

THE LAW COMMISSION

THE EXECUTION OF DEEDS AND DOCUMENTS BY OR ON BEHALF OF BODIES CORPORATE

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GLOSSARY

This glossary sets out simple explanations of the main terms used in the Paper. Most, though not all, have a technical legal meaning. Where these terms are more fully defined in the Paper, the paragraph references are given below.

Administrative receiver - a receiver or manager appointed by a security holder. The appointment must be over the whole, or substantially the whole, of the company's property, and the security must have been or included a floating charge over the company's property. (para 8.32)

Administrator - an insolvency practitioner appointed by the court under the Insolvency Act 1986, on the application of the company, its directors or creditors, with power to manage or dispose of its business. An appointment may be made where there is some prospect of ensuring the company's survival, or making a better realisation of its business, or as a prelude to a voluntary arrangement with its creditors. (para 8.32)

Articles of association - regulations for the management and internal arrangement of a company.

Attestation - the witnessing of an act or event, for example witnessing the signature or sealing of a document.

Common seal - the seal adopted by a corporation aggregate and used for executing documents. The seal of a registered company must have the name of the company engraved upon it. (paras 4.13 - 4.14)

Company - an association of persons formed for the purpose of some business or undertaking carried on in the name of the association. A company may be incorporated or unincorporated, but in this Paper the term is used exclusively to refer to an incorporated body, and generally in the sense of a company registered under the Companies Acts. (para 4.5)

Contract under seal - a contract entered into by deed. (para 11.6)

Corporation - a body which is recognised by law as having a separate legal personality, distinct from those of its members. A corporation may, for example, generally hold property, and may sue and be sued, in its own name. (para 2.3)

Corporation aggregate - a corporation consisting of a body of persons (although it is technically possible to have a corporation aggregate with a single member). Examples include registered companies (both public and private), local authorities, and building societies. (para 2.3)

Corporation sole - a corporation consisting of one person and his or her successors in a particular office or station. Examples include the Crown, government ministers, and bishops. (para 4.25)

Deed - a written document which is executed with the necessary formality, and by which an interest, right or property passes or is confirmed, or an obligation binding on some person is created or confirmed. A common example is a conveyance or transfer of land. (para 2.6)

Delivery - the final formality required for the execution of a deed, by which the maker demonstrates in some way that they intend the deed to take effect and to be binding on them. (para 6.2)

Escrow - an instrument which has been delivered so that it will only take effect as a deed when certain conditions are fulfilled. It is common, however, to refer to such an instrument as being a deed which is executed in escrow. (para 6.5)

Execution - the way in which a corporation enters into a document by sealing it, or by the signature of its directors or other officers or agents, and gives it legal effect. The term is sometimes used simply to mean sealing/signature, and sometimes to mean sealing/signature *and* delivery. A corporation enters into a deed by executing it, but the term is sometimes used in relation to any contract or document, whether or not a deed. (paras 11.21 - 11.24)

Face-value requirement - the requirement, first introduced by section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, that an instrument is not a deed unless it is clear on the face of the instrument that the maker or parties to the instrument intended it to be a deed. "Face-value requirement" is not a technical term, but a convenient shorthand for this requirement. (para 3.2)

Foreign companies - companies incorporated outside Great Britain, to which the Foreign Companies (Execution of Documents) Regulations 1994 apply. (paras 4.33 - 4.34)

Instrument under hand - a written instrument, such as a contract, which is signed by or on behalf of the maker or parties, but which is not in the form of a deed. (para 2.2)

Internal management rule - the rule that a person dealing with a corporation in good faith is not obliged to enquire into the regularity of its internal proceedings. (para 5.11)

Liquidator - a person appointed to carry out the winding up of a company.

Non-administrative receiver - any receiver or receiver and manager (other than an administrative receiver) appointed by a security holder. This is not a technical term. Such a receiver is often referred to as an **LPA receiver** or a **fixed charge receiver**. (para 8.36)

Power of attorney - a document by which one person (the donor) gives another person (the attorney) the power to act on the donor's behalf and in the donor's name. For example, a company may grant a power of attorney to enable an attorney to execute a document to which the company is a party on its behalf. (para 8.3)

Presumption - a conclusion or inference as to the truth of some fact in question, for example as to whether a deed has been validly executed and delivered. The presumption may be conclusive, or rebuttable by evidence to the contrary.

Registered company - a company formed and registered under the Companies Acts. (para 4.5).

Simple contract - any contract (whether in writing or made orally) other than a specialty. (para 2.2)

Specialty - a contract entered into by deed. The term also has a range of more technical meanings, such as an obligation by deed securing a debt, or a debt due from the Crown or arising under statute (and also any such debt itself). (para 2.10)

Unregistered companies - certain types of corporation which, whilst not being registered companies, are nonetheless subject to some of the provisions of the Companies Act 1985. (para 4.19)

PART I INTRODUCTION

Introduction

- 1.1 It is a matter of everyday practical importance that the way in which a company or other corporation executes a document that will bind it should be well-known, simple and rational. We shall explain in this Paper that the present requirements fall short of that objective and we shall set out options and make provisional recommendations for reform.

Background

- 1.2 The background to this Paper lies in the changes made to the law governing deeds and their execution in 1989, although some of the difficulties with the present law are of longer standing. So far as companies are concerned, the Companies Act 1989 abolished the requirement that every company must keep a common seal, and, for the first time, permitted companies to execute deeds by the signature of their officers alone.¹ Further amendments were made to bring the position into line with the Law of Property (Miscellaneous Provisions) Act 1989, which had just made changes to the requirements for deeds generally.²
- 1.3 Although the ability for a company to execute deeds without a seal has been generally welcomed, the detailed drafting of the new rules has been much criticised. It has been suggested by practitioners that section 36A of the Companies Act 1985 - where the rules for companies are now set out - is both complicated and uncertain, and also difficult to reconcile with other overlapping statutory provisions, particularly section 74 of the Law of Property Act 1925, and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.³ We have been asked to review the position in the light of such concerns.⁴
- 1.4 With certain exceptions, section 36A only applies to companies formed and registered under the Companies Acts. Different rules apply to the execution of documents by other types of corporation, and we have also been asked to take this opportunity to consider these rules as well.

¹ Companies Act 1989, s 130(2), inserting s 36A into the Companies Act 1985.

² Law of Property (Miscellaneous Provisions) Act 1989, s 1, which was based on recommendations in our report Deeds and Escrows (1987) Law Com No 163. Section 1 abolished the requirement for sealing where the maker of a deed is an individual, but it may be noted that the similar step taken for companies was not part of the same set of proposals. In Law Com No 163, we recommended that corporations should continue to execute under seal: para 5.2.

³ See in particular, "Execution of Deeds by Companies" [1992] 1 LSG 28, publication of a report by a joint working party of the City of London Law Society.

⁴ By a joint reference from the Lord Chancellor and the President of the Board of Trade dated 10 October 1994, requesting us to "review the law on the execution of deeds and documents by or on behalf of all bodies corporate and to make recommendations".

Our provisional views

- 1.5 Our provisional views are summarised towards the end of this Paper,⁵ but we would make three general comments at the outset. First, we have found there to be a lack of consistency and uniformity in the present law, and also serious technical uncertainties and problems of statutory interpretation which seem quite disproportionate to the area of law under review. Moreover, as we have just explained, this Paper is the direct result of problems with the present law raised by practitioners following the changes made in 1989. However, it is now some years since those changes were made, and we would particularly like to hear how the present rules are operating in practice, and to learn of situations where difficulties have arisen. The consensus may be that many parts of the current law are working adequately, and should not be disturbed, whatever their technical shortcomings. Common practices may have developed since 1989 in areas where the new law initially caused uncertainty. We have therefore sought to structure this Paper to ask not only whether there should be further changes in the fundamental rules, but also to enable us to address much more specific technical difficulties in a more ad hoc manner.
- 1.6 Secondly, the level of formalities required for a corporation to execute a deed or other document affects both the corporation itself, and those that have to rely upon or be able to enforce the document - typically the other parties to it. Any situation where those advising either party are left in any uncertainty as to what is a valid method of execution, and so whether a document will be effective, seems to us to be deeply unsatisfactory. It may also cause difficulty where the document has to be registered, or where a legal opinion has to be given as to its validity, or allow a party to raise an unmeritorious technical argument in an attempt to escape liability.
- 1.7 Thirdly, the issues which we have been asked to consider in this Paper are practical ones which affect the day to day conduct of transactions by practitioners on behalf of clients. Moreover, they are of particular relevance to a number of different areas of practice: most obviously to those practising company or commercial property law, but also banking and insolvency law. Whilst we hope that many practitioners will let us have their views on all the issues raised, those only wishing to comment on one or two areas of particular relevance to them are very welcome to send in a limited response.

Scope of this paper

- 1.8 This Paper examines the rules governing the execution of deeds and documents by or on behalf of companies and other types of corporation under the law of England and Wales. The aim is both to address specific concerns with section 36A, and also to consider whether the rules for execution by different types of corporation can be simplified and made more uniform. Although we concentrate on the execution of deeds, with which section 36A is mainly concerned, this also requires us to look briefly at contracts made on behalf of corporations.

⁵ See below, Part XIX.

- 1.9 We include foreign corporations, where they execute deeds which are to be used in England and Wales. We also look at the execution of deeds on behalf of corporations under powers of attorney, and extend this to execution by insolvency practitioners and other receivers.
- 1.10 We do not deal directly with the execution of documents by individuals, which has been the subject of previous Law Commission papers.⁶ However, we do address a limited number of issues which are relevant to deeds generally, where it appears to us that the rules in relation to corporations cannot otherwise be satisfactorily examined.
- 1.11 We do not consider pre-incorporation contracts,⁷ and we have taken it as being beyond our remit to propose any change in the situations when the law requires a deed to be used, or indeed to invite views on whether it remains appropriate to maintain the distinction between deeds and other instruments.

Arrangement of this paper

- 1.12 The present law governing the execution of deeds and other documents by or on behalf of corporations is both complex and difficult, and we have felt it appropriate to set it out at some length. Parts II to IX are therefore concerned with the present law, with Part X containing a summary. We start by looking briefly at the legal nature and effect of deeds, and by asking what purposes are served by requiring particular formalities for their execution.⁸ We explain that there are certain important distinctions between deeds and other documents, but that the rules distinguishing between them are not always clear. This has caused uncertainty as to how certain types of document should be executed in order to achieve a particular purpose.⁹ We state the formal requirements for deeds in general, whether made by an individual or a corporation, and ask whether they are operating satisfactorily.¹⁰ We then examine in more detail how different types of corporation execute deeds,¹¹ and the various presumptions of execution and delivery applicable where the maker of a deed is a corporation.¹² It will be seen that the relevant statutory provisions are inconsistent and often difficult to understand, and that there are wide differences in the rules applicable to different types of corporation. To give a simple example, a company may execute a deed by the signature of two of its

⁶ Transfer of Land: Formalities for Deeds and Escrows (1985) Working Paper No 93; Deeds and Escrows (1987) Law Com No 163.

⁷ See Companies Act 1985, s 36C.

⁸ Part II.

⁹ See, eg, the practice note issued by the Joint Contracts Tribunal in November 1990 on how the attestation clauses to the JCT standard forms of building contract should be amended following the 1989 reforms, describing the new statutory provisions as “difficult to interpret in detail”, and advising employers and contractors to take legal advice where they wish to enter into what had been commonly referred to as a “contract under seal”: Practice November 1990, RIBA Publications.

¹⁰ Part III.

¹¹ Part IV.

¹² Parts V and VI respectively.

directors. Many other types of corporation must still execute under seal. Moreover, it seems that the consequences - for example as regards delivery of the document - may differ depending upon how a company executes a deed (namely under seal or otherwise).

- 1.13 We go on to look at the various statutory provisions governing the way in which corporations make contracts, where there are again overlapping statutory provisions for different types of corporation,¹³ before examining the execution of deeds on behalf of a corporation by an attorney, liquidator, receiver or administrator.¹⁴ We will explain that execution by an attorney is an area where current practice appears in some cases to have outstripped the existing statutory rules, leaving considerable technical uncertainties. Eminent practitioners and commentators have also criticised the apparent lack of provision made for execution by an attorney by the 1989 reforms. Some of these points are equally relevant where a deed is executed on behalf of a company by a receiver under a power of attorney, but there are added complications for a receiver if the company goes into liquidation. However, our concern with execution on behalf of a company by a liquidator or administrative receiver is more with potential technical uncertainties with their powers under the Insolvency Act 1986, which have again been referred to us.¹⁵
- 1.14 This is followed by consideration of one specific aspect of execution, namely the use of facsimile seals and signatures.¹⁶ The issue here is whether the current methods by which a deed may be executed are adequate to meet the needs of modern companies, particularly in cases where large numbers of documents need to be executed quickly.
- 1.15 Part XI sets out our main criticisms of the present law, and in Parts XII to XVIII we consider options for reforming the law. Finally, in Part XIX we summarise the matters upon which we invite comments, and our provisional recommendations. The main statutory provisions governing execution are reproduced at Appendix A, and we add brief notes comparing the position with other jurisdictions, and on the relevant conflict of laws rules in Appendix B and Appendix C respectively. There is a glossary of the main technical terms at the beginning of the Paper.

Acknowledgements and addendum

- 1.16 We are most grateful for the substantial assistance received in the preparation of this Paper from Richard Coleman of Clifford Chance, and also from the Society of Public Notaries of London. We would also like to thank Richard Fearnley of HM Land

¹³ Part VII.

¹⁴ Part VIII.

¹⁵ This can lead to difficulties in practice where conveyancing practitioners may find it frustratingly difficult to establish how a deed should be correctly executed when property is purchased from a company in liquidation or receivership.

¹⁶ Part IX.

Registry, who has drawn our attention to a number of the difficulties with the present law, and Antony Thomlinson of Frere Cholmeley Bischoff for commenting on the Paper in draft. The Council of Mortgage Lenders has kindly assisted us with our enquiries as to any possible link between the relaxations in formalities introduced in 1989 and mortgage fraud.

- 1.17 We would draw attention to a recent decision of the Chancery Division in Cardiff, *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, which has yet to be fully reported.¹⁷ So far as we are aware, this is the first case in which the courts have carried out a detailed analysis of section 36A of the Companies Act 1985. The decision came after the preparation of this Paper had been substantially completed, but we have endeavoured to take full account of it, albeit in some places as an addendum to the main text. We would like to express our gratitude to Judge Moseley QC, who very kindly arranged for us to receive a transcript of his judgement.

¹⁷ 10 May 1996. The relevant parts of the decision have so far only been noted in (1996) NPC 81. Other aspects of the decision are reported at [1996] EGCS 87. We have based our comments on the transcript of the judgement. The decision has not been appealed. The judgement is also of particular interest as regards the scope of Law of Property (Miscellaneous Provisions) Act 1989, s 2, holding that the correct approach in determining the application of s 2 is to examine the contract as a whole, and that the purpose of s 2 is not to strike down business contracts merely because they might contain some land sale or disposition element.

PART II THE LEGAL NATURE AND EFFECT OF A DEED

Introduction

- 2.1 In this Part, we examine a number of the basic concepts which underpin what follows. We explain the distinction between deeds and other types of document. We examine the legal effects of a deed, and when a deed is required. Finally, we look briefly at the purposes which are served by requiring particular legal formalities for the creation of a deed.

Deeds and documents “under hand”

- 2.2 The law of England and Wales makes an important distinction between instruments which are executed in “solemn form” as deeds, and other instruments which are generally referred to as being in “simple form” under hand.¹ Where the instrument is a contract, this is recognised by the distinction made between a contract executed as a deed, which is a specialty, and an instrument under hand, which is a simple contract.²
- 2.3 An individual may therefore generally execute an instrument such as a contract either in solemn form as a deed, or in simple form under hand. Where the maker is a corporation, the position is a little more complicated. A corporation has a legal status distinct from that of its members, but, not being a natural person, can only act either by resolution of its members in general meeting, or by its directors or other agents.³ One purpose of the common seal of a corporation has traditionally been to provide a means by which the will of the corporation can be expressed, although in practice authority to affix the seal has long been delegated to the directors.⁴ It was formerly

¹ By the term “instrument” we simply mean a formal legal document in writing. For a fuller definition see *Halsbury’s Laws of England* (4th ed 1975) Vol 12 paras 1436-7.

² See further below, paras 2.8 - 2.10, and particularly paras 11.4 - 11.10. A contract made orally and not reduced to writing (also known as a parol contract) is also, of course, a type of simple contract.

³ A corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder of the office in question for the time being. For a fuller definition of a corporation aggregate, see *Halsbury’s Laws of England* (4th ed 1974) Vol 9 para 1204. Such a corporation may be either a mere body, composed of constituent parts no one of which differs substantially from the others, or it may be a body with a head or other distinct member, the existence of which is essential to the corporation (eg, a dean and chapter). See Law of Property Act 1925, s 180 for the position where there is a vacancy at the “head” of a corporation aggregate of the latter type. For corporations sole, see below, paras 4.25 - 4.27.

⁴ See below, para 4.8, and see S Kyd, *A Treatise on the Law of Corporations* (1793) pp 267-268: “A corporation aggregate, being considered as an indivisible body, cannot manifest its intentions by any personal act or oral discourse....the law, therefore, has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. This is by affixing the common seal.” This once widely held

the basic rule that all contracts made by a corporation had to be made under the common seal, but this has long ceased to be so.⁵

- 2.4 The fact that a corporation has a separate legal status allows the law to make a distinction between the execution of an instrument in solemn form as a deed *by* a corporation - albeit that the seal is affixed and witnessed by its officers - and the making of a contract in simple form *on behalf of* a corporation by a person acting under its authority. However, where that authority is in the special form of a power of attorney, executed as a deed by the corporation, the attorney may execute a deed on behalf of the corporation itself.
- 2.5 It will be seen that at common law, all deeds were documents under seal.⁶ Hence contracts executed in solemn form were and are still commonly referred to as “contracts under seal”, although the term is clearly less appropriate now that deeds need no longer be executed under seal. We will explain in Part XI that the changes made in 1989 to the rules which govern the execution of deeds have left a degree of uncertainty about these fundamental distinctions between different types of instrument, which needs to be examined.⁷

Definition of a deed

- 2.6 A deed may be defined as a written instrument which is executed with the necessary formality, and by which an interest, right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.⁸

The principal features of a deed

- 2.7 The principal features of a deed are that:-
- (a) It must comply with certain formalities, which we consider in detail in Part III. The need for such additional formalities explains why a deed is regarded

view has, however, been described as an eighteenth-century rationalisation of a technical rule whose historical origins lie in the fact that the early common law provided no remedy for the breach of parol contracts, whatever the identity of the maker: see the Law Reform Committee’s Eighth Report (Sealing of Contracts by Bodies Corporate) (1958) Cmnd 622 p 3. See also *Chitty on Contracts* (27th ed 1994) Vol 1 pp 21 - 22, pointing out that in early times an executory contract was only given effect if sealed and delivered. The limited usefulness in modern conditions of the idea that a company acts by its seal is discussed in *Gower’s Principles of Modern Company Law* (5th ed 1992) p 139.

⁵ See below, para 7.2.

⁶ See below, para 11.6.

⁷ Paras 11.4 - 11.10.

