

Commercial Update April 2020

E-Signatures and Remote Board Meetings

In the fourth of a series of briefings prompted by the unprecedented impact on business and general life that the Covid-19 virus is causing, Alden Legal looks at the use of E-signatures, the signature of documents remotely and how to hold remote board meetings.

Executing Agreements Remotely

Articles of Association

If executing a document as a company, it is important to check that there are no prohibitions or restrictions in the company's Articles of Association (the document governing how the company functions). If the Articles of Association are silent, which is most common, then the company is permitted to use electronic signatures.

Foreign Counterparties and Agreements

This guidance note relates only to the position under English law in relation to English companies and English law governed agreements. If your company, the counterparty or the governing law of the agreement is not English, then you should check the position in the relevant jurisdiction.

Specific Types of Document

Most written agreements have no specific execution formalities and have signatures primarily to evidence the intentions of the parties. However, certain types of agreement have particular formalities under English law which cannot be met by the use of an electronic signature, for example documents that need to be filed at HM Land Registry or with HMRC require "wet ink" signatures. It is important to check that there are

no specific execution formalities for your documents.

Key Points

- *Check your Articles of Association, the governing law of the agreement and the country of incorporation of the counterparty before using an E-signature to execute an agreement.*
- *Documents that need to be filed with HMRC or at HM Land Registry require "wet ink" signatures.*
- *When executing deeds that require the witnessing of signatures, the witness must be physically present.*
- *Consider holding board meetings more regularly than normal.*
- *Ensure that board meetings comply with the company's Articles of Association.*
- *Be aware of where the board meeting will be deemed to have taken place.*

Types of E-Signature

There are three primary types of E-signature:

- the e-mail signature - where a copy of the relevant document is printed off (or the signature page is printed off) and signed with a "wet ink" signature before being scanned or photographed and returned (typically with the original being returned in hard copy form in the post or by courier);
- the scanned signature - where a scanned copy of a signature (such as a jpeg or .pdf) is applied to an electronic copy of the document; and

- the document signing service where the parties use an online document execution service to affix a digital signature to an electronic copy of the document.

Unless there is a specific requirement in law, contract or a company's Articles of Association, then any of these types of E-signature may be used.

Pre-signed Agreements

Agreements should only be signed once all of the terms have been agreed to by the parties. Therefore, you should not pre-sign signature pages in advance of finalising the agreement. Please note that this differs from agreements which have been finalised and signed but held in escrow pending a specific event, such as a release of funds.

Execution of Deeds

Although not all deeds need to be signed in front of a witness, where there is a requirement that the signature of a deed is witnessed the witness must be there in person. Whilst there has been some academic discussion as to whether a witness can be present by electronic means (e.g. video conference) this is not advisable and you should arrange for execution in front of a physically present person whilst observing the appropriate social distancing protocols.

Board Meetings

Form of Board Meetings, Notices and Quorum

The Articles of Association of a company may set out requirements for notices of board meetings, the manner in which the meeting is held and the necessary quorum for the meeting. In particular this often applies for companies where investors have the right to appoint directors. You should check your Articles of Association and comply with these requirements.

Good Practice

- Consider holding board meetings more regularly than in normal circumstances given the challenges businesses are currently facing and the unusual decisions that may have to be taken.
- Choose the appropriate technology, whether a telephone conference or a video conference, taking into account the location and technology available to the participants.
- Provide ample advance notice of the meeting to all directors together with joining instructions, ground rules for the conduct of the meeting and the relevant board meeting information and documents pack.
- Require all directors to consent to the board meeting being held at the stated time and by the method by which it is held.
- Contact any absentees both beforehand, so that their input can be included in the meeting, and afterwards, to advise them on the outcomes and decisions.
- Ensure that all attendees have the ability to hear and participate in the meeting.
- Circulate comprehensive minutes of the meeting as soon as possible afterwards so that all attendees have a formal note of what was discussed and can flag anything that they feel was incorrectly recorded.
- If it is not possible to hold a remote board meeting, consider the use of written board resolutions (but remember, it is important to check the Articles of Association for any requirements relating to written resolutions such as whether they must be unanimously approved).

Location of the Board Meeting

If a board meeting is held by telephone or video conference, the location of the meeting will be the location of the chair. If this may have adverse consequences for the company (e.g. taxation, access to incentives or conduct of business in certain jurisdictions) you should appoint an alternate chair. Ideally the majority of attendees should also be in the relevant country.

This briefing considers matters of English law and practice and is intended for guidance purposes only. It does not constitute legal advice. Specific legal advice on relevant contract terms, formalities or issues should be obtained if you have concerns or questions to address.



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