave them "reasonable ground to suspect" that the parties had committed a serious tax fraud. This, in turn, was the basis on which the search warrants had been issued.

The claimants maintained that the documents with the re-attached signature pages were effective because the client had later ratified the differences between the earlier drafts that they had executed and the final form of the documents to which their signature pages had been re-attached. They based that argument on *Koenigsblatt v Sweet*[3] (***Koenigsblatt***), a 1923 decision of the English Court of Appeal.

Koenigsblatt involved a contract for the sale of land. The vendor, the defendant in the proceedings, had signed his counterpart of the contract and handed it over to his solicitor for exchange. That counterpart identified the purchaser as being the plaintiff and his wife jointly. When the vendor's solicitor met the purchaser's solicitor to exchange counterparts, however, he saw that the purchaser's counterpart identified the purchaser as the plaintiff alone, not jointly with his wife. The vendor's solicitor amended his client's (already signed) counterpart to reflect the fact that the plaintiff was the sole purchaser, and then completed the exchange.

Some days after the exchange, the vendor's solicitor met with his client and explained the changes he had made. The vendor verbally approved those changes at the meeting.

The vendor later decided that he did not want to proceed with the sale. When the purchaser brought an action for specific performance, the vendor argued that no agreement had been entered into, because the initial counterparts were not the same. He also argued that even if there were an agreement, he had not signed a sufficient note or memorandum for the purposes of the Statute of Frauds 1677, because the counterpart as signed by him did not reflect the agreement in a material respect (as it did not identify the correct purchaser).

The Court of Appeal unanimously rejected this argument. It held that the vendor's later ratification of the amendments had the effect of retroactively validating them, as if they had been made and approved before the vendor had signed. On that basis there was an agreement, and the vendor's signed counterpart was a sufficient note or memorandum of the agreement to satisfy the Statute of Frauds.

Returning to the decision in *Mercury Tax*, the claimants there sought to use the reasoning from *Koenigsblatt* to argue that the documents in their final form, with the re-attached signature pages, were effective because they had been ratified by the client. The court was not convinced that the client had in fact ratified the changes. Even if the changes had been ratified, though, the court was of the view that the documents still failed, because the final documents were not the same physical instruments as the ones the client had signed. In the court's view this differed from

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[3] [1923] 2 Ch 314.

the situation in *Koenigsblatt*, where the document that was altered after signing and then ratified was still essentially the same physical instrument as the one that the vendor had previously signed. The court in *Mercury Tax* felt that the principle in *Koenigsblatt* could not be extended to accommodate a situation where the signature page from one document was removed and (in the court's words) "recycl[ed] for use in another".[4]

> The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing.[5]

The court in *Mercury Tax* also took the view that the documents failed as deeds because the manner of execution did not comply with s 1(3) of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK). That section provides that an instrument will only be validly executed as a deed by an individual if "it" is signed. In the court's view, the language of s 1(3) "necessarily involves that the signature and attestation must form part of the same physical document (the "it")… which constitutes the deed".[6]

These aspects of the decision in *Mercury Tax* were not well received by English practitioners. In 2009, a joint working party of the Law Society's Company Law Committee and The City of London Law Society's Company and Financial Law Committee published a guidance note (the **City of London Guidelines**) on the conduct of remote signings. The note sought, among other things, to downplay the implications of *Mercury Tax*, and to confine it to its facts. A copy of the City of London Guidelines is attached to this paper, as Attachment 2.

The City of London Guidelines propose three options for remote signings. The first (and most cautious) option is designed for use if a document needs to be executed as a deed, or for a document that involves a dealing in land (although it can be used for other types of document as well). The second (more relaxed) option is not recommended by the guidelines for deeds or real estate contracts, but can be used for guarantees and other simple contracts.

Options 1 and 2 both require the parties to sign documents (or the signature pages for documents) at the time of the signing or closing, when the content of the documents has been agreed. Option 3, however, follows the US "pre-signed signature pages" approach, and allows for signature pages to be signed before the document has been negotiated. The City of London Guidelines say this option can also be used for guarantees and other simple contracts, but not for deeds or real estate contracts.

In 2010, the English Law Society followed up the City of London Guidelines with its own (largely identical) note on remote signings. That note is available at www.lawsociety.org.au/advice/practice-notes/virtual-execution-of-documents.

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4 [2008] EWHC 2721, [39].

5 Ibid, [39].

6 Ibid, [40].

4. A PROPOSED APPROACH FOR AUSTRALIA

The five firms involved in the discussions on remote signing had initially expected that they might simply be able to adopt the City of London Guidelines. We soon decided, however, to develop our own set of protocols instead. This was for two main reasons:

- It was not sufficiently clear that all the legal analysis that underpins the City of London Guidelines was consistent with Australian law – for example, in relation to the execution of deeds, or guarantees.

- We felt that our market would benefit from a more detailed set of guidelines — one that provided a set of specific steps and template emails to guide lawyers (particularly junior lawyers) through the signing process, and that took into account the practical reality of the way remote signings typically unfold.

The protocols had not quite been finalised at the time of writing. The current drafts are attached to this paper, as Attachment 1.

The protocols have been developed to assist with the remote signing of financing transactions. For that reason, they focus on the documents that are most relevant to financing arrangements, ie:

- deeds (such as security trust deeds);

- guarantees;

- security agreements that are subject to the *Personal Property Securities Act 2009*;

- real property mortgages;

- other instruments that need to be lodged with a Land Titles Office (or equivalent);

- other agreements that affect real property (such as contracts for the sale of land); and

- other simple contracts (such as facility agreements).

5. THE PROTOCOLS IN SUMMARY

The protocols set out three approaches to the remote execution of documents, with differing degrees of formality. The approaches broadly mirror the City of London Guidelines in most respects, but differ from them in some important ways as well. They are summarised in the table on the next page.

No.	Approach	Accepted for	Not preferred for
1.	**Email entire signed document** Remote party receives by email and prints entire document, signs it and returns by email a copy of the entire signed document, or of the signed signature page.	All types of document.	Not applicable.
2.	**Email signed signature page** Remote party receives by email the entire document with a separate signature page, prints and signs just the signature page, and returns a copy of the signed signature page by email.	Guarantees (unless deeds). Agreements that affect real property (unless registrable, or deeds). PPSA security agreements (unless deeds). Other simple contracts.	Deeds. Real property mortgages. Other registrable real property documents. Contracts required by statute to be in writing and signed.
3.	**Pre-signed signature page** Remote party receives by email and prints a separate signature page, signs it and returns a copy of the signed signature page by email. Remote party sends in original signed signature page by courier, before closing. Remote party sends follow-up email when document has been finalised, agreeing to be bound by the document and authorising the original signed signature page to be inserted into a hard copy.	PPSA security agreements (unless deeds). Other simple contracts which Australian law does not require to be signed.	Deeds. Real property mortgages. Other registrable real property documents. Guarantees (where the Statute of Frauds applies). Agreements that affect real property. Documents executed by a company under s 127(1) or (2) of the Corporations Act, if other parties intend to rely on the statutory assumption as to due execution in s 129(5) or (6) of the Corporations Act.

The full requirements for each approach are of course more complex than this. The protocols contain a detailed explanation of the steps that the co-ordinating law firm and

remote parties should take for each of the approaches, including suggested template language for the emails that need to be exchanged as part of the signing process.

Econveyancing

Australian States and the Northern Territory are in the process of introducing electronic real property conveyancing laws. Those laws have been enacted in New South Wales as the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW), and have so far been adopted by five other States and by the Northern Territory. The laws are taking effect in phases, with each jurisdiction introducing the laws in stages in accordance with its own timetable.

The protocols do not attempt at this stage to accommodate the changes being introduced by these laws.

6. STRUCTURE OF THIS PAPER

Part B of this paper summarises the key principles of Australian law that affect the ways in which the different types of documents can be signed remotely. Part C comments on the manner in which the protocols respond to those requirements. Part D concludes.

PART B – THE LEGAL PRINCIPLES

1. DEEDS

1.1 The nature of a deed

Deeds have been a feature of the common law since its very early days. Deeds are used frequently in financing transactions that have a connection with Australia, for a number of reasons. For example:

- parties may want to ensure that the document does not fail for want of consideration;
- the document may be a mortgage, and the mortgagee may want to take advantage of a power of sale or other powers that are incorporated by statute into mortgages that are deeds;[7]
- the document may contain a power of attorney, and the donee of the power may need to be able to use it to execute a deed;[8] or
- applicable law may simply require that the document be a deed.[9]

The classic treatise on deeds is Norton on Deeds[10] (**Norton**). It defines a deed as:

> a writing (i) on paper, vellum or parchment, (ii) sealed and (iii) delivered, whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed.[11]

The general law requirements for a deed have been modified by statute. Those modifications vary from State to State, although there is a significant degree of consistency across jurisdictions. For example, all States and Territories now provide that a deed by an individual must be signed.[12] All jurisdictions then provide, however, that an individual does not need to seal a deed, or that an individual is presumed to have sealed a deed if it contains words to that effect.[13]

While the statutory variations have relaxed some of the strictness of the rules applicable to deeds, a deed remains an instrument of some formality, and the rules relating to the formation of a deed still need to be satisfied if a document is to take effect as one.

Those rules raise a number of challenges for remote signings. Those challenges are heightened by the fact that the concept of a deed is not well understood by practitioners from non-common law jurisdictions. US practitioners are also not familiar

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7 For example, under s 101 of the *Property Law Act 1958* (Vic).

8 See the cases cited in note 35, below.

9 See, for example, s 52 of the *Property Law Act 1958* (Vic), or s 23B(1) of the *Conveyancing Act 1919* (NSW).

10 R Norton, R Morrison and H Goolden, *A Treatise on Deeds*, (Sweet & Maxwell, 2nd ed, 1928).

11 Ibid, 3. The definition has been cited with approval on many occasions. For just one example, see *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 132.

12 See, for example, s 73(1) of the *Property Law Act 1958* (Vic), or s 38(1) of the *Conveyancing Act 1919* (NSW).

13 See, for example, s 73A of the *Property Law Act 1958* (Vic) or s 38(3) of the *Conveyancing Act 1919* (NSW).

with the common law requirements for deeds, even though US non-statutory law is founded on the English common law system. As many Australian practitioners will have experienced, it can be difficult to convince American lawyers of the need to ensure that the formalities required for a deed are complied with, particularly in transactions where the American lawyers are co-ordinating the signing process and do not understand why their quite-relaxed signing processes need to be turned on their heads in order to comply with Antipodean formalities whose roots are almost lost in the mists of time.

Much has been written on the law of deeds. This paper does not attempt to traverse all that law, but instead just considers the aspects of the rules regarding the formation of deeds that present particular challenges for remote signings. Those challenges fall into two categories.

1.2 Does a deed need to be a physical instrument?

A deed, as Norton says, is a "writing … on paper, vellum or parchment".[14] It is at its heart a physical instrument, at least traditionally. If a deed is to be executed remotely, the signing procedures will need to ensure that the remote party executes the document in a manner that accommodates this requirement.

Of course, Norton's definition of a deed does not have the force of law, and was written long before the invention of computers and the internet. It could be argued, based on the desirability of the law keeping pace with commercial realities, that a deed should no longer need to be a physical instrument, and that a deed should be able to exist in electronic form as well.

This appears to be the expectation that underpins the approach to the remote execution of deeds that is set out in the City of London Guidelines (discussed further below). It is however not entirely clear that Australian courts would embrace that view, given the strength of the traditional understanding of what constitutes a deed, and so the protocols have been prepared on the assumption that deeds need to exist in physical form, pending confirmation by case law to the contrary.[15]

Electronic Transactions Acts

All Australian States and Territories have enacted legislation dealing with electronic documents and signatures.[16] Section 7 of the *Electronic Transactions Act 2000* (NSW) provides, for example, that:

> For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

A "law of this jurisdiction" includes both written and unwritten law[17], and a "transaction" includes "any transaction in the nature of a contract, agreement or other arrangement".[18]

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14 Norton et al, above note 10, 3.

15 More recent definitions than Norton's continue to say that one of the requirements for a deed is that it be written on parchment, vellum or paper. See, for example, LexisNexis Butterworths, Halsbury's Laws of Australia, Vol 10 (at 29 July 2014), 140 Deeds and Other Instruments, 'Deeds' [140-1].

16 *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Northern Territory) Act 2000* (NT); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2011* (WA).

This suggests that it might be possible to create a deed electronically. However, the strong traditional understanding of a deed as a physical instrument suggests to the author that courts might require a clearer indication from Parliament than this in order to read the legislation as allowing a deed to exist in a non-tangible form. There is in any event a risk that the legislation may not apply in relation to deeds, at least in some States and Territories, because of exceptions to the operation of the legislation – see, for example, clause 5(f) of the *Electronic Transactions Regulation 2007* (NSW), which states that the relevant provisions of the NSW legislation do not apply to:

> any requirement under a law of this jurisdiction for a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of that document.

There is no doubt that it would greatly simplify the execution of deeds in a remote signing if they could be executed electronically. Until the position is clarified (whether by case law or legislation), however, the prudent approach is to assume that the legislation may not apply to deeds, and that deeds still need to be executed as a physical instrument.

1.3 What can constitute "delivery"?

As Norton states[19], a document can only be a deed if it has been "delivered". In the early history of deeds, this no doubt contemplated a physical handing over of the instrument.[20] Case law has since relaxed this requirement, however, and delivery can now be effected by any act of the party that demonstrates "an intention to be bound"[21] by the document or, put another way, that demonstrates that the party regards the document as being "presently binding"[22]. This intention can be stated expressly, or can be inferred from the circumstances.[23] A party can deliver a document as a deed by demonstrating its intention to be bound by the document, even if the party retains possession of the instrument itself.[24]

Use of "signed, sealed and delivered" in the execution block

It is standard market practice in Australia, where an individual is to execute a deed (whether in his or her own right, or as an attorney), for the execution block to state that the deed is "signed, sealed and delivered" by the individual. Can the use of the words "and delivered" in the execution block import delivery?