⁸ This definition is adapted from that given in *Norton on Deeds* (2nd ed 1928) p 3. Norton does not include an instrument which confirms (as opposed to creates) an existing obligation, but it seems appropriate to extend the definition to do so, at least in the case of a document which contains an express or implied covenant to observe or perform the existing obligation. Norton notes that it is, in fact, “very difficult” to give a definition which is completely satisfactory. It should also be noted that the original function of a deed in many cases appears to have been probative, rather than dispositive: see Graham Virgo and Charles Harpum, “Breaking the seal: the new law on deeds” (1991) 11 LMCLQ 209, 210, n 7.

as being in “solemn form”.⁹

- (b) It must also perform one of the functions mentioned in paragraph 2.6 above.¹⁰ For example a share certificate is not a deed, even if sealed by a company, as it is no more than evidence of ownership of the relevant shares.¹¹ Whether a document performs one of these functions has been treated as being principally a matter of intention, although this may now need to be seen in the light of the new requirement (explained in Part III) that the intention to create a deed must be clear from the face of the instrument.¹²
- (c) Certain transactions are only fully effective if carried out by deed. We explain this further below.¹³
- (d) Quite apart from this, a deed has certain effects which distinguish it from an instrument which has been entered into under hand. We turn to this next.

Effect of a deed

Consideration

- 2.8 One important difference between a deed and an instrument in simple form concerns the need for consideration. The general rule is that a promise made without valuable consideration is not enforceable. However, when a promise is made by deed, it is known as a specialty,¹⁴ and may generally be enforced despite any lack of consideration.¹⁵ The courts will not, however, usually order specific performance of

⁹ “A deed is an instrument of a higher nature than a simple contract”: *Chitty on Contracts* (27th ed 1994) Vol 1 p 28. For the importance attached by the early common law to a sealed writing see further *Halsbury’s Laws of England* (4th ed 1975) Vol 12 para 1355. See also Sir Frederick Pollock’s preface to Revised Reports Vol 29, p V.

¹⁰ See *R v Morton* (1873) LR 2 CCR 22.

¹¹ *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496, 503. See *Chitty on Contracts* (27th ed 1994) Vol 1 p 22: “At common law, all deeds were documents under seal, but not all documents under seal were and are deeds”.

¹² *Re Stirrup* [1961] 1 WLR 449, 453, *per* Wilberforce J, who held that, since 1925 at least, where the formal requirements are met, a document is effective to pass a legal estate if the intention to do so can be made out. In this case, a document which was wrongly in the form of an assent was effective as a conveyance (but cf *Re King’s Will Trusts* [1964] Ch 542). A transfer of registered land is a deed. Although it does not itself pass the legal estate (which vests in the transferee only on completion of registration), it does create binding rights and obligations between the parties: *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, 857. See also *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* [1996] Ch 51.

¹³ Paras 2.12 - 2.14.

¹⁴ For the meaning of “specialty” see below, para 2.10.

¹⁵ *Sharington v Strotton*, 1 Plowd 308; 75 ER 469; *Cannon v Hartley* [1949] Ch 213, 217. See also *Morley v Boothby* (1825) 3 Bing 107; 130 ER 455, 456, *per* Best CJ: “The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made, was to suffer some inconvenience in consequence of the one making, or the other accepting such promise.”

a voluntary covenant (as opposed to damages for breach), even if it is made by deed.¹⁶ That is because equity will not assist a volunteer.¹⁷

Limitation period - specialties

- 2.9 The limitation period within which proceedings may be brought also differs. In the case of an action brought on a simple contract the period is six years from the date on which the cause of action accrued.¹⁸ However, in the case of a specialty the equivalent period is twelve years.¹⁹
- 2.10 The word "specialty" has been used in a number of different senses.²⁰ Sometimes it has been taken to mean an obligation under seal securing a debt, or a debt due from the Crown or arising from statute.²¹ In practice it has more frequently been taken to include "any contract entered into under seal",²² or "any obligation entered into by deed under seal".²³ We have mentioned above that an examination of whether and if so how these concepts have been affected by the reforms made in 1989 seems overdue, and we return to this in Part XI.²⁴

Other legal effects

¹⁶ *Re Ellenborough. Towry Law v Burne* [1903] 1 Ch 697.

¹⁷ See *Jeffreys v Jeffreys* (1841) Cr & Ph 138, 141; 41 ER 443, 444. It might be truer to say that equity will *no longer* assist a volunteer. The maxim is in fact of comparatively recent provenance: see MRT Macnair, "Equity and Volunteers" (1988) 8 LS 172.

¹⁸ Limitation Act 1980, s 5.

¹⁹ *Ibid*, s 8.

²⁰ It has been described as "an archaic word of somewhat imprecise meaning: it includes contracts and other obligations in documents under seal, and also, traditionally, obligations arising under statutes": M Franks, *Limitation of Actions* (1959) pp 188-189, pointing out that it is used to describe both the document and the obligation. As to the origins of the term, see Sir William Holdsworth, *A History of English Law* (5th ed 1942) Vol III p 103, where the term is simply equated with a deed. See also the memorandum on contracts under seal by Goddard J appended to the Law Revision Committee's Sixth Interim Report (Statute of Frauds and Doctrine of Consideration) (1937) Cmd 5449.

²¹ *R v Williams* [1942] AC 541, 555-556 (share certificate under seal not a specialty). Given the specific provision of a six year limitation period in an action for any sum recoverable by virtue of an enactment (now Limitation Act 1980, s 9(1)), it seems that for limitation purposes, a specialty now excludes any such sum: see *Leivers v Barber, Walker & Co Ltd* [1943] 1 KB 385, 398, approved in *Central Electricity Board v Halifax Corporation* [1963] AC 785. This is, however, a matter of construction of the relevant statutory obligation, and is subject to express provision to the contrary in any statute (eg, Companies Act 1985, s 14(2)).

²² *Aiken v Stewart Wrightson* [1995] 1 WLR 1281, *per* Potter J: approving the dictum of Oliver LJ in *Collin v Duke of Westminster* [1985] QB 581, 601 that "[t]he obvious and most common case of an action upon a specialty is an action based on a contract under seal, but it is clear that "specialty" was not originally confined to such contracts but extended also to obligations imposed by statute".

²³ See the Law Reform Committee's Twenty-First Report (Final Report on Limitations of Actions) (1977) Cmnd 6923 p 22: "For practical purposes, a specialty may be treated as an obligation entered into by deed under seal...".

²⁴ See below, paras 11.4 - 11.10.

- 2.11 Further differences between deeds and other documents include the following:-
- (a) As a general rule the maker of a deed is estopped from claiming that the contents of a deed did not correctly express the maker's intentions, or that there are reasons why the deed should not take effect.²⁵
 - (b) There is a general rule of interpretation that where a doubt arises on the construction of a deed, it should be construed most strongly against its maker, and in favour of the grantee or covenantee.²⁶
 - (c) The use of a deed may also trigger certain statutory consequences. For example the appointment or retirement of a trustee by deed will give effect to the provisions set out in section 40 of the Trustee Act 1925, including the vesting of the trust property in the new trustee without the need for a separate conveyance.

When a deed is necessary

- 2.12 Although a deed is now only necessary for certain transactions, they are important ones. In particular, a deed is required for the conveyance of land or of any interest in land. Unless made by deed, such a conveyance is void for the purpose of conveying or creating a legal estate.²⁷ This means that, with certain exceptions, all conveyances, transfers, mortgages, charges, leases and surrenders of a legal estate or interest in land must be made by deed.²⁸ The grant of a power of attorney must also be by deed.²⁹
- 2.13 A deed is also necessary at common law in certain other cases, for example for a release or discharge of a debt or liability (although it will be effective in equity if given for valuable consideration),³⁰ or a gift or voluntary assignment of tangible goods which is

²⁵ Co Litt 45a, 47b, 352a, 363b; *Goodtitle v Baily* (1777) 2 Cowp 597, 600-601; 98 ER 1260; *Xenos v Wickham* (1866) LR 2 HL 296; *First National Bank plc v Thompson* [1996] 2 WLR 293, 298, *per* Millet LJ. This did not prevent a corporation raising a defence of ultra vires (see below, para 5.4) or that the deed had not been properly executed.

²⁶ "[E]very man's grant shall be taken by construction of law most forcible against himself": Co Litt 183 a; *Neill v Duke of Devonshire* (1882) 8 App Cas 135, 149, *per* Lord Selborne (at least where the deed is executed for valuable consideration); *Fowle v Welsh* (1822) 1 B & C 29, 35; 107 ER 12, 14, *per* Bayley J. However, the rule is reversed for powers of attorney: see *Bowstead and Reynolds on Agency* (16th ed 1996), para 3-011. We would emphasise that the deed is only construed against the maker when a doubt arises, which, by implication, means that the intention of the maker or of the parties cannot be clearly established by the normal rules of construction: see further *Halsbury's Laws of England* (4th ed 1975) Vol 12 paras 1459-1473, particularly at 1472.

²⁷ Law of Property Act 1925, s 52, and Land Registration Act 1925, ss 18, 21, 25(1), 31(1), 33(1), 38(1), and Land Registration Rules 1925, SR & O 1925 No 1093, rr 74, 75, 80, 98 *et seq*, Sched, Forms 19 *et seq*.

²⁸ The exceptions include assents by a personal representative, conveyances and surrenders by operation of law, and oral leases and tenancies permitted by s 54: see s 52(2). For registered land, see Land Registration Act 1925, ss 18, 21, 25(1), 33(1) and 38(1).

²⁹ Powers of Attorney Act 1971, s 1(1).

³⁰ *Halsbury's Laws of England* (4th ed 1975) Vol 12, para 1309.

not accompanied by delivery of possession.³¹

- 2.14 There are also situations where one party to a transaction may insist on the use of a deed, although there is no rule that such a transaction must be made by deed. For example, where a guarantee is taken of an existing debt there may be doubt whether valuable consideration is given for the guarantor's undertaking (the making of the original loan being past consideration, and hence no consideration). It is common practice in such a situation to insist upon the guarantee being executed as a deed, so that it is enforceable even in the absence of consideration. A party may also be required to execute a deed where the other party insists on having the benefit of the longer limitation period applicable to a specialty,³² for example in the case of a building contract,³³ or a collateral warranty given on the construction of a new building.
- 2.15 We have explained that it is beyond our remit in this Paper to propose any change to the situations where a deed is required.³⁴

Defective deeds

- 2.16 It should be apparent from the preceding paragraphs that a document which would usually be entered into in simple form will generally be equally effective if executed as a deed.³⁵ We understand that a difficulty sometimes encountered in practice is whether a document which is expressed to be a deed but which is not executed with the necessary formality can nonetheless take effect as a simple contract.³⁶ We can see no reason in principle why such a document should not be enforceable as a simple contract, assuming that all the other elements required for such a contract (such as consideration) are present, that the document has been signed by a person or persons with authority to bind the company to such a contract, and of course that the transaction is not one for which a deed is required.³⁷ We return to this, however,

³¹ *Ibid*, para 1310. For further examples see *ibid*, paras 1307-1310.

³² Whether this will be achieved depends, however, on the other provisions of the Limitation Act 1980: see, eg, *Romain v Scuba TV Ltd* [1996] 3 WLR 117 (limitation period for guarantee under seal in respect of rent was 6 years by virtue of Limitation Act 1980, s 19).

³³ See, eg, the choice of execution either under hand or as a deed given on the JCT 1980 ed Standard Form of Building Contract, and the guidance issued by the Joint Contracts Tribunal on this point (RIBA Publications Ltd, September 1990, revised December 1990).

³⁴ See above, para 1.11.

³⁵ On general principles, a deed being the more solemn form. See also *Ortigosa v Brown* (1878) 38 LT: "...it being clear that a transfer by writing without seal was sufficient, and the seal not rendering the instrument less effectual than it would have been without a seal", *per* Hall VC.

³⁶ Eg, where what was intended as a deed has only been signed by a single director.

³⁷ For a similar view see *Hudson's Building and Engineering Contracts* (11th ed 1995) Vol 1 p 10. *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375 has been cited as authority for the proposition that a document which does not comply with all the formalities for a deed may be effective as an instrument under hand (see *Halsbury's Laws of England* (4th ed 1975) Vol 12, para 1301), but this seems incorrect. A purported deed of appointment of a receiver was held to be effective as an "appointment in writing" (which was all that the debenture under which the appointment was made required), as opposed to an instrument under hand: *per* Evershed MR at p 393. At first instant, Cross J had rejected an argument that the

below, and invite views.³⁸

The purpose of formalities for the execution of deeds

- 2.17 Most legal systems have formal requirements for certain types of transactions, and English law is no exception. However the policy reasons for these requirements are seldom articulated in the case law.³⁹
- 2.18 We have previously analysed the formal requirements for deeds as serving the following (overlapping) purposes⁴⁰:-
- (a) *Evidential*: providing evidence that the maker did enter into the transaction, and so of authenticity, to other parties and to bodies such as the courts and the Land Registry.⁴¹ Hence the fact that the company seal has been affixed to a deed and attested by the secretary and a director serves the purpose of providing evidence of the company's intention to enter into the transaction.⁴²
 - (b) *Cautionary*: requiring the maker of a deed to pause and give due consideration to the transaction. This may be less important in the case of a company making a commercial transaction than for an individual. Formality requirements do, however, serve what might be called a "managerial purpose" where the maker of a deed is a company or other corporation. The need to use the company seal, and/or for the signature of two officers, gives the company an element of control over the way in which it executes deeds,

instrument was effective as an appointment "under hand", because the relevant directors had been authorised by the board to prepare and seal a deed, and so lacked the authority to sign an instrument under hand: [1961] Ch 88, 104. See also *Re Tahiti Cotton Co, ex parte Sargent* (1874) LR 17 Eq 273 (stock transfer form invalid as a deed but still effective where the articles do not require the transfer to be by deed). For the position of a defective lease see below, para 11.13, and for a defective charge, see *Re Fireproof Doors Ltd; Umney v the Company* [1916] 2 Ch 142 (irregular document of charge will take effect as an agreement to create a charge); *Rushingdale Limited SA v Byblos Bank SAL* [1986] 2 BCC, 99, 509 CA (interlocutory appeal: charges were not validly executed as deeds, but arguable case that, having been signed by the president (and effective managing director) of the company, they took effect as valid equitable securities, and that such signature was sufficient to bind the company).

³⁸ See below, paras 13.12 - 13.14.

³⁹ For an example (in this case on the requirement for signature by two directors) see *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1993] BCLC 814, *per* Chadwick J at 833, and [1994] 1 All ER 261, *per* Hoffmann LJ at 265. The matter has been considered more fully by legal writers in the United States. For a brief summary of the American literature, see J D Feltham, "Informal Trusts and Third Parties" [1987] Conv 246 at pp 248, 249.

⁴⁰ *Transfer of Land: Formalities for Deeds and Escrows* (1985) Working Paper No 93, paras 3.1 - 3.2. See also *Transfer of Land: Formalities for Contracts for Sale etc of Land* (1987) Law Com No 164, paras 2.1 - 2.13.

⁴¹ The requirement that a deed must be in writing also provides evidence of its contents, but that is not relevant to the issue of the manner of execution.

⁴² As to the importance attached by the common law to the affixing of a seal as evidence of an intention to be bound see above, para 2.8 n 15.

and hence takes on certain obligations.⁴³

- (c) *Labelling*: making it apparent to third parties what kind of document it is, and what its effect is to be.⁴⁴

2.19 Any reform of the law of formalities should reflect these purposes. As we have mentioned in Part I, it should also consider the matter from the perspective of both the corporation itself, which will have its own internal procedures for execution, and that of a person dealing with the corporation, who needs to know how far it is necessary to enquire into those procedures in order to be satisfied that the corporation has properly executed the document.⁴⁵ Deciding on the right level of formality for the execution of a deed means striking a balance between the two interests.

⁴³ The somewhat paradoxical result is that a single director cannot, eg, execute a conveyance disposing of the company's land, but may make a contract for such disposal on its behalf. On the question of a director's authority, see below, paras 5.16 - 5.20.

⁴⁴ This is sometimes also referred to as a "channelling function", offering the parties a legal framework into which they may fit their actions: see *Chitty on Contracts* (27th ed 1994) Vol 1 p 263.

⁴⁵ The same applies to a body such as the Land Registry, which must satisfy itself that transfers and other documents sent to it have been properly executed before the relevant entries are made on the register.

PART III FORMALITIES REQUIRED FOR A DEED

Introduction

- 3.1 In this Part we set out the formalities required for a deed under the present law, whether the maker is a corporation or an individual. In doing so we discuss briefly the new “face-value” requirement introduced by the Law of Property (Miscellaneous Provisions) Act 1989 (to which we return in Part XI below), and address the question whether the rules introduced in 1989 have changed the law as regards who must be a party to, or must execute, a deed.

The present requirements

- 3.2 At common law, the only formal requirements for a deed were writing on paper or parchment, sealing, and delivery.¹ Following the Law of Property (Miscellaneous Provisions) Act 1989, there are now four formal requirements for a deed (whether executed by a corporation or an individual). These are a combination of common law and statute, and may be summarized as follows:-
- (a) First, a deed must be in writing, but may be on any substance. This is a common law requirement, although modified by statute.²
 - (b) Secondly, section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that an instrument is not a deed unless it makes it clear on the face of the instrument that the person making it or, as the case may be, the parties to it intend it to be a deed (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise).³ This “face-value” requirement was new in 1989.
 - (c) Thirdly, section 1(2)(b) of the 1989 Act provides that the instrument must be validly executed as a deed by the person making it or, as the case may be, by one or more of the parties to it.⁴
 - (d) Fourthly, a deed must be delivered.⁵ This is again a common law requirement.

¹ *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 398-9. Vellum was acceptable in addition to paper or parchment. There was no requirement for the seal to be attested.

² Law of Property (Miscellaneous Provisions) Act 1989, s 1(1)(a), abolishing any rule of law restricting the substances on which a deed may be written. When used in any statute, the word "writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form: Interpretation Act 1978, s 5, Schedule 1. It will be noted, however, that the requirement for writing derives from the common law, not the 1989 Act.

³ See also Companies Act 1985, s 36A(5).

⁴ A party to a deed may, however, be estopped from denying that the deed has been executed where there is a representation of execution which is intended to be relied on: *TCB Ltd v Gray* [1986] Ch 621, 634 (power of attorney given by an individual was signed but not sealed, but stated that it had been “signed sealed and delivered”).

⁵ As to whether it is correct to treat (c) and (d) as separate requirements where the maker of the deed is a corporation, see below para 6.4.

There is little more to be said about the first requirement for present purposes.⁶

The “face-value” requirement

- 3.3 The second requirement, that the document must make it clear on its face that it is intended to be a deed, seems simple enough. The purpose is to make a clear distinction between deeds and other instruments now that deeds may be executed without the use of a seal. The position will be evident if the document is headed or begins with words such as "this deed", or states that it is "executed as a deed". There is, however, uncertainty whether it is sufficient if the document merely describes itself as a type of document which must be in the form of a deed (for example if it commences "this lease"), or is executed under seal without otherwise describing itself as a deed. We discuss this further in Part XI.⁷

Who must execute a deed

- 3.4 The second and third requirements (both of which are contained in the 1989 Act) also need to be seen in the context of the general rules establishing who may benefit under a deed, and who must execute a deed.⁸ At common law, a person could not take an immediate benefit under a deed inter partes (that is a deed which expressly states that it is made between two or more named parties) or sue on a covenant contained in it unless named as a party to it, and that remains the general rule.⁹ As an exception, by statute a person may take an interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property even though not named as a party to the conveyance or other instrument.¹⁰ However, once a party has executed a deed, it will generally take effect against that party in favour of the other named parties even though it has not been executed by those other parties,¹¹ unless it was delivered subject to a condition that all such parties

⁶ See however further below, Part IX, in the context of facsimile seals and signatures.

