

Article

Corporate & Commercial

Bind Games

Whether under Contract or on the guillotine, execution is a serious matter with potentially grave consequences

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Picture this: you're in the market to sell your business, and you've got a potential buyer; they're offering to purchase all of the shares in your company at a substantial premium to the other bidders, but the potential buyer is incorporated in a foreign jurisdiction. How do you make sure that it's bound to the transaction documents?

It's a crucial question, but valid execution is a problem that's often not treated with the importance it deserves. For those commercially minded, it can be seen as a legal technicality and the last thing anyone wants to think about, particularly when you're at the eleventh hour of a deal. But those terms that took weeks to negotiate and agree on don't matter if the parties aren't bound to the agreement.

This isn't just legal fearmongering. The risk is real; it's happening every day, resulting in costly and well-publicised litigation.¹ Bendigo and Adelaide Bank were wrapped up in litigation twice in two years:² once because its signatory did not put their name next to their signature and then again because a counterparty improperly affixed an e-signature to a loan deed.

¹ See for example:

- a. [Bendigo and Adelaide Bank Limited v DY Logistics Pty Ltd \[2018\] VSC 558](#);
- b. [Bendigo and Adelaide Bank Limited \(ACN 068 049 178\) & Ors v Kenneth Ross Pickard & Anor \[2019\] SASC 123](#);
- c. [Lakomy v Accounting TEK Property Investment Pty Limited \[2021\] NSWSC 1152](#); and
- d. [Hewlett-Packard Australia Pty Ltd v Exeed Pty Ltd \[2004\] FCA 135](#).

² Ibid.

Execution by Australian companies

It's important to start with the fundamentals. All officers of Australian companies should know how to properly execute documents for and on behalf of that company, and what to look for to ensure that counterparties are doing the same.

For the purposes of the *Corporations Act 2001* (Cth), a "Company" is a body corporate registered in Australia by ASIC under the Corporations Act.³ Each Company is allocated a unique, nine-digit number when registered with ASIC, known as an Australian Company Number (**ACN**). This is the key identifier for that corporation, which is needed for everything from finding current and historical details about its officeholders and members, to suing it.

An Australian Company may execute a Contract in one of 5 ways:

- a) by affixing the common seal;
- b) by the company officers without a common seal;
- c) by an agent;
- d) by an attorney; or
- e) by an alternative method allowed in the Company's Constitution.⁴

³ [Section 9 of the Corporations Act](#).

⁴ Previously known as Articles of Association.

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The difficulty for counterparties is that there is no way of knowing whether that execution has been validly performed without undertaking its own enquiries. For example, a counterparty will not usually know:

- a) whether a person purporting to be a company officer actually holds that position;
- b) whether the agent or attorney has been validly authorised by the Company to enter into a particular agreement; or
- c) whether any other method of execution is authorised under that Company's constitution.

The requirements for executing a Deed are even more onerous than those for executing an agreement (i.e. a contract). In most circumstances, the common law requires a Deed⁵ executed by a corporation to be signed by an authorised signatory, sealed and delivered, and witnessed.

Presumptions of valid execution under the Corporations Act

Fortunately, sections 126 and 127 of the Corporations Act state that, so long as a specified procedure is followed in the execution of a Contract or Deed, a counterparty is legally entitled to make certain presumptions and rely upon that execution as being valid and binding - regardless of whether those presumptions are in fact true.⁶

Specifically, section 127(1), (2) and (3) of the Corporations Act states that a Company may execute a document (including a Deed) if the document is either: signed by; or affixed with a seal witnessed by:

- a) 2 directors of the Company; or
- b) a director and a company secretary of the Company; or
- c) for a proprietary Company that has a sole director — that director, if:
 - i. the director is also the sole company secretary; or
 - ii. the Company does not have a company secretary.

⁵ Which should be used in place of a contract where there is any doubt about consideration passing between the parties.