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17 See, for example, the *Electronic Transactions (Victoria) Act 2000* (Vic), s 5(1) definition of "law of this jurisdiction".

18 See, for example, the *Electronic Transactions (Victoria) Act 2000* (Vic), s 5(1) definition of "law of this jurisdiction".

19 Norton et al, above note 10, 3.

20 Often described as being accompanied by a formal declaration along the lines of: "I deliver this as my act and deed". See, for example, *Tupper v Foulkes* (1861) 142 ER 314, 319; and *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619.

21 *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 133.

22 *Xenos v Wickham* (1866) LR 2 HL 296, 312; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 133.

23 *Re Carile* [1920] VLR 427, 433.

24 *Xenos v Wickham* (1866) LR 2 HL 296, 323.

This question came before the Queensland Court of Appeal in 2010 in 400 *George Street (Qld) Pty Limited v BG International Limited*.[25] In that case, a party had executed a document by means of an execution block that contained the words "signed, sealed and delivered". The words "Executed as a deed" also appeared at the top of the signing page, and "no revocation of power of attorney" text below the signature line also referred to the document as being a "deed".

Much of the argument in the case concerned whether the document was in fact a deed, or whether those indicators were outweighed by other factors that suggested that it was not. The court concluded that the document was intended to be a deed, because of the presence of these factors. Despite this (and in particular, despite the presence of the words "and delivered" in the execution block), the court held that the document had not been delivered. Any inference as to delivery that could be drawn from the presence of those words in the execution block was outweighed by other evidence which suggested that the parties had not intended to be immediately bound.[26]

Delivery by a corporation

Delivery, as noted earlier, can be any act by which the party to the deed demonstrates an intention to be bound by it.

If a company appoints an attorney to execute a deed on its behalf, that intention can be manifested by the attorney. If a company executes a deed by affixing its common seal or by the signatures of two directors (or a director and company secretary) under s 127(1) or (2) of the Corporations Act[27], however, the execution of the deed is an organic act of the company itself, not the act of a separate agent. And while ss 127(1) and (2) provide a mechanism by which a company can execute a deed, they say nothing about the manner in which the deed should be delivered.

There is authority to the effect that the sealing of a document can import delivery.[28] However, other authorities do not clearly reflect that view[29], and the rule (even if correct) would not assist in any event where the deed is signed by two directors or a director and company secretary under s 127(1), as that manner of execution does not involve the use of a seal.

More generally, the word "execute" can mean more than just "sign"[30], and in the context of deeds can also include the act of delivery.[31] This could mean, when ss 127(1) and (2) refer[32] to a company "executing" a deed, that the term includes delivery

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25 [2010] QCA 245.

26 See also P Butt, *Land Law* (Thomson Reuters, 6th ed, 2010), [19130].

27 Section 127(3) of the Corporations Act states that a company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with s 127(1) or (2).

28 *The Staple of England v The Bank of England* (1887) 21 QBD 160, 165; *Venetian Glass Gallery Ltd v Next Properties Ltd* [1939] 2 EGLR 42, [45]-[46].

29 For example, *Mowatt v Castle Steel and Iron Works Company* (1996) 34 Ch D 58, 62. Some jurisdictions have confirmed this by statute – see, for example, s 47(1) of the *Property Law Act 1974* (Qld).

30 See for example the *Macquarie Dictionary Online*, 2014, Macquarie Dictionary Publishers (accessed 30 July 2014): "to transact or carry through (a contract, mortgage, etc.) in the manner prescribed by law; complete and give validity to (a legal instrument) by fulfilling the legal requirements, as by signing, sealing, etc".

31 See, for example, *Powell v London and Provincial Bank* [1893] 2 Ch 555, 563; *Longman v Viscount Chelsea* [1989] 2 EGLR 242, 245.

– that is, that the act of signing (or signing and sealing) the document in the manner described in s 127(1) or (2) will be taken to satisfy the requirement of delivery as well.

One unfortunate consequence of that analysis would be that the company would become bound by the deed immediately it signed (or signed and sealed) it, and would be denied the ability to hold the document in abeyance until it was ready to deliver it. The inconvenience of this outcome tends to suggest that "execute" in this context may in fact not include delivery.[33] Even if the analysis is correct, though, there is no suggestion in s 127 that a company is unable, if it signs under that section, to deliver the deed as an escrow (as to which, see below). So whether or not the references in s 127 to the execution of a deed include delivery, there needs to be some way of determining the company's intention in relation to delivery – whether the document has been delivered at all (if "execute" in s 127 has only a narrow meaning), or whether (and on what terms) it has been delivered as an escrow (on either interpretation). The common sense approach is to look for this intention in the minds of the individuals who caused the company to execute the document by themselves signing it. This approach has been adopted (indeed, assumed to be the case) in a number of English decisions,[34] and is likely to apply in Australia as well.

Agents

A party may deliver a document as a deed itself, or through an agent. If the party wants to appoint an agent to deliver the document on its behalf, however, it must do so by way of another instrument under seal.[35]

Escrows

A party that has delivered a document as its deed is generally unable to withdraw from the deed, because the act of delivery has demonstrated the party's intention to be presently bound by it.[36] Delivery, however, can be conditional rather than unconditional. If a deed is delivered unconditionally, it takes effect immediately. If a deed is delivered conditionally, commonly referred to as being delivered as an escrow, then the deed only takes effect if the condition is satisfied.[37] If the condition is satisfied, though, the deed takes effect retroactively, as of the date of delivery.[38]

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32 In conjunction with s 127(3).

33 A similar view has been taken on the meaning of "execution" in other statutes. See, for example, *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 121f.

34 *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, 102-104; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, 619.

35 *Powell v London and Provincial Bank* [1893] 2 Ch 555, 563; *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, 98; *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 119-120; and *Scook v Premier Building Solutions Pty Ltd* (2003) 24 WAR 124, [42]-[43]. This requirement has been abrogated by statute in Victoria: see s 73B of the *Property Law Act 1958* (Vic).

36 *Beesley v Hallwood Estates Ltd* [1961] CH 105, 121; *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 30 EG 92.

37 *Powell v London and Provincial Bank* [1893] 2 Ch 555, 563; *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, 99; *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 119-120; and *Scook v Premier Building Solutions Pty Ltd* (2003) 24 WAR 124, [26].

38 *Powell v London and Provincial Bank* [1893] 2 Ch 555, 563; *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, 98; *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 119-120; and *Scook v Premier Building Solutions Pty Ltd* (2003) 24 WAR 124, [26]-[29].

Whether delivery of a deed is conditional or unconditional is a question of the intent of the party.[39] The conditions do not need to be set out in the deed itself, and can be established orally, or implied from the circumstances.[40] For a deed to be delivered conditionally, however, the conditions must be outside the party's control.[41] If a proposed condition is something that the party can control (such as a condition that the party do some further act, or provide a further consent), then the purported delivery will not be delivery at all (because the party has not demonstrated an intention to be presently bound). Rather, the party (or its appropriately appointed agent) will need to (re) deliver the deed later, when the party has completed the act or given the consent.

A rigid application of the rule that delivery (including as an escrow) is irrevocable, and the rule that a person can only deliver a deed on another person's behalf if themselves authorised to do so by an instrument under seal, does not sit comfortably with market practice for the conduct of conveyancing transactions, where the parties normally execute their documents in advance of closing and hand them over to their solicitors, on the basis that the solicitors will exchange them for the other side's counterparts at settlement. The potential conflict arises because the executed documents are typically regarded as being revocable until they are exchanged, but the parties do not normally appoint their solicitors by an instrument under seal to effect delivery on their behalf.

This issue came up for consideration in New South Wales in 1977 in *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers*[42] (**Hooker**). This case involved the grant of an option to purchase some land in Lane Cove in Sydney, which the parties had agreed to in principle, but subject to formal documentation being settled. The documents were negotiated, and each party signed a counterpart. Before the counterparts were exchanged, however, the vendor received a superior offer from another party, and declined to complete.

The buyer sought a declaration that the vendor was bound to complete the transaction. The executed counterparts were in the form of deeds, and the buyer argued that the vendor had executed and delivered its counterpart as an escrow, conditional only on execution of a corresponding counterpart by the buyer. As the buyer had executed its counterpart, the buyer argued that the escrow condition had been satisfied, and that the deed was binding on the vendor.

The court did not disagree with the principle that a deed, once delivered, cannot be revoked. On the facts, however, the court held that the deed had not yet been delivered by the vendor. Instead, the court took the view that the parties were intending to follow normal conveyancing practice, and to reserve the ability to withdraw from the transaction at any time before exchange of documents. It followed from this

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39 *Beesley v Hallwood Estates Ltd* [1961] Ch 105, 121; *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80, 90; *Segboer v AJ Richardson Properties Pty Ltd* [2012] NSWCA 253, [58]; *Rose v Rose* (1986) 7 NSWLR 679, 685.

40 See *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 134.

41 *Beesly v Hallwood Estates Ltd* [1961] Ch 105, 120-121; *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 118; *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124, 133; *Foundling Hospital (Governors and Guardians) v Crane* [1911] 2 KB 367; *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] 1 Ch 88, [100]-[102].

42 [1977] 2 NSWLR 109.

that the vendor had not yet delivered its deed, because it did not have the requisite intention:[43]

> in a case where the parties employ solicitors, and intend to adopt the customary conveyancing practice adopted in relation to entering into contracts for the purchase of land, I do not believe that the sealing of a deed, and its return to a party's solicitor, imports delivery of it as a deed, either conditionally or unconditionally. It clearly is not intended, in such a case, to operate as that party's deed until it is exchanged.

While this factual finding largely dispensed with the matter before the court, the court went on to discuss whether it was possible for the "customary conveyancing practice" to accommodate the requirements for delivery of a deed, given the rule that an agent can only deliver a deed if the agent's authority to do so is conferred under seal.[44] The court refrained from expressing a view on this, however, other than to point out that the potential difficulties that the rule could generate did not entitle a court to re-engineer the intention of a party when it signed and sealed the document:[45]

> It may be that difficulties associated with the delivery of deeds by agents of grantors has led to findings that deeds have been executed in escrow. If the law in the present day and age still requires companies in our society to appoint an agent or attorney under seal, before that agent can effect delivery of any deed of the company, then one can understand this. But this situation does not warrant a finding that a deed was delivered in escrow, when in fact delivery by exchange was intended, even though the latter might not be legally effective through want of a power of attorney or other solemn authorisation.

The same question was considered more recently by the English Court of Appeal in *Longman v Viscount Chelsea*.[46] In that case, a tenant of land sought an order requiring the landlord to complete the grant of a new lease. Similar to the situation in *Hooker*, each party had executed a counterpart of the deed of lease and provided it to their lawyers, but the counterparts had not been exchanged. The landlord decided before exchange that it was no longer satisfied with the commercial terms of the new lease, and refused to proceed on those terms. The tenant argued that the landlord was obliged to complete the transaction, because it had executed and delivered its counterpart of the deed of lease as an escrow, and the escrow conditions were now fulfilled or capable of fulfilment.

The Court of Appeal was clearly not impressed by the landlord's behaviour. Despite this, the court held that the landlord was not bound to complete the transaction.

The leading judgment was delivered by Nourse LJ. He summarised the available options for delivery of a deed in this way:[47]

> A writing cannot become a deed unless it is signed, sealed and delivered as a deed. Having reached that stage, it is correctly described as having been "executed" as a deed. Having been signed and sealed, it may be delivered in one of three ways. First, it may be delivered as an unconditional deed, being irrevocable and taking immediate effect. Second, it may be delivered as an escrow, being irrevocable but not taking effect unless and until the condition or conditions of the escrow are fulfilled. Third, it may be handed to

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43 Ibid, [118].

44 See the cases cited at note 35.

45 *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, 120.

46 [1989] 2 EGLR 242.

47 Ibid, 245.

> an agent of the maker with instructions to deal with it in a certain way in a certain event, being revocable and of no effect unless and until it is so dealt with, whereupon it is delivered and takes effect.

The court held that the third of these options applied in this case. This was based in part on the expectations of the "general practice of conveyancers". The determining factor, as in *Hooker*, was the landlord's intention – had the landlord intended to deliver the deed so that it was no longer able to withdraw from the transaction, or had it signed and sealed the document and handed it over to its lawyer as one step in a negotiation that was not yet complete, and on the basis that it was still able to withdraw if it so chose? On the facts, and reflecting usual conveyancing practice, the court held that the landlord had intended to retain the ability to withdraw from the transaction. This meant that it had not yet intended to deliver its deed, whether as an escrow or otherwise, and so was not bound to complete.

This aspect of the decision is quite consistent with the established principle that delivery of a deed is an act by which a party demonstrates its intention to be bound. If an action by the party does not demonstrate an intention to be bound, then it will not constitute delivery of the deed, in the technical legal sense. Nourse LJ went on, however, to address a further point raised by counsel to the tenant,[48] to the effect that the expectation of conveyancing lawyers, that an as-yet undelivered deed could become effective as a deed upon exchange by a party's lawyers at settlement, would fall foul of the rule that a party's deed can only be delivered by an agent if the agent is authorised to do so under seal. The court acknowledged that potential difficulty, but appeared to suggest that it should be possible to deliver deeds as part of a conveyancing transaction despite the rule:[49]

> If there be a conflict here between arcane but hallowed principles of the law relating to deeds and the settled expedient practices of conveyancing, it is obvious that we must look to uphold the latter.