⁷ See below, para 11.13.

⁸ We should add that this paper does not examine the questions of acceptance and disclaimer of deeds: see, eg, *Xenos v Wickham* (1866) LR 2 296, 312, and *Lady Naas v Westminster Bank Ltd* [1940] AC 366.

⁹ *Harmer v Armstrong* [1934] Ch 65 at 86, though such a person could take an interest in remainder or by way of trust: see *Halsbury's Laws of England* (4th ed 1975) Vol 12, para 1357. In the case of a deed which is not made inter partes (eg, a deed poll) a person named or sufficiently identified in the deed may, however generally enforce an obligation undertaken in it in their favour, even though they have not executed the deed, *ibid*, para 1357.

¹⁰ Law of Property Act 1925, s 56(1). See Treitel, *The Law of Contract* (9th ed 1995), pp 586-587. The section has been construed narrowly: *White v Bijou Mansions Ltd* [1938] Ch 351 (covenant must purport to be made with person seeking to enforce it); *Beswick v Beswick* [1968] AC 58, 77, *per* Lord Reid (does not extend to personal property other than chattels real); but for a recent decision where s 56(1) applied see *Re Shaw's Application* (1994) 68 P & CR 591.

¹¹ *Cooch v Goodman* (1842) 2 QB 580, 600; 114 ER 228, 235.

must execute it, or it would be inequitable to enforce it.¹² Hence it is common for a deed to be drawn up between two or more named parties, but with the intention that one or more of them will not execute it.¹³ It follows that if one party signs an instrument described as a “deed” under hand, that will not in itself prevent them enforcing the document against another party which has executed it as a deed.¹⁴ Finally, where a person named in a deed has, without executing the deed, accepted some benefit under it, that person must give effect to all the conditions on which the benefit was expressed by the deed to be conferred, and so must perform all the covenants and stipulations on their part contained in the deed.¹⁵

- 3.5 It is true that the *second* formal requirement for a deed given above, and contained in section 1(2)(a) of the 1989 Act, is that it must be clear that the instrument was intended to be a deed “by the parties to it”, which might suggest that all parties to a deed must now execute it. However, the intention is to be shown “on the face of the instrument”, and this can be achieved by the wording of the document (for example by describing itself as a deed). The parties’ intention can therefore be shown without requiring all of them to execute the document. Moreover, this is implicit in the *third* requirement (execution as a deed, contained in section 1(2)(b) of the 1989 Act), which expressly recognises that where there are two or more parties to a deed they need not all execute it, since execution may be by “one or more of the parties to it”. It is clear that the common law position outlined in the previous paragraph has not therefore been affected by the requirements added by the 1989 Act. This means that the practice of preparing a deed and one or more counterpart deeds (so that each party executes one or more of the counterparts but no one document is necessarily executed by all the parties) is also unaffected.¹⁶

Execution “as a deed”

- 3.6 It will be noted that the third requirement is not simply for execution, but for execution *as a deed*. The intention is again to emphasise the distinction between deeds and other instruments. An individual now executes a deed by signing the instrument in the presence of a witness, who attests the signature, and by delivery of the instrument as a deed. The former requirement for sealing has been abolished, but attestation is now

¹² Eg, where a party has executed a deed on the understanding (but not the condition) that another person will also do so, and the failure of that person to do so makes the obligation assumed by the party different from the one which would have been enforceable had the other person executed: *Lady Naas v Westminster Bank Ltd* [1940] AC 366, 391.

¹³ A common example would be a guarantee, which will often only be executed by the guarantor.

¹⁴ The longer limitation period prescribed for specialties by Limitation Act 1980, s 8 would presumably only operate against the party which had executed the document as a deed.

¹⁵ *Halsbury’s Laws of England* (4th ed 1975) Vol 12, para 1360.

¹⁶ The usual practice is to add a provision to the deed expressly authorising execution in counterparts in this way. See further *Halsbury’s Laws of England* (4th ed 1975) Vol 12, para 1304.

mandatory.¹⁷ In the next Part, we turn to the ways in which an instrument is executed as a deed by a corporation. The final formal requirement for a deed - namely delivery - is dealt with separately in Part VI.

¹⁷ Law of Property (Miscellaneous Provisions) Act 1989, s 1(3). As an alternative, the instrument may be signed at the maker's direction and in his presence, and in the presence of two witnesses who each attest the signature: *ibid*, s 1(3)(a)(ii). An individual may still seal a deed, in addition to signing and having this witnessed, but it is generally considered that the addition of the seal has no additional effect: see below, para 11.8.

PART IV

EXECUTION BY CORPORATIONS

Introduction

- 4.1 We have explained that in order to be a deed, an instrument must be validly executed as a deed by the person making it or, as the case may be, by one or more of the parties to it.¹ We now go on to consider the way in which corporations execute an instrument as a deed. It will be seen that the position varies depending upon the type of corporation, and that there are significant uncertainties in the present statutory rules which govern execution by companies.

Different types of corporation

- 4.2 The great majority of corporations are now created under public general Acts of Parliament, in particular limited companies incorporated under the Companies Acts.² Others have been incorporated by private Act or royal charter,³ and corporations may still be encountered in practice which owe their existence to prescription, custom, or presumed lost charter.⁴ It is not, however, the purpose of this Paper to offer a detailed classification of corporations.⁵ Instead, we categorise them according to the rules governing the way in which they execute deeds and other documents.

A general rule

- 4.3 It will be seen that those rules vary according to the type of corporation, but there is a principle of general application which must be explained at the outset. To be validly executed as a deed, an instrument must also be executed in accordance with the corporation's constitution, which may lay down the manner of execution, in particular by regulating the use of the common seal.⁶ This has, however, been significantly affected by the changes introduced by the Companies Act 1989,⁷ and is also subject to a number of presumptions and protective provisions which exist for persons dealing with a company or other corporation which we consider in Parts V and VI below.
- 4.4 When we refer in this Part to the "execution of a document" or to its being "executed"

¹ See above, para 3.2.

² See below, para 4.5. Trading corporations have also been incorporated by special Act of Parliament, but most were dissolved on the nationalisation of their undertakings.

³ These include a small number of privately owned trading companies which remain in existence, such as the Hudson's Bay Company.

⁴ See further *Halsbury's Laws of England* (4th ed 1974) Vol 9, para 1231.

⁵ For such a classification see *Halsbury's Laws of England* (4th ed 1974) Vol 9, paras 1201-1203, and for the creation of corporations generally, see *ibid*, paras 1231-1248.

⁶ *Clarke v The Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315, 326; 110 ER 473, 477; *Ernest v Nicholls* (1857) 6 HL Cas 401; 10 ER 1351; *TCB Ltd v Gray* [1986] Ch 621, 636; cf *Agar v Athenaeum Life Assurance Society (Official Manager)* (1852) 3 CBNS 725; 140 ER 927, and *Prince of Wales Assurance Society v Athenaeum Life Assurance Society* (1858) 31 LT 149. See further *Halsbury's Laws of England* (4th ed 1974) Vol 9, para 1218.

⁷ Most obviously by Companies Act 1985, s 36A(4) (see below, para 4.10), and see Part V generally.

we exclude delivery. We consider the requirement of delivery separately in Part VI.

Companies incorporated under the Companies Acts

Section 36A of the Companies Act 1985

- 4.5 The way in which a company incorporated under the Companies Acts⁸ executes deeds and other documents⁹ is governed by section 36A of the Companies Act 1985.¹⁰ For the sake of convenience, we set out the whole of the section below, although subsections (5) and (6) are not considered in detail until Parts V and VI of this Paper:-

36A.—(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed.

A “purchaser” means a purchaser in good faith for valuable consideration and includes

⁸ “Company” is defined by Companies Act 1985, s 735 as a company formed and registered under the Companies Act 1985, or under the former Companies Acts, other than a company formed in what is now the Republic of Ireland. The definition applies unless the contrary intention appears: *ibid*, s 735(4). See further Jeremy Whiteson, “Receivership and the quasi company” (1993) *Insolvency Law and Practice*, Vol 9, No 3, p 77. See also Companies Act 1985, s 680 (companies not formed under the Companies Acts but capable of being registered under the 1985 Act), and Sched 21, para 6 (application of the 1985 Act to such companies).

⁹ “Document” is defined by Companies Act 1985, s 744 to include a “summons, notice, order, and other legal process, and registers”.

¹⁰ Inserted by Companies Act 1989, s 130(2).

a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

- 4.6 The section therefore provides two ways for a company to execute a document:-
- (a) First, a document may be executed by a company by affixing its common seal, as provided by section 36A(2). This preserves the method of execution by corporations under common law.¹¹
 - (b) Secondly, whether or not a company has a seal, section 36A(4) provides that a document may be executed by being signed by a director and the secretary of a company, or by two directors, and expressed (in whatever form of words) to be executed by the company.¹² Such a document has the same effect as if executed under the common seal of the company. There is no requirement that the signatures of such officers should be attested.¹³
- 4.7 These appear to be the only valid means of execution for such a company (other than by appointing an attorney), since there is no saving provision authorising execution in any other manner.¹⁴ It is also important to appreciate that section 36A provides two ways in which a company may execute a *document*, and is not restricted to the execution of *deeds*. This is made clear by section 36A(5), which provides that a document executed by a company which makes it clear on its face that it is intended by the person or persons making it *to be a deed* has effect, upon delivery, as a deed. The purpose is to reflect section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989,¹⁵ and also to make it clear that a company may execute a document other than a deed by one of the two methods given in section 36A, for example a share certificate.¹⁶
- 4.8 We have explained that at common law, sealing had to be accompanied by any necessary formalities prescribed by the company's constitution.¹⁷ In practice, the use

¹¹ See below, para 4.20.

¹² Execution by the single signature of a person who was both director and secretary would not suffice: *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, transcript, para D(III) 11 (see above, para 1.17).

¹³ When an individual executes a deed, his or her signature must be attested: Law of Property (Miscellaneous Provisions) Act 1989, s 1(3). This does not apply here, since execution is "by the company", not by the officers.

¹⁴ In contrast to Law of Property Act 1925, s 74(6). In *Johnsey Estates* (see above, para 1.17), the court expressed the view (obiter) that execution under Law of Property Act 1925, s 74(1) or under the pre-1926 law remain valid alternatives to s 36A (transcript, para D(III) 6). Given the lack of any saving provision in s 36A we doubt whether this view can be correct, or that execution by a registered company by some other method (if any) permitted before 1926 would have any validity. Moreover, s 74(1) is a deeming provision, not a method of execution, and in any event overlaps with s 36A(2).

¹⁵ See above, para 3.2.

¹⁶ See above, para 2.7. For an example see *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1993] BCLC 814.

¹⁷ See above, para 4.3.

of the seal will generally be governed by the articles of association.¹⁸ The traditional method of execution by companies has been by affixing the common seal, with the instrument also being signed by a director and the secretary, or by two directors.¹⁹ When an instrument is executed in this way it is probably incorrect - though a convenient shorthand - to say that the directors and secretary are signing by way of attesting the seal. Rather they are signing because this is part of the mechanism prescribed by the company's constitution for the execution of an instrument.²⁰ It is possible that the point is significant, because, if correct, a deed which has been sealed but not signed is not effective, since it will not have been executed in accordance with the articles, whereas mere attestation may not be essential. However, what is required will be a matter of construction of the articles. Even if the articles were to refer to attestation instead of signature, it seems likely that this would be part of the formalities required by the constitution of the company, and so probably essential for valid execution.²¹

4.9 Section 36A(2) simply states that a document may be executed by a company "by the affixing of its common seal", but it seems unlikely that this overrides the need for a company to comply with its articles, for example by dispensing with the signature of two of its officers if that is required by the articles. If it were otherwise, this would make redundant the presumptions of due execution which are considered in Part V below where execution is under seal. We do, however, ask below whether the point requires clarification.²²

4.10 On the other hand, it seems clear that a company may execute a deed in accordance with section 36A(4) without using its common seal, even though:-

- (a) the only method given in the articles for the execution of deeds is under the common seal, or
- (b) there is some other possible inconsistency with the articles, for example if they specify signatories to the seal other than a director and secretary or two

¹⁸ Eg, Companies Act 1985, Table A, para 101, which provides that the seal shall only be used by the authority of the directors or of a committee of the directors. The directors may determine who shall sign any instrument to which the seal is affixed, and unless they determine otherwise a director and the secretary or two directors shall sign.

¹⁹ This method of execution has long been commonly prescribed by the articles: see, however, Companies (Consolidation) Act 1908 Sched 1 Table A, para 76 which requires attestation by two directors *and* a secretary or such other person as the directors may appoint for the purpose.

²⁰ *Shears v Jacob* (1866) LR 1 CP 513; *Deffel v White* (1866) LR 2 CP 144, 146; *Norton on Deeds* (2nd ed 1928) p 24. Law of Property Act 1925, s 74(1), however, does refer to attestation.

²¹ It is suggested in *Emmet on Title* (19th ed 1986) para 20.004, that the point may be important where the directors who sign to authenticate the affixing of the common seal are also parties to the deed, given the common law rule that a party to a deed cannot be a witness to it: *Seal v Claridge* (1881) 7 QBD 516. As to dealings between a company and its directors generally, see Companies Act 1985, Part X.

²² See below, para 15.5.

directors.²³

Section 36A(3) states that sections 36A(4)-(6) apply whether a company has a seal or not, and so clearly envisages that execution as provided by section 36A(4) should be available where the company has a seal, and hence provisions in the articles for its use. Moreover, it seems likely that the ability of the directors to execute a deed by signature in accordance with section 36A(4) would in most cases be within the general power of management which is normally given to them by the articles.²⁴

4.11 It should be noted, however, that section 36A(4) is an exception to the general rule at common law that a corporation must execute a deed by its common seal.²⁵ Whilst the articles govern the way in which the common seal is affixed (they may, for example, provide that the seal may be affixed and the document signed by a single director), it is doubtful whether they can provide a means by which the company itself may execute a deed or other document without a common seal which is effective unless it accords with section 36A(4). It will also be noted that section 36A(4) makes no obvious provision for execution where a director or secretary of a company is itself a corporation.²⁶

4.12 Section 36A means that execution may be either under the common seal, or by the signature of two officers. We ask below whether it is appropriate to retain this “dual regime”, and whether there should be any changes in the method by which a deed may be executed without the use of the common seal.²⁷

The common seal

4.13 The power to possess, use and change a seal is incidental to a corporation.²⁸ In the absence of any special and legally binding regulations to the contrary, it seems that the seal need not bear any special emblem to identify it as the seal of the corporation, and indeed that a corporation may use any seal, even that of an individual, so long as the

²³ This view is supported by the decision of Chadwick J at first instance in *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1993] BCLC 814, 832, 833 (approved on appeal but without comment on this point [1994] 1 All ER 261). Relying on s 36A(4), it was held that stock transfer forms had been validly executed although not authorised by the board. It was enough that two directors had signed, despite the requirements of the articles, which adopted Table A reg 101 (n 19 above). It was also immaterial that the forms referred to the common seal being affixed when this had not been done. Section 36A(4) requires a document to be “expressed ... to be executed by the company”. It may be that the reference to the seal being affixed was sufficient for this purpose: the point does not appear to have been addressed expressly.

²⁴ Eg, Companies Act 1985, Table A, SI 1985 No 805, para 70. See further below, para 5.7.

²⁵ See below, para 4.20.

²⁶ See further below, para 11.46.

²⁷ See below, paras 14.5 and 14.7 - 14.11.

²⁸ *Sutton’s Hospital Case* (1612) 10 Co Rep 23a, 30b; 77 ER 960, 970.

seal which is used is applied as the seal of the corporation for the time being.²⁹

- 4.14 In the case of a company registered under the Companies Acts, however, the company's name must be engraved in legible characters on the seal (if it has one).³⁰ Both the company and any officer or person using or authorising the use of a seal which does not have the name engraved upon it in this way are liable to a fine.³¹ Since, however, the use of such a seal is not prohibited, it is at least arguable that deeds executed under such a seal would nevertheless bind the company.³² We return to this point in Part IX.

Official seals and authentication

- 4.15 If the objects of a company which has a common seal require or comprise the transaction of business in foreign countries, then if its articles permit, it may have an official seal for use outside the UK.³³
- 4.16 A company which has a common seal may also have an official seal for sealing share certificates. It must be a facsimile of the common seal, with the addition of the word "Securities" on its face.³⁴
- 4.17 A document requiring authentication by a company is sufficiently authenticated for the purposes of the laws of England and Wales by the signature of a director, secretary or other authorised officer of the company.³⁵

²⁹ *Yarmouth Corp'n and Cowper's Case* (1630) Godb 439; 78 ER 258; *Cooch v Goodman* (1842) 2 QB 580; 114 ER 228. See further *Halsbury's Laws of England* (4th ed 1974) Vol 9, para 1218.

³⁰ Companies Act 1985, s 350(1).

³¹ *Ibid*, ss 350(1) and (2).

³² See *Halsbury's Laws Of England* (4th ed 1975) Vol 12, para 1337, n 4, citing *Wright v Horton* (1887) 12 App Cas 371, 377, 380 and 384 (failure to register debentures did not invalidate them as between holder and unsecured creditors), and *H E Randall Ltd v British and American Shoe Co* [1902] 2 Ch 354, 358 (trade name protected despite failure to comply with Companies Act 1862, ss 41 and 42 on company identification). But cf *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 1 WLR 1555 (for a discussion of the principle that as a matter of public policy the court will not enforce a contract which on the face of it is illegal or made for an illegal purpose), followed in *Heald v O'Connor* [1971] 1 WLR 497 (unlawful financial assistance renders security void).

³³ Companies Act 1985, s 39. The official seal must be a facsimile of the common seal, with the addition on its face of the name of every territory, district or place where it is to be used. When duly affixed to a document, the official seal has the same effect as the common seal. It may be affixed by any person authorized to do so under the common seal, and such person must certify in writing on the deed or other instrument the date on which and the place at which it is affixed (ss 39(3) and (5)).

³⁴ *Ibid*, s 40.

³⁵ *Ibid*, s 41.

Unregistered companies within the Companies Act

- 4.18 A number of the provisions of the Companies Act 1985 apply to unregistered companies.³⁶ These include sections 36A (execution of deeds and documents) and 40 (official seal for share certificates), and also sections 35 on a company's capacity and the power of its directors to bind it, and 36 (contracts) which are discussed below.³⁷
- 4.19 For this purpose an "unregistered company" is defined by section 718 of the Companies Act 1985 as any body corporate incorporated in and having a principal place of business in Great Britain *other than any of the following*:-
- (a) Any body incorporated by or registered under any public general Act of Parliament. These include corporations such as local authorities,³⁸ the Post Office,³⁹ building societies,⁴⁰ charities incorporated under the Charities Act 1993,⁴¹ industrial and provident societies,⁴² and of course companies registered under the Companies Acts.
 - (b) Any body not formed for the purpose of carrying on a business which has for its object the acquisition of gain by the body or its members.
 - (c) Any body for the time being exempted by the Secretary of State.