⁶ [Section 129 of the Corporations Act.](#)

Importantly, a company may execute a document as a Deed in accordance with subsection s 127(1):⁷

- a) without that execution being witnessed;
- b) regardless of whether the document is:
 - i. signed by the director or company secretary of the company; or
 - ii. in physical or electronic form; and
- c) without the Common Law requirement that the Deed be delivered.

What if the counterparty is an Australian partnership?

The execution of documents by partnerships is governed by State-based partnership legislation. Generally, in Australia, a partnership will only be bound by an agreement where that agreement has been:

- a) executed by all partners to the partnership; or
- b) executed by an individual who is expressly authorised by all the partners to enter into agreements on behalf of the partnership under a Deed; and
- c) executed in accordance with the relevant partnership agreement.

Incorporated Limited Partnerships (**ILPs**) are a more heavily regulated subset of partnerships which require registration with State based authorities in the jurisdiction of their incorporation. ILPs are common in the M&A space. They are primarily used by businesses engaged in venture capital projects.

The NSW Partnerships Act provides certain presumptions that counterparties to agreements with ILPs are able to rely upon as proof that a document is validly executed by an ILP if certain criteria are met.⁸ This prevents any arguments about whether the ILP is bound by an agreement, and is similar to the equivalent provisions for companies in sections 127 and 129 of the Corporations Act discussed above.

Foreign companies

Now, the above is all well and good for Australian

⁷ [Section 127\(3A\) and \(3B\) of the Corporations Act.](#)

⁸ [Sections 73B and 7D of the Partnerships Act 1892 \(NSW\).](#)

companies and partnerships. But what about foreign corporations?

There is widespread uncertainty in the legal and business communities about how a foreign corporation executes an agreement (especially a Deed) so as to be valid and enforceable under Australian law. This uncertainty is amplified where the agreement in question is a Deed, and the counterparty is from a jurisdiction that does not recognise the concept of a Deed, as is the case in China, Japan, and the United States.

Unlike the UK,⁹ Australia has no legislation governing how foreign entities should execute documents or Deeds. The Australian Government Solicitor advises that foreign entities should execute a document or a Deed in accordance with the laws of their jurisdiction, but that for high-risk or high-value transactions, parties should consider whether specific advice should be sought from a legal adviser practising in the relevant jurisdiction.¹⁰

The complexity in verifying whether agreements have been properly executed in accordance with the laws of the jurisdiction of incorporation of a counterparty is magnified where that jurisdiction's primary language is not English, and its legal system is divergent from Australian law.

Unfortunately, as that complexity rises, so too does the importance of ensuring that the execution of an agreement is valid and binding. The process of then ultimately enforcing an agreement against a foreign entity presents its own set of unique challenges and obstacles after the question of whether that agreement was binding upon the foreign entity in the first place.

So what's the solution?

As always, it depends. The lengths a party will go to certify the validity of the execution of an agreement often comes down to a legally informed commercial decision – one that must balance practicality with commercial risk. What is appropriate will depend upon

⁹ See [Overseas Companies \(Execution of Documents and Registration of Charges\) Regulations 2009](#); [Integral Petroleum SA v Scu-Finanz AG \[2015\] EWCA Civ 144](#).

¹⁰ Fact Sheet 37: Execution Clauses, 'Australian Government Solicitor': https://www.ags.gov.au/sites/default/files/2020-07/Fact_sheet_No_37.pdf

the nature and context of each agreement, and the weight of each competing factor must be considered carefully. In most circumstances, it will be important to consider:

1. the nature of the relationship with the counterparty (e.g. have you had dealings with this party before; are they a foreign entity; are they a competitor; are they a long-standing trade partner or customer?);
2. the importance of the subject matter of the agreement (whether in dollar value or because of its commercial implications);
3. the length of the agreement; and
4. the consequences if the agreement cannot be enforced.

If you are in any doubt at all about whether a document is legally binding, or the manner in which you or a counterparty should execute a document, we'd be happy to assist you.



MORE INFO

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