The court did not need to express a concluded view on this point, though, as it did not affect the landlord's ability to revoke its undelivered deed.

It is unclear, at this stage of the evolution of this strand of thinking, whether it applies just to conveyancing transactions, or more broadly. It also remains to be seen whether it will become a settled part of Australian law. The practitioners involved in the preparation of this protocols had differing views on this, with some being more confident than others that the rule regarding the delivery of a deed by an agent would not apply to a transaction that settled by exchange of documents. As will be seen from the discussion of the protocols a little later in the paper, though, the protocols side-step this question for the time being.

2. GUARANTEES

2.1 Guarantees in financing transactions

Guarantees are a feature of many financing transactions. They may be incorporated in another document, such as a facility agreement, or be in a stand-alone document,

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[48] Who was David Neuberger QC (as he then was), now Lord Neuberger, President of the UK Supreme Court and keynote speaker at our conference this year.

[49] [1989] 2 EGLR 242, 246.

which could be an agreement or a deed. They can be given by individuals, but most guarantees in transactions signed remotely will be given by companies.

Guarantees present some particular challenges for remote signings because of the need in most States and Territories to comply with the requirements of the Statute of Frauds.

2.2 The Statute of Frauds

(a) The legislation

Section 4 of the Statute of Frauds 1677 provides that:

> No action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person … unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

In other words, s 4 of the Statute of Frauds requires that a guarantee, or a memorandum or note of the guarantee, be in writing and signed by the guarantor (or its authorised representative).

The Statute of Frauds was received into Australia under s 24 of the *Australian Courts Act 1828* (Imperial). Section 4 continues to be part of the law in all States and Territories other than New South Wales, South Australia and the Australian Capital Territory.[50]

(b) The "writing" requirement

(i) Timing

Some early case law on s 4 of the Statute of Frauds suggested that a memorandum or note could only satisfy the section if it was brought into existence after the agreement itself had been entered into.[51] It has now been clear for many years, however, that the signed memorandum or note can be brought into existence before the agreement itself is concluded – for example, where a written offer to enter into a guarantee is accepted orally.[52]

(ii) Joinder of documents

To satisfy the Statute of Frauds, the written agreement, or note or memorandum, must contain the terms (or at least the essential terms) of

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[50] *Civil Law (Property) Act 2006* (ACT) s 201; *Conveyancing Act 1919* (NSW) s 54A(1); *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (QLD) s 59; *Law of Property Act 1936* (SA); *Conveyancing and Law of Property Act 1984* (Tas) s 36; *Statute of Frauds 1677 (Imp)* (WA); *Instruments Act 1958* (Vic) s 126.

[51] See, for example, *Munday v Asprey* (1880) 13 Ch D 855, 857.

[52] See, for example, *O'Young v Walter Reid and Company Limited* (1932) 47 CLR 497, 514; and *Pirie v Saunders* (1961) 104 CLR 149, 156.

the agreement.[53] However, it is possible to join separate documents together in some circumstances in order to identify those terms.

For joinder of documents to satisfy the Statute of Frauds, the traditional approach was that the signed document must expressly refer to the other document that is sought to be joined to it. In *Thomson v McInnes*[54] (***Thomson***), for example, the High Court stated that:[55]

> The reference, therefore, in the document signed must be to some other document as such, and not merely to some transaction or event in the course of which another document may or may not have been written.

Sixteen years later, however, a differently composed High Court again considered the issue, in *Harvey v Edwards, Dunlop & Co Ltd*[56] (***Harvey***). In that case the High Court stated, without reference to *Thomson*, that:[57]

> It is also well settled that the memorandum "need not be contained in one document; it may be made out from several documents if they can be connected together." They may be connected by reference one to the other; but further, "if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together"

The inconsistency between needing to refer to the other document (in *Thomson*) or being able merely to refer to a transaction which involves the other document (in *Harvey*) has not been reconciled by the High Court. However, the expansive approach in *Harvey* is generally viewed as the current Australian position.[58]

(c) **The "signing" requirement**

The requirement that the agreement, note or memorandum be "signed" has been interpreted very generously. It is not necessary that the person manually sign their name into the document. Rather, courts have held that a document will be "signed" by a party for the purposes of the Statute of Frauds if, for example, the party's name appears:

- in the letterhead of a sale document prepared by the party;[59]

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53 See JW Carter, *Contract Law in Australia* (LexisNexis, 6th ed, 2013), [9-13].

54 (1911) 12 CLR 562.

55 Ibid, 569.

56 (1927) 39 CLR 302.

57 Ibid, 307.

58 See, for example, JW Carter, above note 53, [9-15]; *Todrell Pty Ltd v Finch (No 1)* [2007] QSC 363, [107]; *Pang v Bydand Holdings Pty Ltd* [2010] NSWCA 175, [22].

59 *Schneider v Norris* (1814) 105 ER 388, 389.

- on the front page of a sale catalogue that an auctioneer cuts out and pastes into the book that the auctioneer then uses to record a sale made as the party's agent;[60]

- as the addressee of a letter that is prepared by the party for execution by the other party;[61]

- in a record of the agreement prepared by a third party, if the party does an act by which he or she recognises it as a record of the agreement; [62] or

- in a telegram that is sent with the party's authority.[63]

In all these cases, the party involved was seeking unmeritoriously to extricate itself from a bargain that it had freely entered into but no longer wanted to complete. This is no doubt predisposed the court to read the section flexibly. The principle that can be extracted from these cases, however, is that a typed or pre-printed rendition of a party's name can constitute a "signature" by that party for the purposes of the Statute of Frauds if:

- the party itself prepared, authorised or adopted the document as a record of the transaction; and

- its name in the document is intended to designate it as a party to the transaction.[64]

The signature does not need to appear at the foot of the document. It can appear at the top or even in the body of the document, as long as it is clear that it is intended to "authenticate" the document's contents.[65]

It is also possible for a signature that is applied to a document at one point in time to be treated as a signature of a different version of that document at a later point in time, if the later version of the document is ratified by the signatory before the agreement takes effect. This is what happened, for example, in *Koenigsblatt.*[66] In that case, a party's later ratification of changes made to its signed document had the effect not only of validating the amendments as a matter of contract law, but also of causing the original signed document with the ratified amendments to be a sufficient note or memorandum of the agreement (as amended) for the purposes of the Statute of Frauds.

A further example of this principle, and one that was relied on in part by the Court of Appeal in *Koenigsblatt*, can be found in the 1874 decision of *Stewart v*

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60 *Cohen v Roche* [1927] 1 KB 169, 178-179.

61 *Evans v Hoare* [1892] 1 QB 593, 598-599.

62 *Durrell v Evans* (1862) 158 ER 848, 855.

63 *Godwin v Frances* (1870) LR5CP 295, 305-306.

64 This elevation of a typed or printed rendition of a party's name into a signature for the purposes of the Statute of Frauds is often referred to as the "authenticated signature fiction". For the early history of the development of the authenticated signature fiction, see Williams, Section 4 of the Statute of Frauds (Cambridge Press, 1932), at 83f.

65 *Evans v Hoare* [1892] 1 QB 593, 596; *Caton v Caton* (1866) LR 1 Ch 137, 148.

66 See note 3 and the accompanying text.

Eddowes[67]. *Stewart v Eddowes* involved a series of offers and counter-offers for the sale of a ship. The thrust and counter-thrust began when the vendors' broker sent the proposed sale agreement to the purchaser. The purchaser hand-marked some changes to the agreement, signed it and returned it to the broker. The vendors did not accept the purchaser's changes, however, so they (and their broker) struck them out and added some further changes of their own. The vendor's broker then signed the agreement as agent for the vendors, and re-presented it to the purchaser. The purchaser agreed to the vendors' changes, and approved of the agreement.

The court held that the purchaser's signature on the document was sufficient to satisfy the Statute of Frauds, even though the purchaser had actually only signed the earlier (pre-amended) copy of the agreement, because he had subsequently agreed (orally) that "his [earlier] handwriting should operate as a signature to what then became a complete agreement between the parties".[68]

Koenigsblatt and *Stewart v Eddowes* have been followed in Australia – see *O'Young v Walter Reid and Company Limited*[69], and more recently *Amalgamated Television Services Pty Ltd v Television Corporation Ltd*,[70] and *Licata v Madeddu*.[71]

The decision in *Mercury Tax* is not readily reconcilable with these cases. However, it can perhaps be distinguished on the basis that the Statute of Frauds was not at issue in *Mercury Tax*, and that *Mercury Tax* related to deeds. And more generally, to the extent that *Mercury Tax* cannot be reconciled with the principles that were set out in *Koenigsblatt* and were adopted in the Australian cases referred to above, those latter authorities should clearly be followed, and *Mercury Tax* confined to its particular facts.

(d) **Can an email be a "signed writing"?**

The terms of any guarantee in a corporate financing transaction will invariably be contained in a prepared document.

In a remote signing, however, it may be possible to argue if necessary that the emails that are exchanged by the parties, rather than the prepared document itself, will constitute a sufficient "signed writing" for the purposes of the Statute of Frauds.

(i) **Can an email be "writing"?**

Before the computer was invented, writing necessarily appeared in a physical medium – typically on paper. With the arrival of the electronic age, however, this is no longer so. Case law has kept pace with this development in relation to the Statute of Frauds, and it is now clear that an email can constitute a "writing" for the purposes of Statute of Frauds,

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67 (1874) LR 9 CP 311.

68 Ibid, 314.

69 (1932) 47 CLR 497.

70 [1970] 3 NSWR 85.

71 [1986] ANZ ConvR 438, 439.

whether or not it is printed out. See the cases discussed in the next section.[72]

(ii) **Can an email be "signed"?**

It is clearly not possibly for an email to be "signed" in the traditional sense of a wet-ink signature on a piece of paper. Once it is accepted that an email can be "writing", however, the extended concept of a signature, discussed in paragraph (c) above, is able to come into play.

This came up for consideration in England in 2006, in *J Pereira Fernandes SA v Mehta*[73] (***Mehta***). In that case, a director offered by email to guarantee amounts owed by his company to a supplier. The email was not signed by the director in the traditional sense, but his surname and part of his first name were inserted automatically into the header of the email when the email was dispatched. The offer was accepted orally.

The court held that the email was capable of being a sufficient writing for the purposes of the Statute of Frauds. Despite this, the claim on the guarantee failed because the writing had not been signed. The court accepted that a person can sign an email for Statute of Frauds purposes by inserting his or her name into the email, but held on the basis of *Evans v Hoare*[74] and *Caton v Caton*[75] that the name must be inserted in the email in order to authenticate the contents of the email, ie as a signature. Here, the sender's name was not inserted by the sender with the intention that it operate as a signature, but rather was inserted automatically when the email was sent. This was not sufficient to satisfy the Statute of Frauds.

The proposition that an email can be a writing for the purposes of the Statute of Frauds, and that the sender can sign it for this purpose by inserting its name into the email in a manner that is intended to authenticate the email's contents, was also recognised by the English Court of Appeal in 2012 in *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd*.[76] The New South Wales Supreme Court has also accepted in a series of recent decisions that an email can be a "writing", and that the sender can "sign" the email by inserting his or her name in the email in order to authenticate its contents.[77] The New South Wales decisions did not relate to the Statute of Frauds, but in the author's view Australian courts are likely to take the same view in the context of the Statute of Frauds as well, particularly given the English authority in *Mehta* and *Golden Ocean Group*.

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72 As something of an aside, it has also been held in a different context that an email can be a "document": see *Victor Chandler International v Customs and Excise Commissioners* [2002] 2 All ER 315, [45].

73 [2006] EWHC 813.

74 [1892] 1 QB 593.

75 (1866) LR 1 Ch 137.

76 [2012] EWCA Civ 265, [31]-[32].

77 See *Kavia Holdings Pty Limited v Suntrack Holdings Pty Limited* [2011] NSWSC 716, [33]; *Kation Pty Ltd v Lamru Pty Ltd* [2011] NSWSC 219, [33]; and *Stuart v Hishon* [2013] NSWSC 766, [33]-[34].

Agents

The Statute of Frauds states that the agreement, memorandum or note for a guarantee can be signed by an agent. The authority of the agent need not be in writing.[78] In *Mehta*, for example, the purported guarantor instructed a member of his staff to send the note or memorandum of the guarantee to the solicitors of the guaranteed party, and this oral instruction was sufficient to create the necessary agency.[79]

(iii) **The Electronic Transactions Acts**

It is also possible that the requirements of the Statute of Frauds could be satisfied electronically, through the operation of the *Electronic Transactions Act 2000* (NSW) and its counterparts in the other States and Territories. Given the flexibility available as a result of the decisions in *Mehta* and *Golden Ocean Group*, however, it is not necessary to explore this further.

2.3 Guarantees that are deeds

If a guarantee is given as a deed, it will need to satisfy the requirements for execution of a deed, discussed earlier in this paper. These requirements should be sufficient to satisfy the requirements of section 4 of the Statute of Frauds as well.

3. DEALINGS IN LAND

3.1 Real estate contracts in financing transactions

Financing transactions frequently involve land. Loans are often secured by a mortgage of land. If a transaction is to finance an acquisition of land, the documents for the transaction may also include the contract under which the land is to be purchased, and the transfer document itself. Some of these documents will need to be registered with the relevant land titles office. If a transaction involves a document that needs to be registered with a land titles office, the parties will need to sign "wet ink" originals in a form that reflects all the relevant registrability requirements.

Even if real property documents do not need to be registered, they will still need to comply with some formal requirements.