Corporations outside the Companies Act

- 4.20 The execution of a deed by such corporations (that is for those to which section 36A does not apply) is governed by the common law, unless there are specific statutory provisions applicable to the corporation.⁴³ A document is therefore executed by affixing the corporation's seal, accompanied by the formalities, if any, prescribed by its constitution (for example by its statute, charter or articles),⁴⁴ and by delivery.⁴⁵ There is statutory

³⁶ Companies (Unregistered Companies) Regulations 1985, SI 1985 No 680, as amended, made under Companies Act 1985, s 718 and Sched 22.

³⁷ See below, Parts V and VII respectively. For this purpose references in ss 36 to 36B, 40 and 186 to the common seal are replaced by references to the common or other authorised seal. Section 38 (execution of deeds abroad by attorney) and s 39 (official seal for use abroad) do not apply to unregistered companies.

³⁸ Eg, Local Government Act 1972, ss 2(3) and 14(2). For Wales see now Local Government (Wales) Act 1994.

³⁹ Post Office Act 1969, Sched 1 para 1.

⁴⁰ Building Societies Act 1986, s 5(2).

⁴¹ Charities Act 1993, Part VII, s 50 *et seq.*

⁴² Industrial and Provident Societies Act 1965, s 3.

⁴³ That means that execution must be under the seal of the corporation. There are, however, examples where the courts have accepted execution by the officers of a corporation under their own seals on behalf of the corporation, where this is the method prescribed by its constitution. For an example, see *Xenos v Wickham* (1866) LR 2 HL 296, where it appears that execution in accordance with the deed of settlement of a company by the signatures and seals of two directors was sufficient (at pp 308, 311 and 322).

⁴⁴ *Clarke v The Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315, 324-326; 110 ER 473, 477-478. See further *Halsbury's Laws of England* (4th ed 1975) Vol 12, paras 1335-1336. It seems that any deed of a non-statutory corporation (ie, one created other than by the

recognition that the manner of execution may be authorised simply by the long practice of the corporation.⁴⁶

4.21 Many types of corporation are, however, subject to specific statutory provisions which govern the execution of deeds, or at least the use of the corporate seal. Such provisions are, for example, frequently found in the statute setting up a statutory corporation. It is noticeable that where these provisions are very recent, the trend is for them to mirror or reflect section 36A of the Companies Act 1985.⁴⁷ Otherwise, a typical “modern” provision is for the corporation in question to have an official seal, which is to be authenticated by a member of the corporation or its secretary, or by some other person authorised by the corporation for that purpose. There is frequently a rebuttable presumption that any instrument purporting to be sealed and authenticated as mentioned above is an instrument of the corporation.⁴⁸

4.22 There are no specific provisions in the Local Government Act 1972 governing the use of the seal of a local authority, although this may be dealt with in standing orders made by the authority.⁴⁹ We understand that in practice these frequently require the affixing of the authority’s seal to be attested by the chairman, vice-chairman or other elected member, and also by the clerk or his or her deputy. There are special provisions for parish and community councils, which need not have a common seal.⁵⁰

4.23 The rules of a building society must provide for the form, custody and use of the society’s

authority of Parliament) must, in the absence of any special and legally binding regulations to the contrary, be sealed at a duly constituted meeting of the corporation and in pursuance of a resolution of a majority of the members then present. The position is similar as regards delivery of the deed by the corporation: *Mayor, Constables and Company of Merchants of the Staple of England v The Governor and Company of the Bank of England* (1887) 21 QBD 160, 165-166. If it is a trading corporation, however, then in the absence of specific provision under its constitution, the seal may be affixed by those managing its affairs, in the performance of acts within their authority: *Re Barned’s Banking Co, ex parte Contract Corporation* (1867) LR 3 Ch App 105.

⁴⁵ We deal with delivery separately in Part VI.

⁴⁶ Law of Property Act 1925, s 74(6). For an example see *Wolstenholme & Cherry’s Conveyancing Statutes* (12th ed 1932), p 346 “the Corporation of London execute deeds and other instruments in accordance with their ancient practice or usage”.

⁴⁷ Eg, Friendly Societies Act 1992, Sched 6 para 2 (in the case of incorporated friendly societies), and Charities Act 1993, s 60 (in the case of charities incorporated under that Act). For charities, see further below, para 16.7.

⁴⁸ Eg, in the case of the Forestry Commission, see Forestry Act 1967, Sched 1, paras 4 and 5.

⁴⁹ See Local Government Act 1972, s 99, Sched 12 and s 135. As to the effect of non-compliance with standing orders see *ibid*, s 135(4), but also *North West Leicestershire DC v East Midlands Housing Association Ltd* [1981] 1 WLR 1396 CA (contract affixed with corporate seal but not in accordance with the standing orders held to be invalid). See generally *Halsbury’s Laws of England* (4th ed 1979) Vol 28, para 1316.

⁵⁰ Local Government Act 1972, ss 14(3), 33(3) and (4). Where such a council has no seal, any act which is required by deed may be signified by an instrument signed and sealed by two members of the council. This would appear to require execution by the members using wafer seals.

common seal.⁵¹ In practice the rules often permit the society to have one or more facsimile seals, reflecting the large volume of deeds to be executed, particularly forms of discharge.⁵² Typically the rules might provide for the use of the seal to be countersigned by an officer approved by the board, and for execution to be recorded in the society's records.

- 4.24 Little purpose would be served by attempting to give a comprehensive list of the relevant execution formalities for corporations outside the Companies Act 1985. Unless persons dealing with such a corporation can rely on the presumption of due execution under section 74(1) of the Law of Property Act 1925,⁵³ they must satisfy themselves that the appropriate formalities have been met in each case. That seems unsatisfactory, and we invite views below on whether it is possible to introduce greater uniformity into the law in this respect.⁵⁴

Corporations sole

- 4.25 A corporation sole consists of one person and his or her successors in some particular office or station, who are incorporated by law in order to give them certain legal capacities and advantages which they would not have in their natural person.⁵⁵ Unlike a corporation aggregate,⁵⁶ a corporation sole has a dual capacity, namely its corporate capacity, and its individual or natural capacity.
- 4.26 Neither section 36A of the Companies Act 1985 nor section 74(1) of the Law of Property Act 1925 applies to a corporation sole.⁵⁷ Execution is therefore normally as required by

⁵¹ Building Societies Act 1986, Sched 2, para 3(4), Table, item 12.

⁵² Considered further below, para 14.17.

⁵³ For s 74(1) see below, para 5.24.

⁵⁴ See below, Part XVI.

⁵⁵ *Halsbury's Laws of England* (4th ed 1974) Vol 9, para 1206. Examples include the Public Trustee and bishops within the Church of England. The Crown is usually regarded as a corporation sole (see Law of Property Act 1925, s 180, and Sir William Wade and Christopher Forsyth, *Administrative Law* (7th ed 1994), p 819), though it has been suggested that for some purposes it can also be seen as a corporation aggregate headed by the Monarch (*M v Home Office* [1994] 1 AC 377, 424; *Town Investments Ltd v Department of the Environment* [1978] AC 359). As to execution by the Crown under the Great Seal, see *Halsbury's Laws of England* (4th ed 1974) Vol 8, para 1094, and Crown Office Act 1877, ss 3 - 7, and Great Seal Act 1884, ss 2 and 4.

⁵⁶ For the meaning of a corporation aggregate see above, para 2.2 n 3. A private company registered under the Companies Act 1985 may now have a single member whilst preserving limited liability (*ibid*, ss 1(3) and 24, as amended by Companies (Single Member Private Limited Companies) Regulations 1992, SI 1992 No 1699), but would remain a corporation aggregate (see para 2(1)(a) of the Regulations).

⁵⁷ As to whether a corporation sole is a "body corporate" see *Halsbury's Laws of England, op cit*, where it is described at para 1206 as a "body politic having perpetual succession, constituted in a single person", but at para 1201 as "an office". It falls outside the definition of "company" in Companies Act 1985, s 735, and section 740 of that Act provides that references in the 1985 Act to a body corporate or to a corporation do not include a corporation sole. As to Law of Property Act 1925, s 74(1), see below, para 5.24. The position where there is a vacancy in the office is dealt with in Law of Property Act 1925, s 180(3).

common law, by sealing and delivery.⁵⁸ However, a corporation sole is not obliged to have its own seal,⁵⁹ and where there is no corporate seal it seems that a person executing in his or her capacity as a corporation sole should continue to use a wafer seal, as was common practice for execution by an individual before 1989.⁶⁰ As a general statement the best that can probably be said is that, in the absence of any specific statutory provision, such a corporation executes in the manner required by law, or practice, or the constitution of the corporation.⁶¹

- 4.27 In the case of government ministers, reference needs to be made to a number of statutes and statutory instruments. There is frequently statutory provision specifying that the relevant minister is a corporation sole, with a corporate seal. Provision is usually made for the authentication of the corporate seal by the relevant Secretary of State, or by a Secretary of State to the department, or by a person duly authorised.⁶² There is often also a rebuttable presumption that an instrument purporting to be made by the relevant Secretary of State, and to be sealed with the corporate seal and authenticated as mentioned above, or to have been signed or executed by a Secretary of State to the department or other authorised person, has been so made.⁶³ There may also be provision authorising the Secretary of State to issue a conclusive certificate that a particular instrument has been made or issued.⁶⁴

Foreign corporations

- 4.28 The execution of documents for use in England and Wales by foreign corporations has in the past been a matter of some difficulty. There has been debate whether the relevant formality requirements are governed by the place of incorporation of the corporation or by the governing law of the document in question (or whether either would suffice).⁶⁵ In the case of any deed relating to land in England and Wales, for example, it was clear that as a general rule all questions arising were governed by English law, including the relevant

⁵⁸ The provisions for execution of a deed by an individual do not apply to a corporation sole: Law of Property (Miscellaneous Provisions) Act 1989, s 1(10).

⁵⁹ *Halsbury's Laws of England* (4th ed 1974) Vol 9, para 1217.

⁶⁰ This seems to follow from the fact that the Law of Property (Miscellaneous Provisions) Act 1989 is inapplicable, and execution must be under seal to comply with the common law rule. We are told that it is standard practice for corporations sole such as an archdeacon to execute using a wafer seal.

⁶¹ *Brookes's Notary* (11th ed 1992) p 180, referring to Law of Property Act 1925, s 74(6). For execution by an attorney on behalf of a corporation sole see *ibid*, s 74(3), discussed below, para 8.15.

⁶² Eg, Treasury Solicitor Act 1876, s 1; Secretary of State for the Environment Order 1970 (SI 1970 No 1681) art 3; Secretary of State for Foreign and Commonwealth Affairs Order 1983 (SI 1983 No 146) art 2. See also Ministers of the Crown Act 1975, s 3, dealing with the position where there has been a redistribution of functions between Secretaries of State, and an enactment requires the execution of a deed or other instrument by a named Secretary of State.

⁶³ Eg, Secretary of State for Transport Order 1976 (SI 1976 No 1775), art 4(3).

⁶⁴ *Ibid*, art 4(4).

⁶⁵ On the conflict of laws aspect see further below, Appendix C.

formalities.⁶⁶ Since English law formerly made no provision for execution other than under seal, there was an obvious difficulty in determining how a foreign corporation which did not possess a seal could enter into a deed which was valid under English law. Practice varied, either placing reliance on execution in accordance with the local law of the corporation, or seeking to follow English law by execution under a plain wafer seal.⁶⁷

The Foreign Companies (Execution of Documents) Regulations 1994

4.29 The position is now, however, governed by the Foreign Companies (Execution of Documents) Regulations 1994, which adapt section 36A of the Companies Act 1985 to the execution of documents (in accordance with the law of England and Wales) by foreign companies.⁶⁸

4.30 Under the Regulations a foreign company may execute a document in the following ways:-

(a) by affixing its common seal, or in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company,⁶⁹ or

(b) by the signature of any person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of the company, so long as the document is expressed, in whatever form of words, to be executed by the company.⁷⁰ Such a document has the same effect as if executed under the common seal of a company incorporated in England or Wales.⁷¹

4.31 The Regulations therefore recognize that it may be impossible for a foreign company to execute documents in the same manner as English companies, for example because it has no seal, or because under its constitution only one person may sign for the company. Moreover, the persons holding offices equating to director and secretary may have quite different titles. At the same time they allow flexibility. Foreign companies whose law

⁶⁶ *Adams v Clutterbuck* (1883) 10 QBD 403. See further *Dacey & Morris, The Conflict of Laws* (12th ed 1993), Rule 117, and at p 963. The position under strict conflict of laws principles is in fact rather more complicated than this, since the relevant law (the *lex situs*) is not necessarily that of the jurisdiction in which the land is situated, but the system of law which that system would apply (*ibid* pp 960-961).

⁶⁷ On the basis of the common law rule that a deed must be in writing, sealed, and delivered: *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 397-399, and that a corporation may adopt any seal for use (see above, para 4.13).

⁶⁸ SI 1994 No 950, as amended by the Foreign Companies (Execution of Documents) (Amendments) Regulations, SI 1995 No 1729, made under the powers conferred by Companies Act 1989, s 130(6). The Regulations apply the whole of Companies Act 1985, ss 36-36C to execution by foreign companies, subject to certain amendments.

⁶⁹ Companies Act 1985, s 36A(2) as applied and amended by para 5(a) of the Regulations.

⁷⁰ *Ibid*, s 36A(4) as applied and adapted by para 5(b) of the Regulations. Since execution in this way is "by the company" it does not appear that s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 is applicable, so that the signature need not be witnessed.

⁷¹ *Ibid*, reg 5(b).

requires them to use a seal for executing documents⁷² may execute under seal, whilst those who execute by signature alone⁷³ may now do so under English law.

- 4.32 It will, however, remain prudent in many cases to seek a legal opinion from lawyers in the jurisdiction in which the company is incorporated, for example to check whether those signing have authority to bind the company, whether there are other formalities to be complied with under the local law (which may at the least be necessary to enforce the document in the place of incorporation of the company), and on separate matters such as corporate capacity.⁷⁴
- 4.33 The Regulations apply to “companies incorporated outside Great Britain”, but there is no attempt to define this further. The general rule is that the English courts will recognise the existence of any corporation duly created under the law of a foreign country.⁷⁵ It may, however, be difficult to ascertain whether a particular body is a corporation in certain cases, particularly with bodies such as treaty organisations.⁷⁶
- 4.34 Moreover, the Regulations refer only to “companies”, but this word is not defined in the Regulations, and there is no definition of “company” in the Companies Act 1985 which is applicable to a foreign company.⁷⁷ Section 740 of the Companies Act 1985 provides that the terms “body corporate” and “corporation” include a company incorporated elsewhere than in Great Britain, and the inference may be drawn from this that not every corporation incorporated outside Great Britain will necessarily be a company, and so within the Regulations.⁷⁸ We understand that in practice the Land Registry apply the general principle that a foreign body corporate can be treated as a company falling within the Regulations if it has been incorporated under laws which have characteristics which are broadly similar to the Companies Act 1985.⁷⁹ It may be necessary for the Registry to seek assurance from a lawyer qualified in the relevant jurisdiction. We invite views in Part XV

⁷² Eg, in some common law jurisdictions: see below, Appendix B.

⁷³ Eg, companies incorporated in many civil law jurisdictions: see below, Appendix B.

⁷⁴ On the question of corporate capacity see below, para 5.4 and Appendix B, para B.11.

⁷⁵ *Henriques v Dutch West India Co* (1728) 2 Ld Raym 1532; 92 ER 494; *Lazard Bros & Co v Midland Bank* [1933] AC 289, 297. See further *Dicey & Morris, The Conflict of Laws* (12th ed 1993), p 1107. Where a body purports to have corporate status under the laws of a territory which is not at that time recognised by the UK, the position is governed by the Foreign Corporations Act 1991, ss 1 and 2.

⁷⁶ See *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 and *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114. See also International Organisations Acts 1968 and 1981.

⁷⁷ See above, para 4.5 n 8. The term “company incorporated outside Great Britain” also appears in s 691. The 1968 EC Convention on the Mutual Recognition of Companies and Bodies Corporate has not been fully ratified and is not in force.

⁷⁸ There appears to be a similar problem with the term “oversea company” for the purposes of Companies Act 1985, Pt XXIII.

⁷⁹ See also the Land Registration (Execution of Deeds) Rules 1994, SI 1994 No 1130, Note (8).

whether it would be helpful to define what is a “company” for the purpose of the Regulations, or whether the Regulations should be extended to all foreign corporations.⁸⁰

Foreign corporations outside the Regulations

- 4.35 The position of any foreign corporation which is not a foreign company for the purpose of the Regulations remains as explained above.⁸¹ If such a corporation is to execute a deed in accordance with English law then it seems that it may do so under its seal (if it has one), by the device of a plain wafer seal,⁸² or by the grant of a power of attorney.⁸³ A purchaser from such a corporation would be able to rely on section 74(1) of the Law of Property Act 1925 if the corporation had a seal and was able to execute in a way falling within that section.⁸⁴

⁸⁰ See below, paras 15.28 - 15.29.

⁸¹ Para 4.28.

⁸² See above, para 4.28 n 67. We are not aware of any judicial authority for this in the case of a foreign corporation, but in principle it should be effective. Land Registry Practice Leaflet No 17 recognizes this possibility (at para 19), but states that evidence of adoption of the seal would be required.

⁸³ Although there would be a question as to how the power of attorney should be executed if the corporation had no seal.

⁸⁴ See below, para 5.24.

PART V

DUE EXECUTION

Introduction

- 5.1 We have explained that a deed must be “validly executed”,¹ and the general rule that a corporation must comply with any requirements of its constitution when executing any document.² We consider in this Part how far a person dealing with a corporation need be concerned with this, and how far they are affected by any irregularity or fraud.
- 5.2 Our concern is principally with the formal validity of deeds and other documents: in other words with how a transaction which has been properly decided upon by a corporation, and which is within its capacity, is given formal effect. As will be seen below, so far as a person dealing with a corporation is concerned, there are special rules in the case of deeds and documents which have been executed by the corporation.³ In particular, we examine the presumptions of due execution set out in section 36A(6) of the Companies Act 1985 and in section 74(1) of the Law of Property Act 1925. We also look briefly at the relationship between these rules and those which apply when a document has been forged.
- 5.3 Nonetheless, it may be helpful to start with a brief overview of the issues of corporate capacity and authority to enter a transaction. We do not propose any reform of the law on these issues - which would go beyond our terms of reference - but they are a necessary background both to what follows, and to any proposals for reform of the law on the execution of deeds. For example, in deciding whether there should be statutory presumptions which protect against irregularities in the manner of execution, it is necessary to know what protection a person dealing with a company would have in the absence of any such presumption. The relevant principles and statutory provisions may allow a third party to enforce a deed against a corporation despite some irregularity in the way in which it has been executed.

Corporate capacity and authority

Corporate capacity

- 5.4 At common law, any act beyond the capacity of a corporation is treated as ultra vires and void. It cannot be ratified by the members of the corporation. The capacity of a corporation is governed by its constitution. In the case of a company registered under the Companies Acts this is determined by the objects set out in the memorandum of association, and by the implied powers to do any act reasonably incidental to the attainment or pursuit of those express objects.⁴ However, so long as an act is capable of falling within those objects and powers, it will not be ultra vires merely because the

¹ Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(b): see above, para 3.2.

² See above, para 4.3.

³ See below, paras 5.24 - 5.26.

⁴ For a fuller consideration of this, and the distinction between a company’s main objects and its ancillary powers, see *Rolled Steel Products v British Steel Corporation* [1986] Ch 246.

directors have exceeded their authority.⁵

5.5 In the case of a company incorporated by private Act, the objects will be set out (or incorporated by reference) in the Act of incorporation.⁶ The position is similar with a local authority incorporated by Act of Parliament. On the other hand, a non-statutory corporation can generally do everything that an ordinary individual can do, unless restricted directly or indirectly by statute, or by its incorporating document (for example its charter).⁷

5.6 For a company or corporation to which section 35(1) of the Companies Act 1985 applies
d. Section 35(1)⁸

provides that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.¹⁰ Nonetheless, the doctrine remains for other statutory corporations, and recent case law has shown its continuing importance, particularly for those dealing with local authorities.¹¹

Corporate authority

5.7 The Companies Act 1989 also made important changes to the question of whether a person dealing with a company need enquire as to the authority of the directors to bind the company. The starting position is that authority to bind a company must be conferred by the articles of association, either directly, or by delegation under a power contained in them. The general power to manage is usually conferred on the board, which may normally delegate, for example to a managing director.¹² The articles may also require the authority of the members in general meeting for particular transactions, for example where

⁵ *Rolled Steel Products v British Steel Corporation* above.

⁶ For an example see *D'Arcy v The Tamar, Kit Hill, and Callington Railway Co* (1867) LR 2 Ex 158.

⁷ Non-statutory corporations include those created by royal charter, some corporations sole, and corporations which exist by virtue of prescription, custom, or presumed lost royal charter. See above, para 4.2.

⁸ Ie, either a company formed and registered under the Companies Acts, or an unregistered company of the type described in para 4.19 above.

⁹ Substituted by Companies Act 1989, s 108(1) as from 4 February 1991. The doctrine had previously been modified by European Communities Act 1972, s 9 (which became the original Companies Act 1985, s 35), which was enacted to implement Article 9 of the First Company Law Directive, 68/151/EEC. Article 9 is now reflected by Companies Act 1985, ss 35, 35A and 35B.

¹⁰ Sections 35(2) and (3) seek to preserve the position for the purposes of the company's internal regulation. There are special rules in the case of charities, and for transactions with directors or their associates, ss 35(4) and 322A.

¹¹ Eg, *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1; *Credit Suisse v Allerdale Borough Council* [1996] 2 Lloyd's Rep 241; *Credit Suisse v Waltham Forest LBC, CA*, *The Times* 20 May 1996; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 WLR 721.

¹² Eg, Companies Act 1985, Table A, paras 70 and 72.

this would cause a borrowing limit imposed by the articles to be exceeded.¹³ At common law, a contract which is not ultra vires the company as a matter of its corporate capacity, but which is purportedly entered into by the company's officers without authority (for example because it exceeds a restriction in the articles, or because the directors are acting in breach of their fiduciary duties to the company), may generally be ratified by the company by ordinary resolution in general meeting.¹⁴ Failing that, and subject to the statutory provisions and the general agency principles outlined in the following paragraphs, the contract may be set aside by the company. In that event the other party to it may hold anything received under it as constructive trustee for the company.¹⁵

5.8 In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or to authorise others to do so (for example by delegation to an individual director), is now deemed to be free of any limitation under the company's constitution, by virtue of section 35A of the Companies Act 1985.¹⁶ This includes any limitation deriving from any resolution of the company in general meeting or of a class of shareholders at a class meeting, and from any shareholder agreement.¹⁷

5.9 For this purpose, a person "deals with" a company if he is a party to any transaction or other act to which the company is a party.¹⁸ Such person will be presumed to have acted in good faith unless the contrary is proved,¹⁹ and shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.²⁰ Moreover, section 35B states that a party to a transaction

¹³ Eg, Companies Act 1948, Table A, para 79.

¹⁴ *Grant v United Kingdom Switchback Railways Co* (1889) 40 Ch D 135; *Bamford v Bamford* [1970] Ch 212. There is an exception in the case of a fraud on the minority: *Cook v Deeks* [1916] 1 AC 554. It seems that a special resolution will be required where there is a breach of a restriction in the memorandum or the articles (on general principles, and by analogy with Companies Act s 35(3)), but cf *Rolled Steel Products v British Steel Corporation* [1986] Ch 246, 296, per Slade LJ (reference to unanimous consent of all shareholders being required for ratification). An ordinary resolution purporting to authorise such acts in advance would, however, be invalid; *Grant v United Kingdom Switchback Railways Co*, above, and *Irvine v Union Bank of Australia* (1877) 2 App Cas 366.

¹⁵ This raises issues on the recovery of the relevant property which go beyond the scope of this Paper.

¹⁶ Companies Act 1985, ss 35A and 35B, inserted by Companies Act 1989, s 108(1) with effect from 4 February 1991. See para 5.6 n 9 above. As in the case of s 35, the intention is to preserve the internal position when the directors exceed their authority: see ss 35A(4) and (5).

¹⁷ *Ibid*, s 35A(3).

¹⁸ *Ibid*, s 35A(2)(a).

¹⁹ *Ibid*, s 35A(2)(c).

²⁰ *Ibid*, s 35A(2)(b). The precise meaning of the sub-section is uncertain. It would appear to be applicable to a situation where the person dealing did not realise that an act was unauthorised, although this was technically within their knowledge, for example because the relevant information was known to an employee, or a copy of the memorandum and articles were held at a branch office. It may be that mere notice of facts which mean that the directors are exceeding their authority, but without an appreciation that they are doing so,

with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so.²¹ It is not yet clear, however, how much protection these sections provide.²² There has been no reported decision on the meaning of "good faith" for the purpose of section 35A, but it seems likely that the courts will adopt a similar approach to that used for the section's forerunner (section 9 of the European Communities Act 1972).²³ Like sections 35B and 35A(2), section 9(1) contained a statement that a person was not bound to enquire as to any limitation on the powers of the directors, and that good faith is to be presumed unless the contrary is proved. In *TCB Ltd v Gray*, Browne-Wilkinson VC held that there was no necessity to check the articles to ascertain how a company should execute a deed: "in my judgment, it is impossible to establish lack of "good faith" within the meaning of [subsection 9(1)] solely by alleging that inquiries ought to have been made which the second part of the subsection says need not be made".²⁴

The doctrine of constructive notice

- 5.10 Under this doctrine, any person dealing with a company is deemed to have notice of its memorandum and articles of association, and of their contents. The justification for this is that these documents must be registered with the Registrar of Companies, and hence are open to public inspection.²⁵ The doctrine extends to other documents requiring registration, such as resolutions within section 380 of the Companies Act 1985. We have explained above that the doctrine is effectively abolished in relation to limitations under the

does not amount to bad faith. As to the meaning of "good faith" see below, n 23.

²¹ Section 35B is expressed to apply only to transactions, and not to a "transaction or other act", as in the definition of dealing.

²² See, eg, *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.1.1, which points out that s 35B excludes the common law duty to inquire further *only* in respect of restrictions in the company's constitution on the powers of the board of directors to bind the company or authorise others to do so. It has the same scope as the "good faith" principle in s 35A. It is uncertain how far the rules on when a constructive trust will arise are affected by ss 35A and 35B: see *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551, *per* Lawson J at p 560 (application of constructive trust principles unaffected in the circumstances of the case by s 9(1) of the 1972 Act).

²³ For the relevant cases on s 9 see *TCB Ltd v Gray* [1986] Ch 621, at p 634 (affirmed on appeal but without considering s 9: [1987] Ch 458); *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551, 559 (lack of good faith to be shown by actual knowledge or where person could not in all the circumstances have been unaware of breach of trust by director); and *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] BCLC 1, 17 ("a person acts in good faith if he acts genuinely and honestly in the circumstances of the case", *per* Nourse J at p 18 (obiter). The test is not an objective standard). See further para 5.24 n 66 below on the meaning of "good faith" in the context of Law of Property Act 1925, s 74(1).

²⁴ [1986] Ch 621, 635-636. The court was reluctant to restrict the effect of European Communities Act 1972, s 9 by the application of constructive notice principles, or a duty to make enquiry.

²⁵ *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869, 893, *per* Lord Hatherley.

company's constitutional documents by sections 35A and 35B.²⁶ It will be further modified if and when section 142 of the Companies Act 1989 (or some equivalent provision) is brought into force.²⁷ Section 142 would provide that a person is not deemed to have notice of any matter merely because it is disclosed in any document kept by the Registrar of Companies, and therefore available for inspection, or because it is made available by the company for inspection. But there is a proviso. This would not affect the question of whether a person is affected by notice of any matter by reason of a failure to make such enquiries as ought reasonably to be made.²⁸ The effect would appear to be that there remains a general duty to make reasonable enquiry, but that in relation to section 35 (ultra vires) and section 35A (power of directors to bind the company) such duty is removed by section 35B in respect of what is permitted by the company's memorandum and in respect of any limitation arising under the company's constitution on the powers of the board of directors to bind the company or authorise others to do so.²⁹

The internal management rule

- 5.11 A person dealing with a corporation may also be able to rely on the internal (or indoor) management rule. The essence of this rule, often referred to as the rule in *Turquand's* case,³⁰ is that persons dealing with a corporation are not obliged to enquire into the regularity of its internal proceedings. They have constructive notice of its publicly registered documents (subject to what has been said above about the doctrine of constructive notice), but where any act appears to have been done in accordance with the articles or other constitutional documents, they are entitled to assume that the internal procedures of the company have been regularly conducted. The same applies where there is a restriction in the articles, but the act is nonetheless capable of having been done in compliance with the articles. The rationale is that a third party will not generally be in a

²⁶ In *TCB Ltd v Gray* [1986] Ch 621, 635, it was held that the doctrine had been expressly abolished by those parts of European Communities Act, s 9 corresponding to Companies Act 1985, ss 35A(2)(c) and 35B. See also *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] BCLC 1, 18, *per* Nourse J at first instance (obiter).

²⁷ Companies Act 1985, s 711A(1), prospectively inserted by Companies Act 1989, s 142(1). As to the current position on s 142, see the Consultative Document *Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985* (November 1994) issued by the DTI. It seems likely that s 142 will have to await new legislation on the registration of charges. See also s 416, prospectively inserted by Companies Act 1989, s 103 as regards the register of charges.

²⁸ *Ibid*, s 711A(2). It seems that this proviso to s 711A(1) should be construed so as to apply only if there were unusual or suspicious circumstances, otherwise it would defeat the object of s 711A(1). The precise effect which the proviso would have has, however, provoked considerable debate.

²⁹ See *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.1.1 and *Palmer's Company Law* (25th ed 1992) Vol I para 3.304.

³⁰ *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886. The ambit of the rule is considered at length in a recent decision of the High Court of Australia: *Northside Developments Pty Ltd v Registrar-General and Others* (1990) 93 ALR 385. In Australia the rule has sometimes been categorised as being a unique principle of company law, based on the idea that the common seal is equivalent to the signature of an individual, rather than being an application of ordinary agency principles.

position to satisfy itself that the company has fully complied with its internal procedures, and cannot reasonably be expected to do so. Where it applies, the rule is conclusive that the relevant requirements have been satisfied.³¹ It is, however, a mixed plea of fact and law which must be pleaded.³²

5.12 The rule does not apply if the person dealing with the company was aware of the irregularity,³³ or if the circumstances were such as to put them on enquiry (for example by virtue of the unusual nature of the transaction³⁴), or if that person also purported to act as a director on behalf of the company in the transaction.³⁵ Moreover, the officers or agents of the company must be acting within their authority, actual or ostensible.³⁶ All this is sometimes expressed as a requirement that the rule only applies in favour of a person dealing with the company in good faith.³⁷ In addition, the rule does not apply in the case of forgery,³⁸ or (subject now to the effect of section 35 of the Companies Act 1985) an ultra vires transaction.³⁹

5.13 The rule in *Turquand's* case therefore protects a person dealing with a company in good faith against an internal irregularity, for example that a transaction has been purportedly authorised by a board meeting of the company which was held without the necessary quorum being present. Such a person would also be protected by section 35A of the Companies Act 1985 so long as such irregularity can be said to result from a "limitation under the company's constitution". The better view is that a matter such as a lack of quorum would be within section 35A, although not literally a limitation on the directors' powers, in which case the rule in *Turquand's* case in this type of situation has been largely superseded by statute.⁴⁰

5.14 As mentioned above, in *TCB Ltd v Gray*, it was held that section 9(1) of the European

³¹ Cf Companies Act 1985, s 382(4) which merely raises a presumption that duly minuted meetings of members or directors were properly convened and conducted.

³² *Rolled Steel Products v British Steel Corporation* [1986] Ch 246, 285, per Slade LJ.

³³ *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156.

³⁴ *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775.

³⁵ *Morris v Kanssen* [1946] AC 459, 475: cf *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 (director acting in his personal capacity contracting with the company through another director).

³⁶ *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, 844, 845. As to actual or ostensible authority, see below, paras 5.16 - 5.20.

³⁷ *Morris v Kanssen* [1946] AC 459, 475.

³⁸ See below, para 5.29.

³⁹ See above, para 5.4.

⁴⁰ *TCB v Gray* [1986] Ch 621, 635, per Browne-Wilkinson VC (a person may rely on European Communities Act 1972, s 9(1) to deal with company "without being adversely affected by ... its rules for internal management"); and see *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.1.1.

Communities Act 1972, which sections 35 and 35A have now replaced,⁴¹ applied to limitations in the articles of a company on the manner of execution of deeds. Browne-Wilkinson VC explained that "...a document under seal by the company executed otherwise than in accordance with its articles was not, under the old law, the act of the company: but section 9(1) deems it to be so, since the powers of the directors are deemed to be free from limitations, i.e., as to the manner of affixing the company's seal. In my judgement, section 9(1) of the Act applies to transactions which a company purports to enter into and deems them to be validly entered into."⁴²

- 5.15 However, the rule in *Turquand's* case is also sometimes referred to in a wider sense, as encompassing general agency principles as they operate in the context of corporate authority.⁴³ Sections 35A and 35B only apply to the powers of the board of directors.⁴⁴ An outsider rarely deals directly with the board,⁴⁵ and the board may argue that a particular contract purportedly entered into on behalf of the company has not, in fact, been authorised by it. If so, the other party will have to invoke those general agency principles, and in this sense the rule in *Turquand's* case remains relevant.

Directors' authority

- 5.16 When a third party deals with a director or other officer who has actual authority, then the company is obviously bound, subject to compliance with matters such as any necessary formality which is required for the relevant transaction. When such director or other officer has either not been appointed to the office he claims to hold, or purports to exercise wider powers than he has actually been granted, then the company will only be bound by a contract which he purports to make on its behalf if he acted within his ostensible (or apparent) authority. Such authority may arise in two ways.
- 5.17 First, a director may be appointed to an office (such as managing director) which carries with it an implied authority to make certain contracts and to perform certain acts on behalf of the company.⁴⁶ A third party dealing with such an officer is entitled to rely on this, so

⁴¹ See para 5.6 n 9 above, and Appendix A.

⁴² [1986] Ch 621, 636.

⁴³ "[T]he whole area of agency rules as applied to companies is sometimes referred to ... as the rule in *Turquand's* case": *Palmer's Company Law* (25th ed 1992), Vol 1 para 3.312.

⁴⁴ In *TCB Ltd v Gray* [1986] Ch 621, 637, it was held that all the directors of the company had agreed to the grant of the debenture in question, but that in any event, having put forward what purported to be board minutes approving the grant and execution of the debenture, the company was estopped from denying that this had been "decided by the directors", as required by s 9(1). However, s 9(1) was expressly restricted to transactions "decided on by the directors", and it may be that the absence of this phrase from s 35A gives it a wider application.

⁴⁵ Though the practice for certain types of transaction has been to insist on a certified copy of the relevant board minutes. The board may then be estopped from denying that the relevant meeting has been held, or from asserting that it did not consider the transaction at the meeting: see n 44 above.

⁴⁶ Such authority will often be the same as the director's actual authority where there has been a valid appointment. But the ostensible authority may be wider, for example where there is an express restriction on the authority actually granted to a director. In fact the usual authority

long as the relevant act is within such implied usual authority,⁴⁷ unless they have knowledge of a relevant restriction or lack of authority,⁴⁸ or unless the circumstances are sufficiently suspicious to put them on enquiry, and no such enquiry is made.⁴⁹

5.18 Secondly, the company may be bound on the basis of estoppel where a body with actual authority, such as the board, has held out a director or other officer (by words or conduct) as having authority to act in a particular matter, and has induced a third party to contract with the company in reliance on this, subject again to the question of notice of irregularity or suspicious circumstances. For example, the company may be estopped from denying the authority of a managing director, where the board or the company has knowingly permitted him or her to act as such, even when there has been no valid appointment.⁵⁰

5.19 It appears to be unnecessary to show that the third party has actually read the articles in order for them to rely on principles of ostensible authority. For example, where there is a power in the articles to delegate powers to a managing director, a third party may rely on the ostensible authority of a person who is acting as managing director of the company even if they have not read the articles.⁵¹ The mere fact, however, that there is such a power in the articles will not in itself amount to a “holding-out”, nor will a power to delegate to an officer assist if the relevant act is beyond the usual authority of a person holding such office. It is uncertain whether the holding out principle applies where a third party deals with a person acting as managing director where there is no such power of delegation in the articles.⁵² It will clearly not apply where there is an express restriction on such delegation, and the third party is aware of it.

5.20 Section 285 of the Companies Act 1985 provides that the acts of a director or manager

of an individual director is very limited, although it appears that it does extend to the execution of a document which has been authorised by the board: see *Gore-Browne on Companies, op cit*, paras 5.3.1-3 for a discussion of the usual authority attached to various offices. See also *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194 (usual authority of “senior manager” of office of trading bank).

⁴⁷ *Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480, 496, *per* Wilmer LJ.

⁴⁸ See above, para 5.10 on the question of constructive notice.

⁴⁹ See above, para 5.12.

⁵⁰ *Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480, 505; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549. In effect, in such cases the company is estopped from denying that a person who has been acting as de facto director has actually been appointed, and clothes them with the usual authority of a validly appointed managing director.

⁵¹ *Freeman & Lockyer v Buckhurst Park Properties*, above, at 496, *per* Wilmer LJ, who distinguished *Houghton & Co v Nothard, Lowe & Wills Ltd* [1927] 1 KB 246 CA (affirmed on appeal), *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, 836 and 843, and *Rama Corporation Ltd v Proved Tin & General Investments Ltd* [1952] 2 QB 147, on the ground that they were examples of unusual transactions, outside the usual authority of the relevant officer, meaning that the third party was put on enquiry.

⁵² *Freeman & Lockyer v Buckhurst Park Properties*, above, *per* Pearson LJ at p 500, *per* Wilmer LJ at p 492, but cf *Diplock LJ* at pp 505-6. See also *Northside Developments Pty Ltd v Registrar-General and Others* (1990) 93 ALR 385, 403 *per* Brennan J.

shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.⁵³ This offers only limited protection to a person dealing with a company, however, because its application appears to be restricted to a mere slip or procedural defect in the appointment, as opposed to a case where there has been no purported appointment at all.⁵⁴

Filing of particulars of directors and secretary

- 5.21 A company is required to keep a register of directors. It must notify the Registrar of Companies of the first directors on incorporation, and subsequently send particulars within fourteen days of any change in its directors or in its secretary.⁵⁵ Hence a person dealing with a company may obtain details of the directors and secretary from the company, or from the Registrar. In turn, the Registrar has an obligation to publish notice of receipt of such changes in the *Gazette*, and the company may not rely on any change in its directors against any other person unless the change had been properly notified, or unless such person knew of it.⁵⁶ It is possible that a company which had given such notification to the Registrar in the case of a director who had been invalidly appointed would be bound by his acts on the holding out principle.⁵⁷

⁵³ There will generally be similar provisions in the articles (eg Companies Act 1985, Table A, para 92 (SI 1985 No 805)).