3.2 Statute of Frauds

(a) **The legislation**

All States and Territories have either preserved or re-enacted s 4 of the Statute of Frauds in some form in relation to dispositions of an interest in land. For example, s 54A(1) of the *Conveyancing Act 1919* (NSW) provides that:

> No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in

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[78] Except in Victoria – see s 126(1) of the *Instruments Act 1958* (Vic).

[79] As noted in the previous section, though, the guarantee failed to satisfy the Statute of Frauds on other grounds.

writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

(b) **Same principles as for guarantees**

The principles discussed above relating to the application of s 4 of the Statute of Frauds to guarantees will apply with equal force in relation to contracts that dispose of interests in land.

3.3 Other real property legislation

States and Territories also apply some further rules for disposals of interests in land. In New South Wales, for example, s 23B(1) of the *Conveyancing Act 1919* (NSW) provides that a legal interest in land can only be disposed of by deed:

> No assurance of land shall be valid to pass an interest at law unless made by deed.[80]

Section s 23C of the *Conveyancing Act 1919* (NSW) also provides as follows:

> (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:
>
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,
>
> (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,
>
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.
>
> (2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.[81]

Section 23C derives from s 3 of the Statute of Frauds,[82] although it is a substantially reworked form to the original Statute.

There is clearly potential for overlap between s 23C and s 54A. The distinction that has been drawn is that s 54A sets out the requirements for an agreement to sell or dispose of an interest in land, whereas s 23C sets out what is required for the actual creation or

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80 Similar provisions are in force in most other States and Territories: *Law of Property Act 1936* (SA) s 28(1); *Conveyancing and Law of Property Act 1884* (Tas) s 60(1); *Property Law Act 1958* (Vic) s 52(1); *Property Law Act 1969* (WA) s 33(1).

81 Similar provisions are in force in all other States and Territories: *Property Law Act 1958* (Vic), s 53; *Property Law Act 1974* (Qld), s 11; *Law of Property Act 1936* (SA), s 29; *Property Law Act 1969* (WA), s 34; *Conveyancing and Law of Property Act 1884* (Tas), s 60; *Law of Property Act* (NT) s 10; *Civil Law (Property) Act 2006* (ACT) s 201.

82 See *Adamson v Hayes* (1973) 130 CLR 276, 302; and *Khoury v Khouri* [2006] NSWCA 184, [38].

disposal of the interest itself. These steps will often coincide, but are conceptually distinct and so may not.[83]

Section 23C is narrower than s 54A, in that it does not allow for a note or memorandum, as an alternative to the operative instrument itself, to be in writing. Importantly for the protocols, however, the principles of joinder do apply.[84]

4. PPSA SECURITY AGREEMENTS

Section 20(1) of the *Personal Property Securities Act 2009* (**PPSA**) provides that a security interest is only enforceable against a third party in respect of particular collateral if, among other requirements, one of the following applies:

- the secured party possesses the collateral;
- the secured party has perfected the security interest by control; or
- the secured party has a security agreement that "covers the collateral".

It will not be practicable or even possible, in the great majority of typical financing transactions, for the secured party to take possession of the collateral or to perfect its security interest by control. This means, for most transactions, that the secured party will need to ensure that its security agreement "covers the collateral".

Section 20(2) of the PPSA sets out what is required for a security agreement to cover collateral. Among other requirements, the security agreement will need to be "evidenced by writing", and that writing will need to be either:

- signed by the grantor; or
- "adopted or accepted by the grantor by an act, or omission, that reasonably appears to be done with the intention of adopting or accepting the writing".

The PPSA defines "writing" broadly, to include electronic forms of recording or displaying words or data:

> ***writing*** includes:
>
> (a) the recording of words or data in any way (including electronically), if, at the time the recording was made, it was reasonable to expect that the words or data would be readily accessible so as to be useable for subsequent reference; and
>
> (b) the display, or other representation, of words or data by any form of communication (including electronic), if:
>
> (i) the display or representation is recorded in any way (including electronically); and
>
> (ii) at the time the recording was made, it was reasonable to expect that the words or data would be readily accessible so as to be useable for subsequent reference.

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[83] See, for example, the discussion in *Khoury v Khouri* [2006] NSWCA 184, starting at [35].

[84] *Australia and New Zealand Banking Group Ltd v Widin* (1990) 102 ALR 289, 300.

Section 20(3) also seeks to accommodate electronic signatures:

> (3) Without limiting subparagraph (2)(a)(i), for the purposes of that subparagraph a grantor is taken to sign writing if, with the intention of identifying the grantor and adopting, or accepting, the writing, the person applies:
>
> (a) writing (including a symbol) executed or otherwise adopted by the person; or
>
> (b) writing wholly or partly encrypted, or otherwise processed, by the person.

The question might arise as to whether s 20 requires the writing to evidence the **existence** of the security agreement, or just its terms – for example, whether it will be sufficient for s 20 if the grantor signs a written offer to enter into a security agreement (which the secured party later accepts by conduct), rather than the security agreement itself. Section 20(2) has within it a clear echo of the Statute of Frauds, and the better view, consistent with the flexible approach that courts have taken to interpreting the Statute of Frauds,[85] is that it only requires that the **terms** of the security agreement be evidenced by writing, not the existence of the agreement as well. This interpretation is also supported by s 20(2)(a)(ii) of the PPSA which, by acknowledging that the writing may be adopted or accepted by the grantor, appears to assume that the writing can be in existence before the agreement itself arises.

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[85] See section 2.2 of Part B.

PART C – APPLICABILITY OF THE PROTOCOLS TO DIFFERENT TYPES OF DOCUMENTS[86]

1. APPROACH 1

1.1 The key steps in the approach

Under Approach 1, the co-ordinating law firm emails to each remote party an entire copy of the document. The remote party prints out the required number of copies of the entire document, and arranges for its signatory to sign them in the appropriate place. The remote party then emails back a scanned copy of one of the entire signed documents including the signature page or, if the document is too long, a scanned copy of just the signature page. If the co-ordinating law firm anticipates that a remote party might only send back the signature page rather than the entire document, it may be helpful as an evidentiary matter for the execution version of the document to include a statement, inserted immediately below the "EXECUTED as a deed" (or equivalent) text that appears above the signature blocks, to the effect that the signatory confirms that it signed the entire document, and not just the signature page separately.

In the email with which the remote party returns the signed document or signature page, the remote party should also confirm either that the document is delivered unconditionally, or that the document is delivered subject to the conditions set out in the email.

Ideally, the return email should come from the remote signatory itself. In many cases, however, this will not be practicable. If the return email is sent by someone other than the remote signatory, the sender should confirm in the email that the remote party has delivered the document as described in the email, ie that they are not effecting the delivery themselves.

The protocols simplify the process for giving these confirmations (and seek to minimise the risk that they might not be given), by having the co-ordinating law firm set out the language of the confirmations in its email to the remote party. The remote party then gives the confirmations by simply replying to the email, without needing to set them out afresh.

Types of documents

This approach can be used for all types of documents. It is the only proposed approach for deeds and registrable real property documents. The reasons are explained in the next two sections.

1.2 Deeds

The steps in Approach 1 are designed to provide the other parties with a sufficient level of confidence that the remote signatory has correctly signed the document, and that the document has been effectively delivered as a deed.

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[86] As noted earlier, these protocols are not necessarily the only ways in which documents in a remote signing can be executed in accordance with Australian law. Other approaches may also work, depending on the documents involved and the circumstances.

Signing

The most important (and potentially most problematic) step in Approach 1 is the requirement that the remote signatory sign an entire copy of the deed, including any schedules and annexures. This can be a logistical challenge for a remote signatory, as they may be in a location where commercial-scale printing and scanning facilities are not readily available.

This is an unavoidable inconvenience, however, if a document needs to be executed as a deed. As noted earlier, the City of London Guidelines are more relaxed on this point, as they do not require the remote signatory to print out the entire document – rather, they only require the remote signatory to print out and sign the signature page, and then to email back the scanned signature page together with the final (unsigned) version of the document that the signature page relates to. The City of London Guidelines take the view that the email combining the signature page and unsigned document will constitute a deed, even though it is not a physical instrument. As also discussed earlier, however, it is not clear that Australian courts would accept that view, so the protocols contemplate, if a document is to take effect as a deed under Australian law, that the entire document should be printed out and signed.

If this is likely to be a challenge, consideration should be given during the drafting and negotiation process to keeping any document that needs to be a deed as short as possible. This could be done, for example, by arranging for the deed to incorporate the contents of other documents by cross-reference, rather than setting everything out in the deed itself. Consideration should also be given to whether a document needs to be a deed at all, or whether it could instead take effect as a simple contract.

Delivery

In addition to signing (and sealing), of course, a document will not take effect as a deed until it has been delivered in the formal legal sense. Again as discussed earlier, delivery can be unconditional or conditional (ie as an escrow). For most remote signings, the remote signatory will want its delivery to be conditional, as it will only want its document to take effect once other parties have executed and delivered their documents as well.

Our approach contemplates that the delivery conditions be contained in the email communications. As noted above, the co-ordinating law firm should set the appropriate language out in the email that it sends to the remote party, so that the remote party can confirm the delivery conditions simply by replying to that email.

Agents

Ideally, the remote signatory itself should send back the email with the signed document (or signed signature page) and the statement as to delivery. Often, however, they will ask someone else to send the email for them (such as a personal assistant, or their law firm). This has two potential consequences.

- First, if the agent sends back just the signature page rather than the entire signed document, there is no personal confirmation from the remote signatory itself that it did indeed print out and sign the entire document.

  The protocols suggest that one way in which this concern could be alleviated could be to include a personal statement by each signatory to that effect in the

signature section of the document. This is not a bullet-proof or essential solution, but is worth considering, as evidentiary support.

- Secondly, care needs to be taken to ensure that the deed is still delivered in the formal sense by the remote signatory, not by the person sending the email. This is because of the rule that an agent can only deliver a deed on behalf of another person if the agent is itself authorised to do so by an instrument under seal.[87]

  If someone other than the remote signatory sends the email, that person is unlikely to have been authorised by deed to deliver the document on behalf of the party that signed remotely. For this reason, Approach 1 relies on being able to argue that the remote signatory has delivered the deed, and that the person sending the email is simply communicating that fact to the co-ordinating law firm. That way, the document is still delivered by the remote signatory (conditionally or unconditionally, as relevant), and issues around the authority of the go-between do not arise.

  Approach 1 does not seek to rely on the potential "exchange" option for delivery which, as discussed earlier, may be available in the context (at least) of conveyancing transactions.[88] The key benefit of being able to rely on the "exchange" option rather than delivering a deed as an escrow is that the "exchange" option retains for the party the ability to withdraw from the transaction at any time before the exchange of documents is complete. This is not likely to be necessary in most remote signings for financing transactions, however, as the parties by that stage have usually made the decision to proceed with the transaction, and are unlikely to expect that they could unilaterally withdraw after they have signed. The commercial expectation is likely to be that the only condition on a party's document taking effect is that the other parties have signed as well, and typically all parties would sign at about the same time. This may need to be reconsidered, however, if a transaction requires a more attenuated signing timeline.

Our approach is more detailed in relation to delivery than the City of London Guidelines. Those guidelines acknowledge the need for a deed to be delivered, but do not spell out how this can be done. As delivery is an essential step in the formation of a deed, though, we felt that it was important to provide some guidance in relation to delivery as well.

Multiple originals

Finally, it will be seen that our approach requires the remote signatory to print out and sign multiple copies of the document, so that the co-ordinating law firm will in due course receive fully-signed originals for distribution to the other transaction parties. The City of London Guidelines, in contrast, do not require this. As an extension of the view taken that the return email with the attached scanned signature page and final form of document can itself be the actual deed, the City of London Guidelines contemplate that the co-ordinating law firm can create additional "originals" of the deed by simply printing off the final (unsigned) document and attaching it to the scanned copy of the signature page. Consistent with the more cautious approach that we are

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87 See note 35.

88 See the discussion of *Hooker* and *Longman v Viscount Chelsea* in the text accompanying notes 42 to 49.

taking to the creation of the deed itself, our preference if multiple originals are required is for the remote signatory to "wet-ink" execute an appropriate number of copies, and not follow the City of London Guidelines approach.

1.3 Registrable real property documents

The reason for using Approach 1 for registrable real property documents (whether or not they are deeds) is purely pragmatic, and that is that the registry with which the document needs to be lodged is likely to require that it be provided with full wet-ink originals, not just a pdf. This approach will also be sufficient to satisfy the requirements of the Statute of Frauds, as well as the other legislated writing requirements for real property instruments discussed in Part B.

If the document is not also a deed, then it is strictly not necessary to ensure that the process of returning the document to the co-ordinating law firm will be adequate to satisfy the technicalities of the rules relating to delivery. We did not want to complicate the steps in the approach more than necessary, however, and so decided to apply the same procedures as for deeds, even though some aspects of those procedures may not always be necessary.

2. APPROACH 2

2.1 The key steps in the approach

Approach 2 is logistically simpler than Approach 1. Under Approach 2, the co-ordinating law firm emails to the remote party an entire copy of the document (including the signature pages), and a separate copy of the remote party's signature page from that document, in the same email. The signature page should clearly identify the document that it belongs to — for example, by containing the name of the document, the numerical identifier given to the document by the drafting firm's word processing system, and/or its page number in the document. The identifying feature(s) need to be sufficient to enable the signature page to be "joined" to the final form of the document under the principles discussed earlier in this paper.[89]

The remote party prints out, and arranges for its signatory to sign, the required number of copies of the signature page. It then emails a scanned copy of one of the pages to the co-ordinating law firm. In that return email, the remote party should confirm that:

- it is bound by the document, either from the date of the email or from the date set out in the email (such as the date on which other parties have signed and sent in their documents as well); and

- the co-ordinating law firm is authorised, when it receives the originals, to insert them into a copy of the document that the co-ordinating law firm emailed to the remote party with the unsigned signature page, and to date the compiled document with that nominated date.