⁵⁴ *Morris v Kanssen* [1946] AC 459, 471. It seems likely that any similar provision in the articles would be construed in the same way.

⁵⁵ Companies Act 1985, ss 288-290.

⁵⁶ *Ibid*, ss 711 and 42. There are special rules for the first 15 days after the date of official notification. Official notification of an event in the *Gazette* does not give constructive notice of the event to third parties: *Official Custodian for Charities v Parway Estates Developments Ltd* [1985] Ch 151, 163.

⁵⁷ See *Northside Developments Pty Ltd v Registrar-General and Others*, above, particularly at pp 425 and 434.

Presumptions of due execution⁵⁸

The common law presumption

- 5.22 The position at common law is that where a person seeking to rely on a deed can show that the seal of a corporation has been affixed by those with legal custody of the seal, the onus of proving that it has not been affixed with the necessary authority lies with the other party: in effect, a presumption of due execution.⁵⁹ A company seeking to set aside its own formal act on the ground of irregularity of proceedings could only do so on the clearest evidence.⁶⁰

Application of the internal management rule to deeds

- 5.23 It was also established that the internal management rule (and general agency principles) apply to the execution of deeds and other documents. Therefore if on the face of it an instrument is regular (in other words it appears to have been executed in accordance with the articles), a person dealing with a company in good faith is entitled to presume that the seal has been duly affixed and that the directors were duly appointed and their signatures were duly made. So long as the requirements of the articles have been complied with, then so far as formal validity is concerned, that person need not prove that there was actual authority to execute the document. Since the rule is conclusive, it is not open to the company to challenge the deed's formal validity on the basis of any internal irregularity. For example, a third party acting in good faith without knowledge to the contrary may assume that a quorum was present at the board meeting approving execution of a document,⁶¹ and that the directors have been properly appointed.⁶² We have also explained that sections 35A and 35B of the Companies Act 1985 may apparently save a deed which has not been executed in accordance with the articles, in favour of a person dealing with

⁵⁸ It will be seen that Law of Property Act 1925, s 74(1) and Companies Act 1985, s 36A(6) might more accurately be described as "deeming provisions", whereas Companies Act 1985, s 36A(5) is worded as a presumption.

⁵⁹ *Clarke v The Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315; 110 ER 473: Seal affixed by directors. Under the statute of incorporation, the directors were given custody of the seal and the power to use it for the affairs of the company. Authority of the members in general meeting required for the contract in question, but no evidence before the court to show that the forms prescribed by the statute had not been complied with. Contract held to be valid. See also: *Hill v Manchester and Salford Water Works Co* (1833) 5 B & Ad 866, 872-874; 110 ER 1011, 1014; and *Re Barned's Banking Co, ex parte The Contract Corporation* (1867) LR 3 Ch App 105 (no provisions in the constitutional documents governing sealing: directors of trading company held to have authority to affix seal: no need to enquire further into the practices of the company). These cases may reflect a wider principle that where a deed is regular on its face, the court will start from a presumption of due execution, and it is for the person disputing its validity to prove their case: eg, *Campbell v Campbell* [1996] NPC 27 (deed of gift by individual; plaintiff failed to prove that maker did not sign in the presence of the attesting witness).

⁶⁰ *Clarke v The Imperial Gas Light and Coke Co*, above.

⁶¹ *County of Gloucester Bank v Rudry Merthyr Steam and Home Coal Colliery Co* [1895] 1 Ch 629, 636.

⁶² *Re County Life Assurance Company* (1870) LR 5 Ch App 288. See also *Duck v Tower Galvanizing Co Ltd* [1910] 2 KB 314 (debenture which was regular on its face was valid although issued without authority, no directors having been appointed, and no meetings or resolutions having been held or passed).

a company in good faith, though this may be limited to cases where the execution of the relevant document has been approved by the board of directors.⁶³ Execution may also be by some statutory method such as that prescribed by section 36A(4) of the Companies Act 1985, notwithstanding that there is no express provision in the articles for execution in such a manner. There are also two statutory presumptions of due execution in favour of a purchaser, to which we now turn.

Statutory presumptions

5.24 A “purchaser” is given additional protection by section 74 of the Law of Property Act 1925. Section 74(1) provides that, in favour of a purchaser, a deed shall be deemed to have been duly executed by a corporation aggregate if its seal has been affixed to the deed in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation. Where a seal purporting to be the seal of the corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed shall be deemed to have been executed in accordance with the requirements of the section, and to have taken effect accordingly. This does not, however, prejudice any other mode of execution or attestation authorised by law, by practice, or by a corporation’s constitution.⁶⁴ The section applies to all corporations aggregate,⁶⁵ but only in favour of a purchaser, which for this purpose is a purchaser in good faith for valuable consideration.⁶⁶

5.25 In the case of companies to which section 36A of the Companies Act 1985 applies⁶⁷ there

⁶³ See above, para 5.15: *TCB Ltd v Gray* [1986] Ch 621, 636, 637. It seems likely that it would be sufficient if the board had merely approved the transaction, without also specifically authorising execution of the relevant deed, but this is uncertain.

⁶⁴ *Ibid*, s 74(6). This merely confirmed that any other mode of execution which was valid before 1925 remained available. See above, para 4.20.

⁶⁵ This excludes a corporation sole, which is distinguished from a corporation aggregate in s 74(3). The Land Registry treat s 74(1) as applicable to a foreign corporation when it executes under seal, attested by two officers falling within the wording of the section: see Practice Leaflet 17, para 20.1.

⁶⁶ Law of Property Act 1925, s 205(1)(xxi). The definition includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property. Where the context so requires, this includes an intending purchaser. As to the requirement for good faith see generally *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48, 55, *per* Lord Denning MR (where “good faith” is required by but not defined in any statute it is for the court to work out the meaning of the phrase from case to case, doing their best to interpret the “will” of the legislature). See also *Smith v Morrison* [1974] 1 WLR 659 (requirement is that purchaser must be acting honestly); *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 528 (good faith usually equated with lack of notice, but also requires honesty or bona fides); and for the phrase in the context of section 9(1) of the European Communities Act 1972 see the decisions cited in n 23 above. The question whether a purchaser can be in good faith despite having constructive (as opposed to actual) notice that the articles require execution in some way other than that prescribed in s 74 is discussed in *Emmet on Title* (19th ed 1986) para 20.003, and also below, n 75. For the definition of “property” see below, para 8.15, n 34, and Appendix A.

⁶⁷ See above, paras 4.5, 4.18. The presumption will apply in the case of a foreign company executing in accordance with s 36A(4) as modified by the Foreign Companies (Execution of Documents) Regulations 1994: see above, para 4.30. See para 5(c) of the Regulations which

is now an additional presumption of due execution, again in favour of a purchaser.⁶⁸ By section 36A(6), in favour of a purchaser, a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company. A somewhat surprising application of the presumption arose in a recent decision where it was held to operate in favour of a landlord seeking to enforce the covenants of the tenant and surety in a counterpart lease. The covenants were held to have created choses in action (a form of property for the purpose of section 36A(6)), and the landlord was a purchaser in good faith who had acquired an interest in those choses in action for valuable consideration.⁶⁹

5.26 The apparent intention of section 36A(6) is to extend the protection available for a purchaser under section 74(1) of the Law of Property Act to the situation where a company takes advantage of section 36A(4) of the Companies Act to execute without using a seal. We will explain in Part XI that there are, however, serious potential inconsistencies between section 36A(6) and section 74(1).⁷⁰ There are also problems in the construction of section 36A(6), of which we mention two at this stage. First, the section refers simply to a document signed by two directors or by a director and secretary. This clearly covers execution in accordance with section 36A(4). It has recently been held that the presumption also arises if the document is signed by two such officers, but merely for the purpose of authenticating the affixing of the seal, where execution is under section 36A(2).⁷¹ We have some doubts whether this construction is justified, but we return to consider this point in greater detail below.⁷² Secondly, it appears that the presumption applies to any document which purports to be signed by a director and secretary or by two directors, even if the document is not intended to be a deed. The document must, however, still be signed by way of execution by the company. Section 74(1) is expressly restricted to deeds.

Summary

modifies s 36A(6) accordingly.

⁶⁸ “Purchaser” is defined by s 36A as a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property. There is no reference to an intending purchaser. As to the extent to which this differs from the definition applicable to Law of Property Act 1925, s 74(1) see below, para 11.44.

⁶⁹ *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, 10 May 1996: transcript, para D(III) 18. It was held that the words “and includes a lessee [or] mortgagee” in s 36A(6) were by way of example only, and did not exclude a lessor or mortgagor from the ambit of the section. Counsel for the lessee and surety conceded that the presumption in Law of Property Act 1925, s 74(1) would also apply in favour of the lessor for the same reasons.

⁷⁰ See below, para 11.38.

⁷¹ *Johnsey Estates Ltd (1990) v Newport Marketworld Ltd and Others*, 10 May 1996: transcript, paras D(III) 1-18.

⁷² See below, para 11.31. A similar point arises in the case of foreign companies, as to whether the presumption in s 36A(6) only applies where execution is by the signature of a person or persons within section 36A(4) as amended by the Foreign Companies (Execution of Documents) Regulations 1994.

5.27 As regards execution, the position so far as the formal validity of a deed is concerned may be summarized as follows. There was a presumption at common law of due execution where the seal had been set by the officers with the power to use the seal, but this was rebuttable, and has largely been superseded by the internal management rule (and general agency principles). A person dealing with a corporation in good faith may rely on this rule where a deed appears on its face to have been executed in accordance with a corporation's articles or other constitutional documents. To do so, however, that person should check the articles to ascertain how the seal is to be affixed (or they will run the risk that the manner of execution is clearly not in accordance with the articles). It seems that affixing and witnessing the seal (and presumably executing without a seal under section 36A(4)) is deemed to be within the usual authority of the directors.⁷³ If a deed has not been executed in the manner specified in the articles, or in accordance with some statutory provision such as section 36A(4), then a person dealing with the company in good faith may still be able to rely on sections 35A and 35B, at least where execution of the document (or perhaps, less specifically, the transaction as a whole) has been approved by the board.⁷⁴ Indeed, given that sections 35A and 35B apparently apply to limitations in the articles as to the affixing of the common seal, they potentially have wide application in this respect. A purchaser in good faith has the additional protection of sections 74(1) and 36A(6), where a deed has been executed as provided in those sections, and need not be concerned with the company's articles. There is a clear overlap with the internal management rule, but the protection offered is wider, because, by deeming the deed to be duly executed, those sections override anything to the contrary in the articles.⁷⁵ Section 74 will not, however, assist if the transaction is ultra vires (in practice now limited to corporations to which section 35 does not apply).⁷⁶ We turn below to the position where the document is a forgery.

5.28 It will also be noted that the general rule, that in order for formal validity, an instrument made by a company must be executed in accordance with the articles, remains in place, but is subject to the protection given by the internal management rule and general agency principles,⁷⁷ re-inforced (where applicable) by sections 35A and 35B, new statutory

⁷³ *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.6. It should follow from this that the directors signing the deed can be assumed to have been validly appointed: see above, paras 5.16 and 5.23.

⁷⁴ See above, para 5.23.

⁷⁵ See the dictum of Nourse LJ in *Longman v Viscount Chelsea* (1989) 58 P & C R 189, at p 199: "The sole purpose of section 74(1) was to make it unnecessary for a purchaser to require proof of the corporation's formal compliance with the provisions of its memorandum and articles of association or its charter". It would seem to follow from this that a purchaser would still be in good faith even if, technically speaking, aware of an irregularity in the manner of execution by virtue of having constructive notice of the articles (see above, para 5.10 and n 66). The prospective abolition of the doctrine of constructive notice for all purposes should overcome any uncertainty on the point. As to the relationship of ss 36A(4) and 36A(6) with the articles, see above, para 4.10.

⁷⁶ See above, paras 5.4 and 5.6.

⁷⁷ The rule offers protection where there may have been compliance with the articles (eg, where they provide that the seal is only to be affixed by the authority of the board of directors, and no board meeting has been held), but not against a defect which is apparent on the face of the deed (eg, where the articles require the seal to be authenticated by two directors, and only one

methods of execution such as section 36A(4),⁷⁸ and the presumptions of due execution such as section 74(1) of the Law of Property Act 1925 and section 36A(6) of the Companies Act 1985.

Fraud or forgery

5.29 A document which purports to be executed as a deed but which is in fact a forgery is a nullity.⁷⁹ That will be the case where the signatures of the corporation's officers have been falsified. The internal management rule does not apply to such a deed. This was settled by the House of Lords in *Ruben v Great Fingall Consolidated*,⁸⁰ where Lord Loreburn observed that:

It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.⁸¹

5.30 It has been explained that the internal management rule is part of, or at least closely connected to the law of agency.⁸² But a forger does not act as agent for the alleged maker of the deed. Instead he impersonates him.⁸³ It follows that the forged deed cannot be ratified by the alleged maker,⁸⁴ but can only become binding if the alleged maker:-

- (a) adopts the deed by entering into a new agreement for valuable consideration with the other party on the terms of the forged deed;⁸⁵ or
- (b) represents by conduct that the deed is binding on the maker and the other party acts to its detriment in reliance on that representation;⁸⁶ or

director has done so).

⁷⁸ In the sense that it provides a valid method of execution which may not be expressly provided for in the articles: see above, para 4.10. How far the same is true of section 36A(2) when execution is under seal has also been considered in Part IV, and we return to this point below: see above, para 4.9, and below, para 15.5.

⁷⁹ *Brook v Hook* (1871) LR 6 Exch 89; *Re Cooper* (1882) 20 Ch D 611 CA; *Gibbs v Messer* [1891] AC 248 PC; *Ahmed v Kendrick* (1988) 56 P & CR 120 CA; *Penn v Bristol and West Building Society* [1995] 2 FLR 938. The rule applies to deeds generally, and not merely to those of corporations.

⁸⁰ [1906] AC 439 (common seal fraudulently affixed by secretary for his own purposes; secretary also forged signatures of two directors; secretary has no authority to guarantee the genuineness or validity of a document which is not the deed of the company).

⁸¹ *Ibid*, 443.

⁸² See above, para 5.15 and n 30.

⁸³ *Re Cooper* (1882) 20 Ch 611, 623, *per* Kay J.

⁸⁴ See *Imperial Bank of Canada v Begley* [1936] 2 All ER 367, 374.

⁸⁵ *Greenwood v Martins Bank Ltd* [1933] AC 51, 57, *per* Lord Tomlin.

⁸⁶ *Greenwood v Martins Bank Ltd* [1932] 1 KB 371, 378-379, CA; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489.

(c) is estopped by negligence⁸⁷ or inaction from denying the deed as the maker's own.⁸⁸

5.31 There are observations in certain cases⁸⁹ and one decision⁹⁰ suggesting that the unauthorised affixing of the common seal itself amounts to forgery, even if no element of counterfeit is involved, at least if the act is done in order to defraud the company. However, this is inconsistent with the general rule that a principal is liable for the fraudulent acts of his agent, when the agent acts within the scope of his ostensible authority,⁹¹ and the suggestion has been disapproved of for that reason.⁹² Where, for example, a director and secretary sign their own names on witnessing the seal, it is difficult to see on what basis there can be said to be a forgery.⁹³

5.32 The relationship between the rules for forged documents and those for the execution of deeds, and in particular the presumptions of due execution explained above, are not spelt out in the relevant legislation. We ask below whether the position needs to be clarified.⁹⁴ There is no authority on the meaning of the references in section 74(1) of the Law of Property Act 1925 and in section 36A(6) of the Companies Act 1985 to a deed or document which “purports” to have been signed by one of the persons mentioned in those sections, or to a seal which “purports” to be the corporation’s seal. The presumptions contained in those sections should protect a purchaser from any lack of authority to sign the document in question (that is where they are the genuine signatures of unauthorised officers). They might also be expected to apply, for example, where the document was attested or signed by persons who were no longer office holders, but notice of their resignation had not yet been filed with the Registrar of Companies. It seems unlikely that they would afford protection where the

⁸⁷ The negligence must directly relate to the loss which was suffered: *Mayor, Constables and Company of Merchants of the Staple of England v The Governor and Company of the Bank of England* (1887) 21 QBD 160, 174, *per* Bowen LJ.

⁸⁸ *Greenwood v Martins Bank Ltd* [1933] AC 51, 57; *Fung Kai Sun v Chan Fui Hing* [1951] AC 489.

⁸⁹ *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, 840; and *Slingsby v District Bank Ltd* [1931] 2 KB 588, 605; see also *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869, 899 *per* Lord Hatherley (affixing of seal by secretary without authority is akin to forgery).

⁹⁰ *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 (affixing of seal required resolution of directors under the articles. Third party put on enquiry where share certificate sealed and witnessed by director and secretary).

⁹¹ *Lloyd v Grace, Smith & Co* [1912] AC 716 (this is so whether the fraud is committed for the benefit of the agent or the alleged principal).

⁹² *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, 256, 257.

⁹³ The application of the internal management rule to forgeries, and the different ways in which the term “forgery” have been used by the courts are considered in *Northside Developments Pty Ltd v Registrar-General and Others* (1990) 93 ALR 385, particularly at 390, 407, 410, 417, and 427.

⁹⁴ See below, para 15.15.

signatures of the company's officers had been forged. Not only would such a result appear to be undesirable on general principles, but it would in effect reverse the decision in *Ruben v Great Fingall Consolidated*.⁹⁵

⁹⁵ [1906] AC 439.

PART VI

THE REQUIREMENT OF DELIVERY

Introduction

- 6.1 The final formality required in order for a deed to become effective is delivery. In this Part we explain what is required for delivery, and the problems which can arise when a deed has to be executed before the maker wishes it to take effect; for example when a conveyance has to be executed before a sale is completed. It will be seen that there are two ways to achieve this; either by delivering the deed so that it does not take effect until certain conditions are satisfied, or by authorising a third party (such as the maker's solicitor) to deliver it on behalf of the maker. Legally these two methods are quite distinct, but it may not always be obvious in practice which has been used. We also explain that there are a number of legal presumptions as to delivery, including three introduced for the first time in 1989.

What is required for delivery

- 6.2 Originally, delivery was the physical act of handing the deed over to the other party, or instructing him to take it up, but the matter is now essentially a question of the intention of the maker of the deed. A deed is delivered in law "as soon as there are acts or words sufficient to [show] that it is intended by the party to be executed as his deed presently binding on him", and even though that party retains possession of the document.¹ It does not matter whether this intention is actually communicated to the other party, so long as it is shown by some sufficient act or words.
- 6.3 It was also formerly an established rule that the appointment of an agent to *deliver* a deed on the maker's behalf must itself be made by deed,² although, as we explain below, in a comparatively recent decision, the Court of Appeal chose to ignore the rule,³ and it has in any event now been abolished by statute.⁴ The rule was important not only where a document was handed to another for delivery, but also where there was an alteration of a deed after execution, or the deed was purportedly delivered but failed to take effect because it contained material uncompleted blanks, and the issue was whether the person making the alteration or completing the blanks was authorised to deliver or re-deliver the deed on behalf of the maker.⁵

¹ *Xenos v Wickham* (1866) LR 2 HL 296, 312, *per* Blackburn J.