Ideally, the sender of the email should manually insert their name into the email as a signature.

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[89] See the text accompanying notes 53 to 58.

To make the process as easy as possible for the remote party (and to minimise the risk that the process might not be followed properly), the co-ordinating law firm should set the appropriate language out in the email that it sends to the remote party, so that the remote party can confirm those matters simply by replying to that email.

Agents

It is preferable for the reply email to come from the remote signatory itself. It can however be sent by another person on the remote signatory's behalf.

Types of documents

This approach can be used for guarantees, for contracts affecting real property that do not need to be registered, and for PPSA security agreements (in each case, as long as they are not intended to take effect as a deed). It can also be used for other simple contracts such as facility agreements. It is not appropriate for deeds, or for registrable real property documents (as to which, see Approach 1).

2.2 Guarantees

As with the other approaches, Approach 2 is designed to provide other parties with a sufficient level of confidence that the remote signatory has signed the correct document, and has done so in a way that satisfies any formalities that are required for that type of document by Australian law.

For documents that are guarantees, this means that the signing process needs to satisfy the requirement in the Statute of Frauds that the agreement, or a memorandum or note of the agreement, be in writing and signed by the guarantor.[90] As discussed earlier, though, it is not necessary that all the terms of the guarantee be contained in the piece of paper that the guarantor actually signs. A signed instrument can satisfy the Statute of Frauds even if it does not contain all the necessary terms, if it is able to be linked sufficiently clearly to other documents that do contain those terms.

This is the purpose behind requiring that the signature page contain identifying features that clearly link it to the full document. The inclusion of these features in the signature page, combined with the fact that the co-ordinating law firm emails the signature page to the remote party together with the final form of the guarantee itself, is designed to allow the separate signature page to be joined to the unsigned final form of the guarantee in a manner that meets the requirements of the Statute of Frauds.

As Approach 2 is not proposed for deeds, it does not need to accommodate the special rules that apply to delivery of a deed. The co-ordinating law firm simply needs to sight a copy of the signed signature page, in order to be satisfied as an evidentiary matter that it has in fact been executed by the remote signatory. It does not matter in this respect whether the scanned signed signature page is sent to the co-ordinating law firm by the remote signatory itself, or by someone on its behalf. It is also technically not necessary, for the guarantee to be binding, that the co-ordinating law firm ever receive the wet-ink signature pages, or that it use them, when they arrive, to compile full

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[90] Strictly, this is only necessary where the relevant law is that of a State or Territory that continues to apply the Statute of Frauds to guarantees. In other words, it is not necessary for transactions governed by the laws of New South Wales, South Australia or the Australian Capital Territory.

"originals". The co-ordinating law firm should do this, however, as a matter of good practice.

The inclusion in the email of a statement that the remote party is bound by the document is not essential, as the execution of the signature page should itself be sufficient to create the necessary signed writing for the purpose of the Statute of Frauds (when joined with the final form of the document that was emailed to the remote signatory with the signature page). It does provide a useful back-up, though, as it allows for an alternative argument, based on *Mehta* and *Golden Ocean Group*,[91] that the email itself can be the signed writing required for the Statute of Frauds. To achieve that end, the procedure suggests that the remote signatory or other authorised sender of the email should manually insert their name into the email, as a signature.

This back-up is however not critical, and parties may feel confident to close a transaction even if the sender of the email fails to insert their name into the email as a signature. The back-up would in any event not always work – for example:

- if there are joint signatories (as it may be difficult for them to jointly send the email); or

- if the return email is not sent by the remote party itself or by an agent authorised by writing to do so, and Victorian law applies.[92]

The City of London Guidelines take a different approach for guarantees. They use the reasoning in *Koenigsblatt* to argue that the final document, with the signed signature page attached on the instructions of the signatory, will be a sufficient signed writing to satisfy the Statute of Frauds. As will be seen from the discussion of Approach 3 below, however, there was doubt in the minds of some members of the working group that the reasoning in *Koenigsblatt* could be extended that far, so the procedure has been structured in a way that avoids the need to resolve the point.

Multiple originals

The City of London Guidelines contemplate that the co-ordinating law firm can produce additional originals of the guarantee by printing off the final (unsigned) document and attaching to it a scanned copy of the signed signature page.

Under our "joinder" approach, the wet-ink signed signature pages are technically the originals all by themselves, and the scanned copies of those pages are likely to be sufficient copies for evidentiary purposes. As a matter of good record-keeping, though, it would be appropriate for the co-ordinating law firm to compile full copies of the guarantee for parties, by inserting the wet-ink signed signature pages into the full document as instructed by the remote signatory.

2.3 Non-registrable dealings with real property

The discussion above in relation to guarantees will also apply for documents that effect non-registrable dealings with real property.

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[91] See the text accompanying notes 73 to 79.

[92] See s 126(1) of the *Instruments Act 1958* (Vic).

2.4 PPSA security agreements

The documentation requirements for PPSA security agreements were discussed earlier. In summary, the security agreement needs to be evidenced by writing, and that writing needs to be signed by the grantor, or otherwise adopted or accepted by the grantor by an act or omission that reasonably appears to be done with the intention of adopting or accepting the writing.

The flexibilities that case law has developed in relation to the Statute of Fraud requirements, such as the capacity to join documents, should be equally applicable to the writing requirements for PPSA security agreements in section 20 of the PPSA. Other PPSA jurisdictions also take this view.[93] This means that Approach 2 can be used for PPSA security agreements as well.

3. APPROACH 3

3.1 The key steps in the approach

Approach 3, the most flexible of all the approaches, is a variant of the US "pre-signed signature pages" approach. Under Approach 3, the co-ordinating law firm emails to the remote party a separate signature page for the document, in advance of the document itself being finalised. The signature page should include the name of the document to which it relates. The remote party prints out, and arranges for its signatory to sign, the required number of copies of the signature page, and:

- emails a scanned copy of one of them back to the co-ordinating law firm; and
- couriers the "wet-ink" originals of the signature pages to the co-ordinating law firm, in advance of closing.

The co-ordinating law firm holds the signature pages until the form of the document is agreed. When the document has been finalised and parties are ready to close, the remote party then sends a further email to the co-ordinating law firm, agreeing to be bound by the final form of the document and authorising the co-ordinating law firm to insert the signed signature pages into a hard copy of it (in each case, either with immediate effect, or on satisfaction of the conditions specified in the email). The email should clearly identify the form of the document in question (eg by reference to an earlier email attaching the final form of the document), and should authorise the co-ordinating law firm to date the document.

To make the process as easy as possible for the remote party (and to minimise the risk that the process might not be followed properly), the co-ordinating law firm should set the appropriate language out in the email that it sends to the remote party, so that the remote party can confirm those matters simply by replying to that email.

Approach 3 states that the follow-up communication, confirming that the document is agreed and authorising the co-ordinating law firm to insert the signature pages into a hard copy of the document, must be in the form of an email, and that the email must be sent by either the remote signatory, or by someone who has the clear authority of the remote signatory to do so. In contrast, the City of London Guidelines and the US approach both allow this confirmation to be given orally (eg on the closing call). They

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[93] See, for example, R Cuming, R Wood and C Walsh, *Personal Property Security Law* (Irwin Law, 2005), 183.

also permit the confirmation to be given by the remote party's lawyers, rather than the remote party itself, whether or not they have documented authority to do so.

The UK/US approach, while commendably flexible, introduces a degree of commercial uncertainty. While the UK/US approach could be effective as a matter of law to ensure that the terms of the document become binding on the parties as an agreement, it would be more difficult as an evidentiary matter to prove that the agreement had in fact been entered into, if the assent to its terms came only in the form of a verbal statement over the telephone by a person whose identity could not necessarily be verified. It may also be more difficult to prove which version of the document had been agreed to. Similar arguments can be made (at least to some extent) in relation to an email, as it cannot be conclusively presumed that the email was in fact sent by the apparent sender (as opposed, for example, to a hacker or someone who otherwise had access to the sender's email account). An email is nonetheless a more robust and durable form of evidence than attempted recollections of a past telephone call.

The protocols contemplate that the email will come from the remote signatory or another authorised representative of the remote party, rather than their lawyers. While it might be possible to assume in certain circumstances that a lawyer has their client's authority to provide the authorisation, there is no general rule to the effect that a lawyer has the authority to do this.[94] Because of this uncertainty, it is preferable for the email to come from the remote party directly, unless their lawyer clearly has the authority to send it.

Types of documents

Approach 3 is proposed for PPSA security agreements and other simple contracts for which Australian law does not prescribe a signing requirement. It is not proposed for deeds; guarantees; documents affecting real property; or any document that is to be signed by a company under s 127(1) or (2) of the Corporations Act, if other parties intend to rely on the statutory assumption as to due execution in s 129(5) or (6) of the Corporations Act.

3.2 PPSA security agreements

This paper noted earlier that the writing requirements in section 20 of the PPSA have an echo within them of the writing requirements of the Statute of Frauds. Unlike the Statute of Frauds, however, section 20 states that the grantor under a security agreement does not need to sign the writing, if it instead adopts or accepts the writing by an act or omission that reasonably appears to be done with the intention of adopting or accepting the writing. This additional flexibility means that Approach 3 can be used for PPSA security agreements as well, on the basis that the remote signatory, by agreeing by email to be bound by the form of the document as emailed to it and confirming that its signature page can be attached to the document, is doing an act that reasonably appears to be done with the intention of adopting or accepting that form of that document.[95]

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[94] See the discussion in *Licata v Madeddu* [1986] ANZ ConvR 438, 440.

[95] The email could itself also be a sufficient signed writing – see section 4 of Part B.

3.3 Simple contracts for which there are no prescribed signing requirements

Simple contracts for which there are no prescribed signing requirements will be subject to the usual rules relating to the formation of contracts. Approach 3 should be sufficient for this purpose (as, of course, are Approaches 1 and 2).

3.4 Other types of contract?

(a) Deeds

Our approach to remote signings is premised on the understanding that the rules governing the creation of a deed require that the deed be a physical instrument at the time it is signed. Approach 3 is not consistent with this requirement.

(b) Registrable real property documents

As the co-ordinating law firm will have the wet-ink signature pages from the remote signatory at closing, and the remote signatory will have authorised the co-ordinating law firm to use those signature pages to compile "original" copies of the document, it might be thought that Approach 3 could be used for registrable real property documents as well, as the co-ordinating law firm can use one of those compiled copies of the document for registration purposes. While that may be correct as far as registration goes, the document will still only be effective as a matter of law if the requirements of the Statute of Frauds are satisfied. That is discussed in the next section.

(c) Guarantees affected by the Statute of Frauds, and documents affecting real property

It is possible to mount an argument to the effect that Approach 3 should also be able to be used for guarantees and real property documents – that is, that the steps contemplated by Approach 3 are sufficient to satisfy the requirements of the Statute of Frauds. That argument could be mounted in a number of ways.

First, it might be argued that the procedure is consistent with *Koenigsblatt*.[96] In *Koenigsblatt*, it will be recalled, a vendor signed a contract of sale that was amended without his authority after he had signed it. The vendor later orally ratified the amendments, however, and this was held to render the signed contract, as so amended, a sufficient document for the Statute of Frauds.

It could be argued that the use of pre-signed signature pages is consistent with this principle – that is, if a pre-signed signature page is attached at a later point in time to a subsequently-negotiated document, that document with the attached signature page will be sufficient for the purposes of the Statute of Frauds if the attachment of the signature page to the document was authorised by the signatory. This appears to be the view taken in the City of London Guidelines.

It is this approach, however, that so troubled the court in *Mercury Tax*. That case did not relate to the Statute of Frauds, and so is not directly applicable, but in the author's view it is not difficult to have some sympathy with the view that

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[96] See note 3 and the accompanying text.

amending a signed document with the signatory's consent is conceptually different to taking a signature page from one version of a document and attaching it to another, even with the signatory's authority. Depending on the nature of the transaction, of course, that consent may be sufficient to make the terms of the freshly-compiled document binding on the party as a matter of contract law, but it is a slightly more uncomfortable proposition to say that the party has "signed" that new document, particularly as the signature page, when initially signed, was not attached to any version of a document at all. And in this situation, where the remote signatory is authorising someone to attach his signed signature page to a document rather than ratifying the fact that this has already been done, it could be argued that the signatory is not ratifying anything, but rather is appointing that person to execute the document for them. That would also be capable of satisfying the requirements of the Statute of Frauds,[97] but would rather complicate the opinion-giving process.

It may well be that a court, when asked to consider this question, will accept that *Koenigsblatt* can be applied (or perhaps extended) in a way that allows Approach 3 to be sufficient to satisfy the requirements of the Statute of Frauds. As Tomlinson LJ observed in *Golden Ocean Group*, the Statute of Frauds "must…., if possible, be construed in a manner which accommodates accepted contemporary business practices".[98] It is however not entirely clear that a court would necessarily take that step, and for that reason the protocols have been prepared in a way that accommodates the possibility that *Koenigsblatt* may not apply.[99]

Secondly, it might be argued that the email communication from the signatory that approves the final form of the document could itself satisfy the Statute of Frauds, on the basis of *Mehta*, *Golden Ocean Group* and the decisions of the New South Wales Supreme Court referred to earlier. While *Mehta* and *Golden Ocean Group* make it clear that an email can indeed be a sufficient "signed writing" for the Statute of Frauds, this would mean however that the law firm that issues the relevant closing opinion would be opining not on the execution and enforceability of the guarantee document, but rather on the execution and enforceability of that email. This would not be customary opinion–giving practice in Australian financing transactions, and in the author's view may be a bridge too far for Australian law firms (and quite probably their clients) at this time.

The same concern applies in relation to the potential application of the Electronic Transactions Acts.

(d) **Documents signed by a company**

Approach 3 can be used for documents signed by a company, if the company is signing the document under a power of attorney. It is not so clear that Approach 3 can be used, however, if a company is to sign a document in a manner that relies on s 127(1) or (2) of the Corporations Act. That is because those sections contemplate the execution of a "document" by the company, and

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97 Except in Victoria – see note 78.

98 [2012] EWCA Civ 265.

99 I should acknowledge that this is another point on which the practitioners involved in the preparation of the protocols had differing views, and that some of the practitioners were more confident than others that *Koenigsblatt* could also apply here.

under Approach 3 the company will (at least initially) be executing only the signature page. It might be thought, based on *Koenigsblatt*, that this would be satisfied if the company later authorised the attachment of the signature page to the final document, but the difficulty this argument faces is that the authorisation arguably also needs to be given in a manner contemplated by s 127. It is not easy to see how an email could do this.

4. OPINION ISSUES

Remote signings, unlike face-to-face signings, do not allow parties or their advisers to directly observe the manner in which other parties execute and release their documents. For this reason, a law firm that needs to issue a closing opinion in relation to a remote signing will need to consider whether the assumptions in its opinion are broad enough to cover the additional factual uncertainties. This includes, for example:

Deeds - if a remote party emails back just the signed signature page, whether the signatory did in fact sign a full copy of the document.

Agents - if execution by a remote party relies on the return email from the remote party, but the email is sent by someone other than the signatory, whether that person was authorised to do so.

Emails generally - whether an email purporting to come from a remote signatory or other particular person was in fact sent by them.

Conditions - if a remote party delivers or otherwise agrees to be bound by a document subject to conditions, whether those conditions have been satisfied.

These questions are likely to be raised with the BFSLA's opinion committee shortly.

PART D – CONCLUSION

As long ago as 500BC (or thereabouts), the Greek philosopher Heraclitus observed that "the only thing that is constant is change". While Heraclitus may not have been a lawyer, his observation is at least as applicable to the practice of law today as it may have been to life in ancient Greece. The ever-accelerating pace of change in both the domestic and cross-border regulatory environments, ongoing developments in financial products and the seemingly ever-increasing expectations of clients all combine to ensure that lawyers need to constantly review what they do, and how they do it, if they are to keep up. This is at least as true for finance lawyers as it is for our colleagues in other practice areas. It is one reason why organisations such as the BFSLA have such a vital role to play.

One of the great strengths of our general law is its capacity to evolve, to reflect developments in social expectations and commercial practices. Unavoidably, however, developments in the general law tend to follow changes in commercial practice, rather than lead them. This can place lawyers advising their clients in an awkward position, as a client may want to pursue a legitimate commercial practice at a time when it is not clear whether the practice is supported by current law. The lawyer may believe that the law will develop with time to accommodate the practice, but will not be able to predict when that will happen, and no lawyer will want to put his or her firm in the position of being the guinea pig in legal proceedings on an as-yet untested legal proposition.

The practice of remote signings is a good example of this dilemma. The expectation of modern commercial life, influenced in part by practice in the United States, is that the execution of

documents for a financing transaction should be straight-forward and unintrusive. By the time a transaction gets around to signing, many bankers regard the deal as done, and their minds have already moved on to the next one. They do not want to be distracted by complex and potentially time-consuming signing processes that appear to be driven by annoying issues of legal arcana.

For the time being, though, some legalistic processes are unavoidable. The general law rules and statutory provisions discussed in this paper are still part of our law, and while that remains the case it will be incumbent on us as lawyers to do what we can to support our clients by ensuring that the process by which documents are executed is adequate to comply with them, without being more burdensome than necessary.

The remote signing protocols that are the subject of this paper have been prepared with this objective in mind. It is the hope of the firms that produced them that they will stimulate further discussion of the ways in which remote signings should be conducted, and lead in time to a market-wide consensus. It is the hope of the author of this paper that it will make a contribution to that process as well.

ATTACHMENT 1

Allens › ‹ Linklaters ashurst HERBERT SMITH FREEHILLS KING&WOOD MALLESONS NORTON ROSE FULBRIGHT

Remote signing protocols for financing transactions[1]

PART A – INTRODUCTION

The safest way to execute any document is for all parties to be physically present and to contemporaneously execute and exchange a fully printed, hard-copy original. This can of course be done in counterparts, in which case the document should contain a suitable counterparts clause.

If it is not practicable for all signatories to be in the same location, the next safest approach is for those parties who are in different locations to appoint an attorney under a power of attorney to execute the document for them in a central signing location.

Increasingly, the location of the parties, the timing requirements of the transaction or other prevailing circumstances are making it impracticable for some or all signatories to be physically present at a signing, either directly or through an attorney. As a result, "remote" or "virtual" signings, involving the electronic exchange of scanned documents or signature pages, have become common, especially in financing transactions. Remote signings raise issues, however, that do not affect face-to-face signings. Commercial parties are no longer able to observe physically the execution of the documents by other parties, and can only rely on the materials that the remote signatories circulate by email as their evidence that the remote signatories have in fact properly executed the documents. Legal advisers also need to be able to satisfy themselves that the manner in which remote parties execute a document is sufficient to satisfy any writing or other formalities that may be required for that type of document under Australian law, where Australian law is relevant. While this will be a concern for all lawyers on the transaction, these questions will be of particular importance to the firms that are issuing the closing opinions.

This note sets out some remote signing procedures that we will accept as being sufficient to enable documents commonly encountered in financing transactions to comply with the writing or other formalities that are required by Australian law. They are not necessarily the only procedures that are capable of satisfying relevant Australian legal requirements, and other procedures may be adequate in particular circumstances. This would need to be considered on a case-by-case basis. The purpose of this note is to set out some "safe harbour" procedures that we are prepared, subject to instructions from the clients involved, to accept in the ordinary course for remote signings, in order to smooth the process for closings in which our firms are involved. Where an opinion is being issued based on a closing in accordance with these procedures (particularly approaches 2 and 3), however, some additional assumptions and qualifications may also be necessary.

If a transaction involves a remote signing, all affected parties should agree which of the approaches is to be adopted. This agreement should be struck in good time in advance of the actual signing, to avoid last minute misunderstandings. Each approach assumes there will be a "co-ordinating law firm" – this should also be agreed in good time. In a financing transaction this would usually be the financiers' counsel, but that is not always the case.

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[1] This document is the joint product of a working party of practitioners from Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright Australia.

ATTACHMENT 1

The approach to be taken will depend on the type of document. In summary, the approaches are these:

No.	Approach	Accepted for	Not preferred for
1.	**Email entire signed document** Remote party receives by email and prints entire document, signs it and returns by email a copy of the entire signed document, or of the signed signature page.	All types of document.	Not applicable.
2.	**Email signed signature page** Remote party receives by email the entire document with a separate signature page, prints and signs just the signature page, and returns a copy of the signed signature page by email.	Guarantees (unless deeds). Agreements that affect real property (unless registrable, or deeds). PPSA security agreements (unless deeds). Other simple contracts.	Deeds. Real property mortgages. Other registrable real property documents. Contracts required by statute to be in writing and signed.
3.	**Pre-signed signature page** Remote party receives by email and prints a separate signature page, signs it and returns a copy of the signed signature page by email. Remote party sends in original signed signature page by courier, before closing. Remote party sends follow-up email when document has been finalised, agreeing to be bound by the document and authorising the original signed signature page to be inserted into a hard copy.	PPSA security agreements (unless deeds). Other simple contracts which Australian law does not require to be signed.	Deeds. Real property mortgages. Other registrable real property documents. Guarantees (where the Statute of Frauds applies). Agreements that affect real property. Documents executed by a company under s 127(1) or (2) of the Corporations Act, if other parties intend to rely on the statutory assumption as to due execution in s 129(5) or (6) of the Corporations Act.

The full requirements for each approach are set out in Part B. They are more complex than this summary, and law firms and remote parties will need to ensure that they follow **all** the steps set out in Part B, including the order and content of the proposed email communications.

A remote signing may not always be appropriate

Approaches 1 and 2 contemplate that the remote party will send its wet-ink signed documents or signature pages to the co-ordinating law firm after closing. This exposes other parties to the risk that the remote party might not do this. While clients may be prepared to accept this risk for most types of documents, on the basis that the emailed signed document or signature page can be sufficient evidence that the remote party has bound itself, it can be more problematic for registrable real property documents, as you will need the wet-ink originals for registration. If you or your client are not completely confident that a remote party will send in the wet-ink originals promptly after signing them, you may need to make alternative signing arrangements.

Also, some legislation may require that registrable instruments be on a particular type of paper, or on paper of a particular size (eg A4). These requirements will need to be taken into account on a case-by-case basis, and may have the result in some transactions that a remote signing will not be practicable. In these situations, again, you will need to make alternative arrangements.

PART B – THE APPROACHES, AND WHEN TO USE THEM

The appropriate procedure for the remote signing of a document will depend on the nature of the document – in particular, whether it is a deed, a real property mortgage or other registrable real property instrument, some other agreement that affects real property, a guarantee or a security agreement under the *Personal Property Securities Act 2009* (Cth).

1. Approach 1 - email entire signed document

1.1 When it can be used

This approach can be used for all types of documents. It is the only proposed approach for deeds, real property mortgages and other registrable real property documents.

1.2 Steps in the approach

1. The co-ordinating law firm emails to the parties and their lawyers the final execution copy of the whole document, as a PDF or Word attachment.[2] The email should:

   (a) instruct the parties to complete the steps described below; and

   (b) state the number of copies of the document that each remote party's signatory needs to sign (eg one for each party).

   A template for this email is attached as Annexure A.

2. Each party prints the required number of copies of the whole document, and its authorised signatory signs each of them on the signature page within the document. The document should **not be dated**.

3. The authorised signatory for each party (or another person authorised by deed) delivers the document (if it is a deed)[3], and the party emails to the co-ordinating law firm either:

   (a) a PDF copy of one of the signed documents, in full; or

   (b) if that is not practicable because the document is lengthy, a PDF copy of the signed signature page from one of the signed documents.

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[2] While there is no substantive difference for present purposes between PDF and Word, parties may prefer to distribute PDFs as they are less amenable to unauthorised amendment. A PDF should also avoid the risk that the Word version of a document might contain an automatic date-updating feature (eg in a footer) that could inadvertently result in parties signing the document with inconsistent footer dates appearing on different pages or the document being automatically repaginated, possibly rendering cross-references incorrect.

[3] A deed, to be effective, needs to be delivered. This can be done either unconditionally, or conditionally (ie as an escrow). Either way, once a party has delivered its deed it cannot resile from it. If a party does not want to deliver its deed immediately, but instead wants to entrust it to another person (eg the party's lawyers) on the basis that the other person will later deliver it on their behalf, it is likely that the party would need to authorise the other person to do so by a document under seal. See eg *Powell v London and Provincial Bank* [1893] 2 Ch 55, and more recently *Scook v Premier Building Solutions (2003)* WAR 124 at paras [42]-[43]. This requirement does not apply, however, in Victoria – see s 73B of the *Property Law Act 1958* (Vic). There is authority to the effect that a more relaxed approach may be available for conveyancing settlements, or possibly other settlements that involve the exchange of documents: see *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, and *Longman v Viscount Chelsea* [1989] 2 EGLR 242. Rather than rely solely on that approach, however, Approach 1 accommodates the stricter requirements for delivery of a deed as an escrow.

If it is anticipated that a remote party might return just the signed signature page and not the entire signed document, it would be helpful as an evidentiary matter for the following text to be inserted into the document, immediately below the "EXECUTED as a deed" (or equivalent) text that appears immediately before the signature blocks:

> *Each person who signs this document for a party confirms that the page on which he or she signs is in a full copy of the document.*

4. The email with which a party returns the signed document or signature page as described in step 3,needs to provide a number of confirmations. The template email in Annexure A is drafted so that the co-ordinating law firm sets the confirmations out in the email, and the remote party gives the confirmations simply by replying to the email. The confirmations are:

   (a) (if they only return the signature page) that the signatory signed the entire document, in the required number of copies, as required by step 2; and

   (b) either:

      (i) that the party has executed[4] and (if it is a deed) delivered the document with immediate effect, and that the co-ordinating law firm is authorised to date it (take care using this option if there is a chance that different parties will respond on different dates); or

      (ii) that the party has executed[5] and (if it is a deed) delivered the document on the basis that the document will not be effective until the conditions specified in the email are satisfied (eg that the co-ordinating law firm has received what it believes to be all other parties' corresponding materials), and that the co-ordinating law firm is authorised to date it, once those conditions have been satisfied.

5. When the co-ordinating law firm believes that any conditions specified under step 4(b)(ii) have been satisfied, it sends a confirmatory email to the parties, and dates the signed documents (scanned or otherwise) that it has received with the date of that email.
   Where a party has only sent scanned signature pages, that party may date its original signed document with the date of the confirmatory email from the co-ordinating law firm.

Steps 1 to 5 will satisfy the relevant formal legal requirements. Steps 6 and 7 should also be completed, however, as a matter of good transaction management.

6. Each remote party promptly sends its original signed documents to the co-ordinating law firm by courier.

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[4] The approach refers here to "execute" rather than "sign" (as used elsewhere), to encompass both signing and (to the extent necessary) sealing.