² *Re Seymour* [1913] 1 Ch 475, 481, *per* Joyce J (affirmed on appeal); *Powell v London & Provincial Bank* [1893] 2 Ch 555, 563, *per* Bowen LJ; *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 88, 98, *per* Cross J. See further below, paras 6.19 n 45 and 8.3.

³ *Longman v Viscount Chelsea* (1989) 58 P & CR 189. See below, para 6.16.

⁴ See below, para 6.19.

⁵ We do not propose to deal with the alteration of deeds in this Paper: for an account see *Emmet on Title* (19th ed 1986) para 20.010, and on the question of the completion of blanks see further below, para 6.19 n 45. There is authority that an invalidly executed deed may become effective if acknowledged by the purported maker, either on the basis of estoppel or re-delivery, and that the same may apply where a material alteration is made after execution:

Does affixing the seal “import” delivery in the case of a corporation?

- 6.4 Conflicting views were long held as to whether the affixing of the corporate seal itself implied delivery by a corporation. The view that no separate act of delivery is required probably explains the fact that the form of attestation clause traditionally used for a company makes no reference to delivery, in contrast to that used for individuals.⁶ The weight of authority, however, was that a separate act of delivery was necessary,⁷ although the sealing of a deed raised a rebuttable presumption of delivery.⁸ There was also authority that there was no need for a separate act of delivery where a purchaser could rely on section 74(1) of the Law of Property Act 1925 (discussed in Part V above),⁹ since “execution” within the meaning of the section must be taken to include delivery.¹⁰ This has, however, been rejected in a recent observation by the Court of Appeal,¹¹ which has now been adopted and followed at first instance,¹² so that delivery appears to remain a distinct requirement in all cases. It will be seen that section 36A of the Companies Act certainly proceeds on that basis.

Deeds and escrows

- 6.5 When a deed is delivered unconditionally it will have immediate effect. Alternatively an instrument may be delivered so that it does not take effect as a deed unless and until certain conditions are fulfilled.¹³ Strictly speaking, such an instrument is known

eg, *Re Seymour* [1913] 1 Ch 475, 485-487, per Cozens-Hardy MR.

⁶ Eg, “the common seal of [x co ltd] was hereunto affixed in the presence of...” as opposed to “signed sealed and delivered by AB”. Alternatively, this formula may have been adopted in reliance on the rebuttable presumption of delivery mentioned in this paragraph.

⁷ See, eg, *Norton on Deeds* (2nd ed 1928) p 11; *Willis v Jermaine* (1589) 2 Leo 9; 74 ER 388. For the contrary view see, eg, *Gartside v Silkstone and Dadworth Coal and Iron Co* (1882) 21 Ch 762, 768, per Fry J: “A deed executed by a company requires no delivery to make it effectual...”; and S Kyd, *A Treatise on the Law of Corporations* (1793) Vol I p 268 (“When the common seal is affixed to a deed, that is sufficient in general without delivery.”).

⁸ *Mayor, Constables and Company of the Merchants of the Staple v The Governor and Company of the Bank of England* (1887) 21 QBD 160, 165-166 (per Wills J at first instance: “Prima facie, putting the seal imports delivery”). See also *Palmer’s Company Law* (25th ed 1992) Vol I para 3.104. Where a deed used the standard form of attestation clause for an individual (“signed sealed and delivered”) there was a conclusive presumption of delivery, either unconditionally or in escrow: *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 511, 520, per Lord Denning MR. In *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42, Harman J took the view that even this formula would yield to contrary intention (at p 45).

⁹ See above, para 5.24.

¹⁰ *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549, 562; *D’Silva v Lister House Development Ltd* [1971] 1 Ch 17, 29.

¹¹ *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 199, per Nourse LJ (his remarks are, however, made obiter). If this is correct, however, it is not clear what meaning is to be given to the words at the end of section 74(1) that a deed executed as prescribed by the section “shall be deemed ... to have taken effect accordingly”.

¹² *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, 10 May 1996, transcript, para D(II) 9. See above, para 1.17.

¹³ *Xenos v Wickham* (1866) LR 2 HL 296, 323, per Lord Cranworth. This should be distinguished from the situation where a document is delivered as a deed, but certain of its terms only become operative on satisfaction of express conditions set out in the deed.

as an escrow (rather than a deed) until those conditions are fulfilled, but the process is commonly referred to as the execution or delivery of a deed in escrow.

- 6.6 The conditions may be express or implied.¹⁴ Whether an instrument has been executed as a deed or as an escrow is again a matter of intention:

You are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.¹⁵

- 6.7 Because the instrument has been delivered, albeit as an escrow, it is irrevocable, and cannot be withdrawn or recalled by the maker.¹⁶ Once the relevant condition or conditions have been satisfied, the instrument becomes effective without any further delivery, and, for the purposes of title, relates back to the date of execution in escrow.¹⁷

The dating of a deed

- 6.8 The general rule is that a deed takes effect from the date upon which execution is completed by delivery.¹⁸ That delivery determines the date which the deed should bear. Execution is complete on the delivery of the deed by the last party whose execution is essential to its validity.¹⁹

¹⁴ That is, they may be spelt out in the deed, or implied from the circumstances of the transaction (see below, para 6.13).

¹⁵ *Bowker v Burdekin* (1843) 11 M & W 128, 146; 152 ER 744, 751, *per* Parke B.

¹⁶ *Beesly v Hallwood Estates Ltd* [1961] Ch 105; *Kingston v Ambrian Investment Co Ltd* [1975] 1 WLR 161, 166. For that reason it seems that the relevant conditions cannot be matters which lie wholly in the control of the person making the deed: *Governors and Guardians of the Foundling Hospital v Crane* [1911] 2 KB 367, 379.

¹⁷ The “relation-back” does not, however, affect any dealing by the person in whose favour the escrow is made with a third party. A conveyance executed in escrow would not, until the condition was satisfied, entitle the purchaser to collect rents from tenants, serve a notice to quit on them, or mortgage the property (although such a mortgage might later be “fed” when title was acquired): *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 511, 521, *per* Lord Denning MR. As to the time for performance of the condition see *ibid*, at p 520; *Beesly v Hallwood Estates Ltd* [1961] Ch 105, 118; *Kingston v Ambrian Investment Co Ltd* [1975] 1 WLR 161, 166; and *Glessing v Green* [1975] 1 WLR 863, 868, 869. In the latter case it was held that the vendor/maker of a deed may serve notice making time of the essence for performance of the relevant condition, even where there was no pre-existing contract. The earlier decisions refer instead to a reasonable time for performance.

¹⁸ *Universal Permanent Building Society v Cooke* [1952] 1 Ch 95, 101. In the case of registered land, the deed will be effective for certain purposes from dating even though the legal estate only passes when registration is completed: (see above, para 2.7 n 12). See also *Abbey National Building Society v Cann* [1991] 1 AC 56; but cf *Lever Finance Ltd v Needleman's Trustee* [1956] Ch 375.

¹⁹ *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455; *Lady Naas v Westminster Bank Ltd* [1940] AC 366; cf *Sinclair v IRC* (1942) 24 TC 432.

- 6.9 The fact that a date has not been inserted does not generally affect the validity of a deed, and external evidence is admissible to show the correct date.²⁰ It seems, however, that a transfer of registered land must be dated.²¹ There is a presumption that the date appearing in a deed is the date it took effect, but this is readily rebutted by evidence to the contrary.²²
- 6.10 In a typical conveyancing transaction, where a deed has been executed in escrow ahead of completion, it will usually be dated on the day when the relevant conditions are fulfilled, which will generally be on formal completion of the transaction. This had been accepted as effective for stamp duty purposes,²³ but was otherwise open to doubt, given the authority that a deed takes effect from delivery.²⁴ So far as stamp duty is concerned, the position is now governed by statute. A “deed” is now treated for stamp duty purposes as executed when it is delivered, or if delivered subject to conditions, when the conditions are fulfilled.²⁵ Subject to that, an instrument which is “not under seal” is treated as executed when signed.²⁶ The increased use of delivery by the maker’s solicitor or other agent on completion - which is discussed in detail below - should reduce any potential difficulty on this point, since the conveyancing documents may then clearly be dated when they are delivered, upon actual completion of the transaction. Equally, we are told that there are other transactions where the practice is to date the deed with the date of delivery in escrow, for example where it is executed in this way shortly before the end of the maker’s accounting year, and the conditions are not fulfilled until after that year has expired.

²⁰ *Morrell v Studd & Millington* [1913] 2 Ch 648, 658. See also *Esberger & Son Ltd v Capital and Counties Bank* [1913] 2 Ch 366 (undated charge effective from date of delivery, but void for non-registration).

²¹ See the forms of transfer prescribed by the Land Registration Rules 1925, r 98, Forms 19, 20.

²² *Browne v Burton* (1847) 17 LJQB 49; 5 Dow & L 289, *per* Patteson J: “a deed or other writing must be taken to speak from the time of execution, and not from the date apparent on the face of it. That date is indeed to be taken prima facie as the true time of execution but as soon as the contrary appears, the apparent date is to be utterly disregarded.”

²³ *Wm Cory & Son Ltd v IRC* [1964] 1 WLR 1332, 1346 (and see *Terrapin International Ltd v IRC* [1976] 1 WLR 665).

²⁴ The decision in *Terrapin International* was not followed by the Court of Appeal in *Alan Estates Ltd v W G Stores* [1982] Ch 511 CA, which preferred the date of delivery in escrow. In *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, 10 May 1996, the decision in *Alan Estates* was treated as establishing that the date of a counterpart lease should be the date it was executed and delivered in escrow (transcript, para D(V) 2). One consequence is that the lease and counterpart might bear different dates, and it is this sort of difficulty which, no doubt, led the Court of Appeal to “anticipate” delivery by the maker’s solicitor on completion, ahead of the 1989 reforms, in *Longman v Viscount Chelsea* (1989) 58 P & CR 189: see below, para 6.16.

²⁵ Stamp Act 1891, s 122(1A) (as amended by Finance Act 1994, s 239(1)).

²⁶ *Ibid*, s 122(1).

6.11 Certain charges created by a company must be registered within twenty-one days after the date of creation of the charge.²⁷ Among the amendments prospectively made to the provisions of the Companies Act 1985 dealing with the registration of charges is a new section 414 (as substituted by section 103 of the Companies Act 1989). This would provide that a charge created by an instrument in writing shall be taken to be created when the instrument is executed by the company or, if execution is conditional, upon the conditions being fulfilled. Given that the word “executed”, when used in the Companies Act 1989, generally excludes delivery,²⁸ this appears to leave open the possibility that the twenty-one day period will run from the date of signing and sealing, which might be some time before a charge is dated and handed to the chargee on completion. As mentioned above, however, it appears that there is likely to be new primary legislation on the registration of charges.²⁹ Moreover, difficulties in this respect may already arise under the present law.³⁰

Conveyancing practice

6.12 In practice, in the great majority of conveyancing and other transactions, any necessary deeds will be executed prior to completion. That is both convenient, and in many cases the only practicable course. Frequently a deed will be sent by a solicitor to a corporate client for execution and return to the solicitor pending completion. In some cases there will be a previous binding contract committing the parties to an agreed completion date.³¹ In others, the parties will move straight from negotiation to completion without any intermediate contract stage.³²

6.13 Until 1989 there was an unbroken line of cases concerning standard conveyancing transactions to the effect that, where a person executed a deed and then handed it over to their solicitor pending completion, the document was regarded as having been executed as an escrow conditional upon formal completion taking place. It was readily assumed that, for example, a vendor executing a conveyance did not intend to be bound until the balance of the completion price was paid and the purchaser had also

²⁷ Companies Act 1985, s 395. The prescribed particulars must be delivered to the Registrar of Companies within 21 days, failing which the charge is void against a liquidator, administrator, or other creditor of the company as regards any security conferred over the company’s property and undertaking. See however the new ss 395-420, prospectively inserted by Companies Act 1989, ss 92-104.

²⁸ See below, para 11.21.

²⁹ See above, para 5.10 n 27.

³⁰ See *Esberger & Son Ltd v Capital and Counties Bank* [1913] 2 Ch 366, and *Fisher and Lightwood’s Law of Mortgage* (10th ed 1988) p 188, note (r).

³¹ This would be the typical position on the sale and purchase of land, although in a commercial transaction exchange of contracts and completion is sometimes simultaneous.

³² This will usually be the case on the grant of a new lease, or of a licence to assign, underlet, or to carry out alterations.

executed the conveyance (or a duplicate) where appropriate,³³ and that a landlord executing a lease did not intend the lease to take effect before receipt of the counterpart lease executed by the tenant.³⁴

- 6.14 The difficulty for a person executing a document in this way was that, since it had been executed in escrow, it could not, technically speaking, be withdrawn or recalled. This could be avoided if it were possible for the deed to be sealed but not delivered, and returned with authority for the solicitor to deliver it on their behalf. However, as we have seen,³⁵ such authority had to be given by deed, and this was seldom if ever done.

Two conflicting decisions

- 6.15 These issues were highlighted by two conflicting decisions reported in 1989. In *Venetian Glass Gallery Ltd v Next Properties Ltd*³⁶ the tenant requested the landlord's consent to assign, which was given subject to completion of a formal licence to assign. A licence deed was executed by the landlord and returned to its solicitor, described as "duly sealed in escrow" but to be held "undated and uncompleted", where it remained on the file, whilst the landlord completed the sale of its own interest in the property. Harman J held that the licence had been delivered as an escrow, conditional on the receipt of a counterpart licence and payment of a rent deposit. When this condition was satisfied the licence became effective, and could not be withdrawn. He could find no evidence from the correspondence to rebut the presumption that a deed which appeared on the face of it to have been executed had not also been delivered, either as an escrow or with immediate effect.³⁷

- 6.16 In *Longman v Viscount Chelsea*,³⁸ decided three months later, the Court of Appeal reached a different decision on similar facts. Terms were agreed, subject to contract, for the surrender of an existing lease and the grant of a new lease at a premium for a longer term. The transaction was delayed, but the parties eventually executed the new lease and counterpart, which in the landlord's case was returned to its solicitors. Completion was further delayed. At this point, some three years after terms had been agreed - being a period during which the market had risen sharply - the landlord withdrew, and refused to proceed unless the agreed premium was substantially

³³ Eg, *Glessing v Green* [1975] 1 WLR 863, 867; *Kingston v Ambrian Investment Co Ltd* [1975] 1 WLR 161, 168.

³⁴ *Beesly v Hallwood Estates Ltd* [1961] 1 Ch 104, 120. It will usually be inferred that execution in these circumstances is subject to anything else understood to be required on completion, such as a rent deposit deed (and rent deposit) if one has been agreed, and the first instalment of rent if payable in advance.

³⁵ See above, para 6.3.

³⁶ [1989] 2 EGLR 42.

³⁷ As to such presumption see above, para 6.4 n 8.

³⁸ (1989) 58 P & CR 189. See also the Australian decision *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Brothers* [1977] 2 NSWLR 109, to similar effect.

increased. The court held that the landlord had not delivered the new lease, and so could withdraw.

6.17 In the *Longman* decision, the court gave particular weight to current conveyancing practice, and to the fact that the negotiations had remained “subject to contract”. Nourse LJ held that there was an alternative to delivery with immediate effect or as an escrow. A deed could be handed to the maker’s agent to deal with in a certain way in a certain event, being revocable and of no effect unless and until so dealt with, at which point it would be delivered and take effect.³⁹ That was standard conveyancing practice, and what had happened on the facts of the case. Such a deed was not executed as an escrow, but in effect went from nothing to a complete delivery.⁴⁰ Delivery was a matter of intention. Where it was perfectly clear - in this case because terms were agreed subject to contract - that the parties did not intend to be bound until their solicitors effected completion, there was no delivery until completion. Nourse LJ recognized that this approach ran counter to the established rule that authority for an agent to deliver a deed must itself be given by deed, but merely stated that this “arcane rule” must give way to conveyancing practice.⁴¹ This and other aspects of the decision have been strongly criticized.⁴² Nonetheless, the decision is undoubtedly a closer reflection of conveyancing practice than the *Venetian Glass* case, and has also been welcomed on that ground.⁴³

³⁹ (1989) 58 P & C R 189, particularly at p 195. The authority given by Nourse LJ for the proposition is *Governors and Guardians of the Foundling Hospital v Crane* [1911] 2 KB 367, and *Windsor Refrigerator v Branch Nominees* [1961] 1 Ch 88, 101, 102.

⁴⁰ This was the view expressed at first instance by Blakett-Ord J, and approved by Nourse LJ.

⁴¹ “If there be a conflict here between arcane but hallowed principles of the law relating to deeds and the settled and expedient practices of conveyancing, it is obvious that we must look to uphold the latter. The eyesight of the court is not so weak as to be blinded by the half light of the study.”: Nourse LJ at p 246.

⁴² Graham Virgo and Charles Harpum, “Breaking the seal: the new law on deeds” (1991) 11 LMCLQ 209, 221-222, where it is submitted that the decision was per incuriam. Nourse LJ distinguished or dismissed a number of the authorities on escrows in somewhat short order, but no reference was made to the earlier decisions which laid down the presumption of delivery (see above, para 6.4), and the decision disregards the traditional distinctions between deeds and simple contracts. In particular it seems unsatisfactory that a fully executed deed which was unconditional on its face was held to be unenforceable by virtue of “subject to contract” correspondence some three years earlier.

⁴³ D N Clarke, “Delivery of a Deed: Recent Cases, New Statutes and Altered Practice”, [1990] Conv 85, which accepts that the approach of the court in the *Venetian Glass* case is a classic application of traditional rules of property law, but prefers the decision in *Longman* on practical grounds.

A recent decision

- 6.18 Since these two decisions the position has been altered by the Law of Property (Miscellaneous Provisions) Act 1989, and, in the case of corporations to which it applies, the Companies Act 1985 (as amended by the Companies Act 1989), which we turn to below. This is reflected in the most recent decision on the question of delivery, in *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*.⁴⁴ The facts are unusually complex, and the decision eventually turned upon a claim for rectification of an agreement for lease, implied terms in that agreement, estoppel, and professional negligence. The issue arose, however, whether a counterpart lease executed and returned by the tenant and its parent company guarantor to their solicitor, but never formally exchanged and completed, could be enforced by the landlord. It was held that the counterpart lease had been executed in escrow, and so could not be recalled, but was nonetheless invalid by reason of the blanks in it, which could not in the circumstances of the case be completed by reference to the agreement for lease. The decision is the first to consider how the *Longman* case has been affected by the new section 36A of the Companies Act 1985 - and in consequence to consider the whole of that section in detail - and we look at further aspects of the decision below, and elsewhere in this Paper. It also demonstrates, however, that the type of questions raised in *Venetian Glass* and *Longman* remain relevant despite - and in some respects precisely as a result of - the changes made in 1989.