[5] See note 4.

7. When the co-ordinating law firm receives the original signed documents under step 6, it dates them with the date of its email under step 5. When it has received all parties' originals, it distributes them as appropriate. In doing this, the co-ordinating law firm should **not** bind multiple counterparts together, or extract signature pages from different counterparts and bind them into "fully-signed" composite copies. Instead, the co-ordinating law firm should distribute the individual counterparts in the form in which it receives them.

2. Approach 2 - email signed signature page

2.1 When it can be used

This approach is proposed for:

(a) guarantees (unless they are intended to take effect as a deed);

(b) agreements affecting real property that do not require registration (and that are not intended to take effect as a deed);

(c) PPSA security agreements (unless they are intended to take effect as a deed); and

(d) other simple contracts.

It is not proposed for deeds, real property mortgages or other registrable real property documents.

2.2 Steps in the approach

1. The co-ordinating law firm emails to the parties and their lawyers the final execution copy of the whole document as a PDF or Word attachment, and a separate PDF or Word copy of the relevant signature page.[6] The email should:

   (a) instruct the parties to complete the steps described below; and

   (b) state the number of original copies of the signature page that each remote party's signatory needs to sign (eg one for each party).

   A template for this email is attached as Annexure B.

   The separate signature page should clearly identify the document that it belongs to, eg by including identifying features such as:

   - *the name of the document (in a header or footer)*
   - *the numeric identifier given to the document by the drafting firm's word processing system (usually in a footer)*
   - *its page number in the document (in a header or footer).*

2. Each party prints the required number of copies of the signature page, and its signatory signs them. The page should however **not be dated**.

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[6] PDFs may be preferable. See note 2.

3. Each party emails to the co-ordinating law firm a PDF copy of one of the signed signature pages.
In the email, the party needs to provide a number of confirmations. The template email in Annexure B is drafted so that the co-ordinating law firm sets the confirmations out in the email, and the remote party gives the confirmations simply by replying to the email. The confirmations are:

   (a) that the remote party will be bound by the document from:

      (i) the date of that email (take care using this option if there is a chance that different parties will respond on different dates); or

      (ii) the date specified in the email as the date on which the remote party intends for the document to otherwise take effect (eg when the co-ordinating law firm has received what it believes to be all other parties' corresponding materials); and

   (b) that the co-ordinating law firm is then authorised, on or after that date:

      (i) to insert each of the original signed signature pages into a copy of the document emailed to the signatory under step 1, in substitution for the corresponding unsigned signature page; and

      (ii) to date those compiled documents.

While not critical it is helpful if the covering email is sent by the remote signatory. The email can however be sent by another person on the remote signatory's behalf. In either case it is helpful if the sender of the email inserts their name into the email by way of signature (and does not simply rely on their email system to identify them as the sender).

4. When the co-ordinating law firm believes that any conditions specified under step 3(a)(ii) have been satisfied, it sends a confirmatory email to the parties, and dates any signed full documents (scanned or otherwise) that it has received with the date of that email.

Steps 1 to 4 will satisfy the relevant formal legal requirements. Steps 5 and 6 should also be completed however as a matter of good transaction management.

5. The party promptly sends the original signed signature pages to the co-ordinating law firm by courier.

6. When the co-ordinating law firm receives the original signed signature pages, it inserts them into the relevant documents, and dates those documents. When it has compiled all the documents, it distributes them as appropriate.

3. Approach 3 - pre-signed signature page

3.1 General description and warning

This approach allows signature pages to be signed before the documents themselves have been finalised. A pre-signed signature page when attached to a final document with the authority of the relevant party can constitute the execution of the document by that party.

This approach may not be acceptable to all parties. If it is used great care should be exercised. The practice requires clear evidence of authority and the creation of a clear and unambiguous paper trail for evidentiary purposes. This is reflected in the steps for this approach as set out below.

3.2 When it can be used

This approach is proposed for PPSA security agreements (unless they are intended to take effect as a deed) and for other simple contracts which under Australian law do not need to be signed.

This approach is not proposed for deeds or for any other documents that are required by law to be signed.

This approach will also not be appropriate if the remote party is expected to execute the document under s 127(1) or (2) of the *Corporations Act 2001* (Cth) in a manner that will allow other parties to rely on the statutory assumption as to due execution in s 129(5) or (6) of the Corporations Act.

3.3 Steps in the approach

1. The co-ordinating law firm emails to the parties and their lawyers the relevant signature page, as a PDF or Word attachment.[7] The signature page should identify the document that it belongs to (eg by including the name of the document or other identifying features).
   The email should:

   (a) describe the procedure and instruct the parties to complete the steps described below;

   (b) state the number of original copies of each signature page that each remote party's signatory needs to sign (eg one for each party); and

   (c) state that when the party's authorised signatory signs the signature pages and releases them for scanning and return to the co-ordinating law firm, it authorises them to be attached by the co-ordinating law firm to the form of document which a subsequent email confirms has been agreed by the party, as outlined below.

   A template for this email is attached as Annexure C.

2. Each party prints, and its signatory signs, the required number of copies of the signature page. The page should **not be dated**.

3. Each party:

   (a) emails a PDF copy of one of the signed signature pages to the co-ordinating law firm; and

   (b) as soon as practicable sends the original signed signature pages to the co-ordinating law firm by courier.

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[7] PDFs may be preferable. See note 2.

The party, by sending the email referred to in paragraph (a), will be taken to give the authorisation referred to in step 1(c).

4. When negotiations are complete, the co-ordinating law firm sends an email to the parties with a copy of the final form of the document and a request for each of them to confirm that:

    - the form of the document is agreed and binding on the party; and
    - the co-ordinating law firm is authorised to insert each signed signature page into a hard copy,

    in each case, either with immediate effect, or on satisfaction of the conditions set out in the email (eg when the co-ordinating law firm has received what it believes to be corresponding emails from all other parties).

    A template for this email is attached as Annexure D.

5. The remote party gives these confirmations by simply replying to the email from the co-ordinating law firm. The reply email should be sent by an authorised signatory of the party or their authorised representative.

6. When the co-ordinating law firm believes that it has received the requisite emails from all the parties, it sends all parties a confirmatory email.

Steps 1 to 6 will satisfy the relevant formal legal requirements. As a matter of good transaction management, the co-ordinating law firm should then assemble and date the documents, and distribute them. Similar to Approach 2, the co-ordinating law firm may use the signature pages for all parties to compile "fully-signed" composite copies of each document.

ANNEXURE A

APPROACH 1 – EMAIL ENTIRE SIGNED DOCUMENT

TEMPLATE EMAIL FROM CO-ORDINATING LAW FIRM

To: Lawyers and parties

Re: [*Name of transaction*] – documents for execution

We attach [in PDF format] execution versions of the following documents:

	Name of document	Parties	No. of copies
1			
2			
3			

Steps for each party to take

Please make sure that your party adheres fully to the steps set out below, to ensure proper execution. If you do not, the transaction may not be able to close. If you are not the sole authorised signatory for your party, please make sure each authorised signatory receives a copy of this email.

Step 1 – Print **in full** the number of copies of each document for your party that is set out for the document in the above table. **Do not just print the signature pages.**

Step 2 – Arrange for your party's authorised signatory/ies to sign each copy of each document in the relevant signature block in the body of the document. **Do not date the documents.** We will date them later, with the date they become effective – see below.

Step 3 – Scan [**one full copy** of each document/the signed signature page from one copy of each document][8], and email the scanned materials to us and the other recipients of this email as attachments to a "Reply all" email.

Step 4 – Courier the full original signed documents to us at:

[*address*]

Delivery and efficacy

When we receive a party's scanned materials referred to in step 3, that party will be taken to have executed and delivered its documents[, on the basis that the documents will only become

[8] Choose the appropriate option.

effective when we confirm by email that we have received emails which appear to be from each party and to conform to step 3][9].

We will then date the documents with the date on which they become effective.

Confirmations

When you email to us a [document/the signature page for a document][10] as described above, you will be taken to confirm the following on behalf of the relevant party:

A. [11][If you only return the signed signature page of the document rather than the full document – that each relevant authorised signatory signed the required number of copies of the document in full.

B.]The documents have been executed and (where applicable) delivered [(subject to any conditions set out under **Delivery and efficacy** above)][12] by that party's authorised signatory/ies, and we can date them as described above.

[B/C.] If you are not your party's authorised signatory, the relevant authorised signatory/ies have authorised you to give the above confirmation(s).

If you have any questions, please let us know.

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9 Delete if documents are to take effect immediately.

10 Choose the appropriate option.

11 Delete if not applicable.

12 Delete if not applicable.

ANNEXURE B

APPROACH 2 – EMAIL SIGNED SIGNATURE PAGE

TEMPLATE EMAIL FROM CO-ORDINATING LAW FIRM

To: Lawyers and parties

Re: [*Name of transaction*] – documents for execution

We attach [in PDF format] execution versions of the following documents:

	Name of document	Parties	No. of copies
1			
2			
3			

We also attach a separate signature page for each document, which we have extracted from the documents.

Steps for you to take

Please make sure that your party adheres fully to the steps set out below, to ensure proper execution. If you do not, the transaction may not be able to close. If you are not the sole authorised signatory for your party, please make sure each authorised signatory receives a copy of this email.

Step 1 – Print the number of copies of each signature page for your party that is set out for the document in the above table.

Step 2 – Arrange for your party's authorised signatory/ies to sign each signature page in the relevant signature block. **Do not date the signature pages**. We will date the documents later, with the date they become effective – see below.

Step 3 – Scan one copy of the signed signature page for each document, and email it to us and the other recipients of this email as attachments to a "Reply all" email.

Step 4 – Courier all the original signed signature pages to us at:

[*address*]

Efficacy

The documents will become effective [as we receive them/when we confirm by email that we have received emails which appear to be from each party and to conform to step 3][13].

[13] Choose the appropriate option.

Confirmations

When you email to us a signature page as described above, you will be taken to confirm the following on behalf of the relevant party:

A. The party will be bound by the document to which the signature page relates from the date on which the document becomes effective, as described above.

B. We are authorised to insert each signed signature page into a copy of the relevant document in the form attached to this email, in substitution for the corresponding unsigned signature page, and to date the compiled document with the date referred to in paragraph A.

C. If you are not the party's authorised signatory, the relevant authorised signatory/ies have authorised you to give the above confirmations.

If you have any questions, please let us know.

ANNEXURE C

APPROACH 3 – PRE-SIGNED SIGNATURE PAGE

TEMPLATE EMAIL FROM CO-ORDINATING LAW FIRM – ATTACHING SIGNATURE PAGES

To: Lawyers and parties

Re: [*Name of transaction*] – signature pages for execution

We attach [in PDF format] signature pages for the following documents:

	Name of document	Parties	No. of copies
1			
2			
3			

Steps for you to take

Please make sure that your party adheres fully to the steps set out below. If you do not, the transaction may not be able to close. If you are not the sole authorised signatory for your party, please make sure each authorised signatory receives a copy of this email.

Step 1 – Print the number of copies of each signature page for your party that is set out for the document in the above table.

Step 2 – Arrange for your party's authorised signatory/ies to sign each signature page in the relevant signature block. **Do not date the signature pages**. We will date the documents later, with the date they become effective – see below.

Step 3 – Scan one copy of the signed signature page for each document, and email it to us as an attachment to an email replying to this email.

Step 4 – Courier all the original signed signature pages to us at:

[*address*]

The [scanned] signed signature pages must reach us before closing, or closing may not be able to proceed.

Confirmations

When you email or courier to us a signature page as described above, you will be taken to confirm the following on behalf of the relevant party:

A. We are authorised, when we receive a subsequent email from an authorised signatory of the party or their authorised representative, confirming that the form of the relevant document has been agreed, to attach the signature page to that form of document.

B. If you are not the party's authorised signatory, the relevant authorised signatory/ies have authorised you to give the above confirmation.

If you have any questions, please let us know.

ANNEXURE D

APPROACH 3 – PRE-SIGNED SIGNATURE PAGE

TEMPLATE EMAIL FROM CO-ORDINATING LAW FIRM – AUTHORITY TO CLOSE

To: [*Names of remote parties*]

Cc: [*Names of lawyers*]

Re: [*Name of transaction*] – authority to close

We refer to our email of [*specify the date of email in the form of Annexure* C] setting up the procedure and authorities that are to apply in relation to the execution of documents for this transaction.

As required in that email, you or your representative have previously sent us your party's signed signature pages for some or all of the following documents:

	Name of document
1	
2	
3	

The final form of each of these documents is now attached.

Confirmation and authority to close

To enable closing to proceed, we need an authorised signatory of each party or their authorised representative to send us an email to confirm the following:

A. The party will be bound by the relevant documents in the form attached to this email, from the date [of the party's reply email/on which we confirm by email that we have received corresponding emails which appear to be from each other party][14].

B. We are authorised to insert each signed signature page into a copy of the relevant document in the form attached to this email, in substitution for the corresponding unsigned signature pages, and to date the compiled document with the date referred to in paragraph A.

Step for you to take

If you are prepared to give these confirmations, please reply to this email by way of a "Reply all" email.

If you have any questions, please contact let us know.

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[14] Choose the appropriate option.

ATTACHMENT 2

CITY OF LONDON GUIDELINES

[*See following pages*]

ATTACHMENT 2

NOTE ON EXECUTION OF DOCUMENTS AT A VIRTUAL SIGNING OR CLOSING

1. Background

This note has been prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees (the **JWP**).

The purpose of this note is to record a (non-exhaustive) range of options available to parties when executing documents at 'virtual' signings or closings (i.e. where some or all of the signatories are not physically present at the same meeting).

This note is not intended to imply that virtual signings and closings cannot, or should not, be conducted in other ways. This note is simply intended to facilitate virtual signings and closings, in the light of the *Mercury* case. This note is relevant for virtual signings and closings of documents governed by English law.

Each transaction should be approached according to its own facts – including the countries of incorporation of the parties (and each party's domestic rules and internal procedures for execution of contracts), the content of board resolutions, whether the transaction requires individual contracts to take effect in a particular sequence, and whether a legal opinion is being issued on a given party's due execution of the documents. In cases where particular procedures or restrictions apply to the execution or delivery of a document by a party (for example, notarisation, escrow conditions or tax considerations), care should be taken to ensure that the signing Option chosen does not conflict with those procedures or restrictions.

In addition, it is important to take into account any relevant regulatory and tax implications (including in relation to stamp duty) before adopting any of the signing Options discussed in this note.

2. The Mercury Case

Some of the obiter comments of the judge (Underhill J.) in this case (*R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721) (***Mercury***) have led to discussion about the effectiveness, under English law, of the use of pre-signed signatures pages and 'virtual' signings and closings where signature pages are sent/transmitted by email or fax. References in this note to the use of email include the use of fax, where appropriate.

In relation to deeds, the judge said (at paragraph 40 of his judgment) that "*the signature and attestation must form part of the same physical document*" when "it" (the deed) is signed.

As a more general proposition (applicable to all contracts, whether deeds or not), the judge said (at paragraph

39): "*The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing……the requirement that a party sign an actual existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistak*e".

The JWP has obtained detailed advice from Leading Counsel (Mark Hapgood QC) on the implications of *Mercury* in relation to the execution of documents. This note has been approved by Leading Counsel. It is the view of Leading Counsel and of the JWP that the Court of Appeal decision in *Koenigsblatt v Sweet* [1923] 2 Ch 314 (***Koenigsblatt***) remains the leading authority on the applicability of the principles of authority and ratification to the creation of legally binding written agreements, that *Mercury* (a first instance decision) should be viewed as limited to its particular facts and, to the extent inconsistent with Koenigsblatt (a Court of Appeal decision), the *Koenigsblatt* decision should prevail.

Even on a cautious assumption that *Mercury* may have wider application beyond its specific facts, the JWP considers that it is possible to demonstrate an alternative understanding and intention of the parties and/or to comply with this requirement for a "*discrete physical entity/authoritative version*" in cases where contracts are circulated for signature by email. Examples of some appropriate procedures are summarised below; these procedures (or permutations of them) are already often followed in practice. Variations of these procedures or other procedures may also work perfectly well.

This note has been developed to help parties who wish to take a cautious approach in the light of *Mercury*, where it is more convenient to have a virtual signing or closing. As such, the JWP has taken, as its starting point, a conservative view of the judge's comments in the case. The JWP nevertheless considers that the judge's comments in paragraphs 39 and 40 should be read narrowly, in the context of the facts of that case.

3. Relevant statutory and other legal requirements

3.1 Deeds

The judge in *Mercury* took the view that section 1(3) of the Law of Property (Miscellaneous Provisions) Act

1989 (**LPMPA**) requires a deed to be executed by an individual in its final version (see his remarks above). Section 1(3) LPMPA provides:

"*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 his presence and 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".

By analogy, the judge's approach could also apply in the case of execution of a deed by a company (see section 74A Law of Property Act 1925 and sections 44 and 46 Companies Act 2006 which also use the word "it" in relation to the document being executed).

Whilst Leading Counsel and the JWP take a different view to that of the judge on the interpretation of section 1(3) LPMPA, it is recognised that this is a question of statutory interpretation that was not addressed in Koenigsblatt. For this reason, the JWP considers that Option 1 (described below) represents a prudent approach in relation to the execution of deeds (whether by an individual or on behalf of a company) at a virtual signing or closing. However, it should be emphasised that Option 1 is not the only way to execute a valid deed at a virtual signing/closing.

3.2 Real estate contracts

In relation to real estate contracts, section 2 LPMPA provides:

"*(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".

Some contracts for the sale or other disposition of an interest in land may be included in a contract that is primarily about something else, e.g. an asset sale agreement may include (i) an agreement to transfer properties, along with other assets, or (ii) an agreement to share a site temporarily, by granting a lease on closing. Another example would be a mortgage, trust deed, mortgage debenture or other security document creating any security interest in real estate that might be acquired in the future.

By analogy, the judge's approach in relation to section 1(3) LPMPA could apply also to section 2 LPMPA. For this reason, where it is decided to execute a real estate contract or contracts containing real estate provisions 'virtually', rather than by following the traditional methods of executing such contracts with 'wet ink' signatures, the JWP considers that the most prudent course of action is to follow Option 1 (described below).

Many real estate contracts will be subject to an exchange utilising one or other of the Law Society Formulae for exchanging contracts by telephone. If this is the case, solicitors in possession of a contract other than with

'wet ink' signatures will need to make this fact clear to the other party and obtain prior approval to its use.

Solicitors should also take account of any need for the future availability of documents with 'wet ink' signatures for registration purposes (as mentioned in paragraph 4.1), or where so agreed, and appropriate undertakings may be required, so that the documents with 'wet ink' signatures are available for those purposes. However, in some such cases (in particular residential conveyances) it may not be appropriate to conduct a virtual signing or closing.

3.3 Guarantees

Section 4 of the Statute of Frauds 1677 requires a guarantee (or a memorandum or note thereof) to be in writing and signed by or on behalf of the guarantor. Guarantees include undertakings by a party to procure that other parties (e.g. subsidiaries) perform their obligations.

Signature, for this purpose, has a relatively wide meaning. In the case of *N Mehta v J Pereira Fernandes S.A* [2006] EWHC 813 (Ch) (***Mehta*****),** the judge made it clear that, even in the case of a guarantee, an email can be a sufficient "*memorandum or note*" of the guarantee, for purposes of section 4, as long as it shows an intention to contract (as opposed to being a mere statement of expectation), and provided the name of the guarantor appears in the e-mail, with the intention that it constitutes a signature (in fact the guarantor in that case had not put his name anywhere in the e-mail, so the guarantee was not upheld). Attaching a signature page to a final approved version of a document with the specific authority of the signatory is considered to be a "signature" within the wider meaning above; it would also satisfy the test laid down in *Mehta*.

Guarantees are sometimes executed as deeds (in which case the comments in paragraph 3.1 above apply). Frequently, guarantees are also included in simple contracts (e.g. credit agreements); in such cases, it is considered that Option 1 or Option 2 (described below) can be followed. Option 3 (the use of pre-signed signature pages) may also be available, provided that there is clear evidence (e.g. an exchange of emails) that the signatories (or their lawyers or someone else authorised by the signatory) have authorised the attachment of their signatures to the final version of the relevant guarantee. Firms issuing legal opinions in relation to guarantees should bear in mind the distinction, in section 4, between a guarantee and a memorandum or note thereof. When Option 2 or Option 3 is used, the legal opinion could refer to the guarantee as a "legally binding guarantee", as opposed to a "contract of guarantee".

3.4 Simple contracts

A simple contract (which does not include a contract for the sale or other disposition of land or a guarantee) can, as a general rule, be formed without any signature (e.g. by an exchange of emails) provided the essential elements of a contract are present. The judge's remarks in *Mercury* about the need for a "*discrete physical entity/existing authoritative version of the contractual document*" seem to relate to an understanding in that case that, if a contract provides for signature, a party is not bound until it has signed a final version of the contract.

It is considered that Option 1, Option 2 or Option 3 (described below) can be followed in relation to simple contracts signed at a virtual signing or closing. It should, however, be recognised that they will carry different levels of risk and should be balanced against any potential evidential problems. Particularly in the case of Option 3 (the use of pre-signed signature pages), there should be clear evidence (e.g. an exchange of emails) that the signatories (or their lawyers or someone else authorised by the signatory) have authorised the attachment of their signatures to the final version of the relevant contract; this is prudent in order to avoid any evidential concerns of being able to show an intention to be legally bound and certainty of contractual terms.

4. Three possible Options for virtual signings and closings

Set out below are three possible options when conducting a 'virtual' signing or closing:

4.1 Option 1 – pdf/Word document signed by each party (for deeds, real estate contracts, guarantees and simple contracts)

The suggested steps under Option 1 are as follows:

1. Before signing/closing the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.

2. When the documents are finalised, the final execution copies of the documents are emailed (as pdf or Word attachments) to all absent parties and/or their lawyers (as agreed). For convenience, a separate pdf or Word document containing the relevant signature page may be attached.

3. Each absent signatory prints and signs the signature page only (there is no need to print off the full document).

4. Each absent party then returns a single email to its lawyers or to the lawyers co-ordinating the signing/closing (as agreed) to which is attached: (a) the final version of the document (pdf or Word); and (b) a pdf copy of the signed signature page. In the case of deeds, the arrangements will also need to make clear when delivery is to take place or, alternatively, to make clear that a deed has not been delivered merely because it has been signed and the steps set out above followed.

5. At or shortly after signing/closing, to evidence the execution of the final document, a final version of the document, together with copies of the executed signature pages, may be circulated by one of the law firms.

   The view of the Leading Counsel and of the JWP is that the pdf (or Word) final version of the document and the pdf of the signed signature page (both attached to the same email) will constitute an original signed document and will equate to the "*same physical document*" referred to in *Mercury*. One or more additional originals may be created by printing off the final execution copy of the document and attaching to it the pdf copy of the signed signature page.

If there is a need to file a signed original of the document with a registry or some other authority (e.g. Companies House or the Land Registry), it will be necessary, as a practical matter, to make arrangements for another original of the document containing original 'wet ink' signatures to be obtained.

4.2 'Option 2 – print off and sign signature page from final document (for guarantees (not executed as deeds) and simple contracts)

The suggested steps under Option 2 are as follows:

1. Before signing/closing, the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.

2. When the documents are finalised, the final execution copies of the documents are emailed (as pdf or Word attachments) to all absent parties and/or their lawyers (as agreed). For convenience, a separate pdf or Word document containing the relevant signature page may be attached.

3. Each absent signatory prints and signs the signature page only (there is no need to print off the full document).

4. Each absent party then emails its signed signature page (as a pdf attachment) to its lawyers or to the lawyers co-ordinating the signing/closing (as agreed) with authority to attach it to the final approved version of the document. The degree of formality required for this authority to be given will depend on the circumstances. Where the authority is to a firm that is not acting for the party represented by the signatory, a greater degree of formality may be appropriate.

5. At or shortly after signing/closing, to evidence the execution of the final document, a final version of the document, together with copies of the executed signature pages, may be circulated by one of the law firms.

In this case, a print-off of the execution version of the document with the attached signed signature pages will constitute an original signed document. The only difference between Option 1 and Option 2 is at step 4, in each case.

4.3 Option 3 – pre-signed signature pages collected before documents are finalised (alternative for guarantees (not executed as deeds) and simple contracts)

The suggested steps under Option 3 are as follows:

1. Before signing/closing, the proposed arrangements for the virtual signing/closing are agreed between all parties' lawyers.

2. In sufficient time before signing/closing, the law firm co-ordinating the signing/closing emails (or circulates hard copies of) the signature pages relating to the documents still being negotiated to each person who will not be present at the closing or to his lawyers. Each signature page should, as a matter of good practice, clearly identify the document to which it relates (e.g. Credit Agreement – signature page).

3. The signature page is executed by each of the signatories and returned to his lawyers or to the law firm co-ordinating the signing/closing (as agreed) by email (as a pdf attachment) or by courier, to be held to the order of the signatory (or his lawyers) until authority is given for it to be attached to the document to be signed.

4. Once each document has been finalised, the law firm co-ordinating the signing/closing emails the final version of the document to each absent party (and/or its lawyers) and obtains confirmation from it (or its lawyers) that it has/they have agreed the final version of the document and authorising the relevant law firm to attach the pre-signed signature page to the final version and to date and release the document. The degree of formality required for this authority to be given will depend on the circumstances. Where the authority is to a firm that is not acting for the party represented by the signatory, a greater degree of formality may be appropriate.

   In this case, the final approved version of the document with the pre-signed signature pages that have been attached with the prior approval of the parties (or their lawyers) will constitute an original signed document.

4.4 Execution – Summary of Options

The table below summarises the relevant Options, according to the type of document:

Type of Document	Option 1 – Return PDF/Word document plus signature page	Option 2 – Return signature page only	Option 3 – Advance pre-signed signature pages
Deeds	Yes	No	No
Real estate contracts	Yes	No	No
Guarantees (stand-alone or contained in simple contracts)	Yes	Yes	Yes
Simple contracts (not incorporating any of the above)	Yes	Yes	Yes

5. Signatories – availability and authorisation

For each of these Options, where a contracting party cannot attend the signing/closing meeting in person, it is recommended that such party is made aware of the need for someone suitably authorised to be available remotely (and, where appropriate, online) at the time of the virtual signing/closing: (a) in order to receive (or otherwise be made aware of the content of) and approve final versions of the documents; (b) in order to sign the relevant documents under Options 1 and 2; and (c) in order to authorise the release of the pre-signed signature pages under Option 3. Signatories will need access to a pdf scanner in the case of Option 1 and Option 2.

ATTACHMENT 2

The Joint Working Party

May 2009 (including minor amendments – February 2010)

DISCLAIMER:

This note was developed by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees and has been approved by Leading Counsel. The aim of this note is to make suggestions only and not to give definitive advice. No liability whatsoever is accepted by those involved in the preparation or approval of this note, or the firms or organisations that they represent, to any company or individual who relies on material in it.