Statutory modification of the law of delivery

Law of Property (Miscellaneous Provisions) Act 1989

- 6.19 The Law of Property (Miscellaneous Provisions) Act 1989 made two changes to the law on delivery, applicable to all deeds, whether made by a corporation or an individual. First, by section 1(1)(c), the requirement that authority to deliver a deed on behalf of another must itself be given by deed is abolished. Authority must still be given, but it need not be by deed.⁴⁵ Secondly, by section 1(5), where in the course of

⁴⁴ Judge Moseley QC, Chancery Division (Cardiff), 10 May 1996. See further above, para 1.17.

⁴⁵ The extent to which the old rule (that authority to execute a deed on behalf of another must itself be given by deed) has been abolished by s 1(1)(c) is discussed further in Part VIII below (see para 8.3 n 4). We should, however, say something more here about the completion of blanks in a deed. The old rule is generally taken to be as stated by Bowen LJ in *Powell v London & Provincial Bank* [1893] 2 Ch 555, at 563, that “an agent cannot execute a deed, or do any part of the execution which makes it a deed, unless he is appointed under seal” (emphasis added). In *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others* (above, paras 1.17 and 6.18, transcript, addendum, para 10), it was held that before 1989, a third party (such as a solicitor) could only complete blanks in a deed which had already been executed if they were authorised to do so by deed, but that this requirement had been abolished by s 1(1)(c). It appears to us that the correct analysis of the *present* position depends upon whether it is a case of delivery by the solicitor or other agent on behalf of the maker of the deed on completion, or of delivery by the maker of the deed in escrow. In the former case, where blanks are filled in on or before completion, the normal inference will be that this is done prior to delivery by the agent. The deed will be valid, on the basis that the maker would have been bound by any deed which he had personally delivered or re-delivered after an alteration had been made, and will be equally bound by delivery by his agent: see *Powell v London & Provincial Bank*, above, at p 563, *per* Bowen LJ. Section 1(1)(c) may be held to extend to matters such as the completion of blanks, but this is unnecessary: it is the authority

or in connection with a transaction involving the disposal or creation of an interest in land a solicitor, licensed conveyancer or duly certificated notary public, or any agent or employee for them, purports to deliver an instrument as a deed on behalf of a party to the instrument, it is conclusively presumed in favour of a purchaser that such person is duly authorised to deliver the instrument.⁴⁶

- 6.20 Taken alone, these provisions would allow the conveyancing procedure described in the *Longman* case to continue. A deed could be signed or sealed and returned to the maker's solicitors with authority for them to deliver it on completion. The deed could be recalled by the maker before completion, because it had not yet been delivered. The purchaser would not need to establish delivery, because this would be conclusively presumed.

Companies Act 1985

- 6.21 However, in the case of companies to which section 36A of the Companies Act 1985 applies,⁴⁷ the position is complicated by two provisions inserted by section 130 of the Companies Act 1989.
- 6.22 First, by section 36A(5), there is a presumption that a document executed by a company, which makes it clear on its face that it is intended by the person or persons making it to be a deed, is delivered upon execution. This clearly applies whether execution is under the common seal or in accordance with section 36A(4).⁴⁸ The presumption is rebuttable, arising "unless a contrary intention is proved". It may therefore be displaced by appropriate wording in the deed,⁴⁹ and arguably does no

to deliver, rather than to complete blanks which is crucial. Where execution is in escrow, and one of the conditions is that the blanks will be completed, it appears that it has never been necessary for authority to complete the blanks to have been given by deed: see again *Powell v London & Provincial Bank*, above, at p 563, *per* Bowen LJ, and *Hudson v Revett* (1829) 5 Bing 368; 130 ER 1103. We think that it will be readily inferred in the case of execution in escrow that completion of the blanks is one of the conditions of the escrow. In either case therefore, blanks may be completed without the need for authority to do so to be given by deed. The agent would, of course, wish to be sure that they had the maker's authority to complete any blanks, though we think it likely that a person returning an executed deed to his or her solicitor impliedly authorises them to do so, at least so far as any third party is concerned. See further below, para 11.71.

⁴⁶ Section 1(5) as amended by the Courts and Legal Services Act 1990, s 125(2), Sched 17. "Disposition" and "purchaser" have the same meaning as in the Law of Property Act 1925, and "interest in land" means any estate, interest or charge in or over land or in or over the proceeds of sale of land: s 1(6).

⁴⁷ See above, paras 4.5, 4.18, and 4.29.

⁴⁸ This is confirmed in *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, 10 May 1996, transcript, para D(III) 8. See above, paras 1.17 and 6.18.

⁴⁹ Eg, the attestation clause might say "This deed is delivered on the date written at the start of this deed". In an appropriate transaction, the presumption in s 1(5) would then apply when the deed was handed over by the solicitors on completion. One disadvantage is that some attempts to rebut the presumption by such wording might leave persons such as the Land Registry in doubt whether the deed has been delivered at all.

more than to spell out the common law presumption of delivery on execution mentioned above.⁵⁰ If so, it might have been expected to yield to the contrary intention implied by the fact that terms had been agreed or negotiations conducted “subject to contract”.⁵¹ In *Johnsey Estates*, however,⁵² it was held that the presumption in section 36A(5) overrides the principle laid down by Nourse LJ in the *Longman* case that where the parties are negotiating subject to contract they will not be bound unless and until there has been a formal exchange.⁵³

6.23 Secondly, as already seen,⁵⁴ by section 36A(6), in favour of a purchaser,⁵⁵ a document is deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company. The second part of section 36A(6) adds that where it makes it clear on the face of the document that it is intended by the person or persons making it to be a deed, it is deemed to have been delivered upon its being executed. By implication, this is irrebuttable, since it is worded as a deeming provision, and there is no reference to a contrary intention being proved, in clear contrast to the presumption in section 36A(5).⁵⁶ The section was treated in the *Johnsey Estates* case as “undoubtedly” creating an irrebuttable presumption.⁵⁷ As we have mentioned, the drafting of section 36A(6) suggests that it only applies when a company takes advantage of section 36A(4) to execute without using a common seal, although the court held otherwise in the *Johnsey Estates* case, and the point must remain uncertain.⁵⁸

6.24 We will explain in Part XI that there are a number of difficulties with these presumptions in section 36A.⁵⁹ They are hard to reconcile with the concept of delayed delivery, and section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989, described above. Quite apart from detailed differences in the wording, there is an

⁵⁰ Para 6.4.

⁵¹ Assuming that the decision in *Longman v Viscount Chelsea* (1989) 58 P & CR 189 is correct: see above, paras 6.16 - 6.17. It would be safer to spell out the necessary contrary intention in the attestation clause, and it seems to be assumed that this is necessary in the forms suggested in *Encyclopaedia of Forms and Precedents* (5th ed 1994 re-issue) Vol 12, forms 118 and 119.

⁵² Above, paras D(IV) 1-9.

⁵³ See above, para 6.17.

⁵⁴ See above, para 5.25.

⁵⁵ See above, para 5.25 n 68, and below, para 11.44.

⁵⁶ Given the difficulties which result from this (see below, paras 11.36 - 11.37), it has been suggested that a court would lean against holding this deeming provision to be an irrebuttable presumption (see, eg, the correspondence in (1989) 135 SJ Pt 3, pp 96-97). Nonetheless, it is hard to see how the presumption can be rebutted on the wording of s 36A(6) without seriously undermining the section, and opening up the possibility that the presumption of due execution in the section could also be rebutted.

⁵⁷ Above, para D(III) 2.

⁵⁸ Para 5.26.

⁵⁹ See further below, paras 11.29 - 11.45, 11.53 - 11.56, 11.61 - 11.68.

obvious inconsistency between section 36A(6) and section 74(1) of the Law of Property Act 1925. Section 36A(6) provides a purchaser with a presumption of delivery, but there is no such presumption in section 74(1). We will explain in Part XI how this discrepancy has come about.

- 6.25 There is another possible uncertainty in the construction of the presumptions, which we mention at this stage. The first part of section 36A(5) states that a document executed by a company which makes it clear on its face that it is intended to be a deed “*has effect, upon delivery, as a deed*” (our emphasis). It is not entirely clear how this relates to the concept of delivery “in escrow”. It seems, however, that the presumptions of delivery in the second part of section 36A(5) and also in section 36A(6) should be construed as permitting delivery in escrow: in other words that the presumed or deemed delivery may be delivery in escrow.⁶⁰

⁶⁰ In *Beesly v Hallwood Estates Ltd* [1960] 1 WLR, Buckley J held (at p 562) that Law of Property Act 1925, s 74(1) required him to treat the lease as having been “not only sealed but also delivered”. Nonetheless, this was held to be consistent with the delivery being in escrow. By analogy, it seems likely that the express presumptions of delivery in ss 36A(5) and (6) may be in escrow. This is confirmed by the *Johnsey Estates* case, where the deemed delivery was held to be in escrow, and now seems to be beyond doubt.

PART VII CONTRACTS

Introduction

- 7.1 Much of what was said in Part V about corporate capacity and authority is relevant to contracts made by corporations,¹ and the subject clearly raises many issues which go beyond the scope of this Paper. Our object in this Part is merely to explain briefly the statutory provisions as to the form required for such a contract.²

The form of corporate contracts

- 7.2 At common law the general rule was that a corporation aggregate had to contract under its seal.³ There were, however, numerous exceptions to this, particularly in the case of trading corporations, and the rule has now effectively been abolished by statute.

Companies Act 1985

- 7.3 The Companies Acts have long made specific provision for company contracts. Before 1989, there was a single provision which broadly equated contracts made by companies with those made by individuals.⁴ One of the changes made in 1989 was to separate out the rules for the execution of documents - whether contracts or some other form of instrument - by a company (which are dealt with in section 36A of the Companies Act 1985⁵) from those which govern the form which a company contract may take. The latter are now set out in section 36 of the 1985 Act, which provides two ways for a company to make a contract, namely:-
- (a) *by a company, by writing under its common seal; or*
 - (b) *on behalf of a company, by any person acting under its authority, express or implied (our emphasis).*⁶

¹ See above, paras 5.4 - 5.21.

² We do not, however, include additional formalities required by statute for particular types of contract, eg, by the Consumer Credit Act 1974.

³ *Wright & Son Ltd v Romford Borough Council* [1957] 1 QB 431, the case which prompted the Corporate Bodies' Contracts Act 1960. See further below, para 11.7 n 6.

⁴ Eg, Companies Act 1948, s 32: contracts which, if made between individuals (a) had to be in writing under seal, or (b) had to be in writing and signed, or (c) could be made by parol, could be made by companies (a) in writing under the common seal, or (b) in writing signed on the company's behalf by any person acting under its authority, express or implied, or (c) by parol by any person acting under its authority, express or implied, respectively.

⁵ See above, para 4.5.

⁶ Clearly, the contract may be made orally or in writing. A contract in writing signed on behalf of the company by an authorized signatory is "signed personally" by the company where any statute requires such a signature: *Re British Games* [1938] Ch 240. The decision turned on the provisions for contracts contained in Companies Act 1929, s 1 (in similar form to those mentioned in n 4 above), but the same result should follow from the differently worded Companies Act 1985, s 36.

The section goes on to state that any formalities required by law in the case of a contract made by an individual⁷ are also necessary where the contract is made by a company, unless a contrary intention appears.

7.4 The normal form - where a deed is not required - is for the company to be the named party to the contract, which is then signed on its behalf.⁸ Such a document will be a contract in simple form (unless of course it is made by an attorney, and executed as a deed). What is less clear, however, is the status of a contract made by a company under seal, and hence the exact relationship between sections 36 and 36A in this respect. We examine this in greater detail in Part XI.⁹

7.5 A bill of exchange or promissory note is deemed to have been made, accepted or endorsed on behalf of a company if made, accepted or endorsed in the name of, or by or on behalf or on account of, the company by a person acting under its authority.¹⁰

The Foreign Companies (Execution of Documents) Regulations 1994

7.6 In the case of foreign companies, the Foreign Companies (Execution of Documents) Regulations 1994 modify section 36 so that a contract may be made either:-

- (a) by a company itself, by writing under its common seal or in any other manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company; or
- (b) on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority, express or implied, of that company.¹¹

⁷ Eg, the requirement for writing incorporating all the expressly agreed terms in the case of a contract for the sale of land: Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁸ No personal liability should attach to the signatory where they clearly sign for or on behalf of the company: *Gadd v Houghton* (1876) 1 Ex D 357. A full discussion of this question is, however, beyond the scope of this Paper, and there is a considerable volume of case-law. See *Palmer's Company Law* (25th ed 1992) Vol 1, paras 3.112-3.115; and *Bowstead and Reynolds on Agency* (16th ed 1996) pp 576-581 (liability of an agent to be determined by the intention of the parties, as appearing from the terms of the written agreement as a whole). The question of authority to contract on behalf of a corporation is one of general agency principles, which we have already explained: see above, paras 5.16 - 5.20.

⁹ See below, paras 11.4 - 11.10.

¹⁰ Companies Act 1985, s 37, and see also *ibid*, s 349(1). Where, under the Bills of Exchange Act 1882, any instrument or writing must be signed, it is sufficient in the case of a corporation if it is sealed under the corporate seal, but this does not require any bill or note of a corporation to be under seal: s 91(2). It appears that the section was enacted to overcome any doubt whether an instrument under the seal of a corporation could be a negotiable instrument: see *Byles on Bills of Exchange* (26th ed 1988) p 46.

¹¹ SI 1994 No 950 (as amended), para 4. See further above, paras 4.29 - 4.34.

Corporate Bodies Contracts Act 1960

7.7 For other types of corporation, section 1 of the Corporate Bodies' Contracts Act 1960, provides that contracts may be made on behalf of any body corporate (other than a company¹²), wherever incorporated, as follows:-

- (a) any contract which if made between private persons would by law be required to be in writing signed by the parties may be made on behalf of the body corporate in writing signed by any person with authority, express or implied;¹³ and
- (b) any contract which if made between private persons would be valid although not reduced to writing may be made "by parol" on behalf of the body corporate by any person acting under its authority, express or implied.¹⁴

7.8 Any written contract may also, however, continue to be made by or on behalf of the corporation under seal.¹⁵ Set against section 36 of the Companies Act 1985, the wording of section 1 now seems a little outdated,¹⁶ but the effect was clearly to abolish the old rule requiring all corporate contracts to be under seal, and (among other things) to allow any contract for which a deed is not required to be made in writing on behalf of the corporation. Since the 1960 Act applies to corporations "wherever incorporated", there is an obvious overlap with the Foreign Companies (Execution of Documents) Regulations, in that both are applicable to contracts made by foreign companies. There is, however, no obvious inconsistency, despite the very different format of the two sets of provisions.

¹² Companies formed and registered under the Companies Acts are expressly excluded by Corporate Bodies' Contracts Act 1960, s 2. Whether a corporation sole is a corporate body, and so within the 1960 Act is uncertain: see above, para 4.26 n 57. In its Eighth Report "Sealing of Contracts made by Bodies Corporate" (1958) Cmnd 622, at para 22 the Law Reform Committee stated that its recommendations "are not intended to apply to corporations sole; special considerations apply to them and we do not consider that these corporations fall within our terms of reference". For the position of a contract made at a time when there is a vacancy in the office-holder of a corporation sole see Law of Property Act 1925, s 180(3).

¹³ *Ibid*, s 1(1)(a).

¹⁴ *Ibid*, s 1(1)(b).

¹⁵ *Ibid*, s 1(4).

¹⁶ Section 1 is largely drawn from Companies Act 1948, s 32 (see above, n 4).

PART VIII

EXECUTION OF DEEDS ON BEHALF OF CORPORATIONS

Introduction

- 8.1 We have considered how a corporation itself executes a deed or other document, and more briefly how it may also make contracts acting through its officers and agents. In this Part we look at the position where a corporation executes deeds by means of an attorney. In such a case, a person dealing with the corporation must establish (among other things) not only that the attorney has been validly appointed by the corporation, but also that the attorney validly executes the deed in question. We also consider the execution of deeds by liquidators, administrators, administrative receivers, and other types of receiver.
- 8.2 We will explain that execution by an attorney is an area where current practice is often well established, but appears in some cases to have outstripped the existing statutory rules, leaving considerable technical uncertainties. Eminent practitioners and commentators have also criticised the apparent lack of provision made for execution by an attorney by the 1989 reforms.

Powers of attorney

Introduction

- 8.3 A power of attorney is a document by which one person (the donor) gives another person (the attorney) the power to act on his behalf and in his name. It may be a general power or limited to certain defined purposes. There is no statutory definition, and the distinction between a power of attorney and other forms of agency appointment is not always easy to draw.¹ It had been established, however, at common law that an authority to execute a deed on behalf of another person must generally be given by deed,² and it is clear (from the definition given at the start of this paragraph) that such an authority is a power of attorney, and hence subject to statutory rules currently set out in the Powers of Attorney Act 1971. Section 1(1) of that Act follows the common law rule in this respect by providing that an instrument creating a power of attorney must be executed as a deed.³ It should be noted that section 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989 only abolished the rule that authority *to deliver* a deed on behalf of another must itself be given by deed. It did not

¹ See *Brooke's Notary* (11th ed 1992) pp 125-130.

² *Steiglitz v Egginton* (1815) Holt 141; 171 ER 193; *Powell v London & Provincial Bank* [1893] 2 Ch 555, 563. There was an exception to the requirement where the attorney executed a deed in the presence of and at the direction of the donor: *Ball v Dunsterville* (1791) 4 TR 313; 100 ER 1038.

³ But the donor may in certain circumstances be estopped from denying the validity of a power of attorney which was not properly executed as a deed. For an example see *TCB Ltd v Gray* [1986] Ch 621. Section 1(3) states that s 1 "does not affect the rules relating to the execution of instruments by bodies corporate".

abolish the requirement that authority *to execute* a deed on behalf of another must be given by deed, despite views to the contrary.⁴

Power to appoint an attorney

8.4 Subject to what is said below, a corporation may generally appoint an agent by means of a power of attorney to execute documents on its behalf.⁵ As might be expected, it was established that an agent could not carry out any act on behalf of the corporation which would be ultra vires if done by the corporation itself,⁶ and this would apply to any document executed by attorney. The doctrine of ultra vires has been abolished as regards an outsider dealing with a company, but the point remains relevant for other corporations.⁷

8.5 The ability of a corporation to grant a power of attorney to execute deeds on its behalf is generally said to depend on whether it has power to do so under its constitution.⁸ In the case of companies formed and registered under the Companies Acts, there will generally be an express power in the articles of association to make such an appointment.⁹ Failing that, a power of attorney granted by a company where there is

⁴ It was assumed that s 1(1)(c) was intended to have such effect by Mummery J in *Phoenix Properties Ltd v Wimpole St Nominees Ltd* [1992] BCLC 737, 740, 741 (presumably on the basis that the rule requiring authority to deliver to be given by deed was merely a facet of the rule requiring authority to execute a deed for another to be given by deed, and applied to any part of the execution process); and see Lightman and Moss, *The Law of Receivers of Companies* (2nd ed 1994), p 224. But the wording of s 1(1)(c) is quite clear. The purpose was to allow delivery by a solicitor on behalf of a vendor on completion, and there is no reason for extending the section to cover the actual execution of a deed, as opposed to delivery. However, the precise scope of s 1(1)(c) remains to be determined. In the recent case of *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others* (see above, para 1.17, transcript, addendum, para 10), it was held that s 1(1)(c) now permits an agent to complete material blanks in a deed without requiring authority by deed to do so. This is discussed above, at para 6.19 n 45. For the position of foreign companies, see below, para 8.20.

⁵ A company cannot grant an enduring power of attorney under the Enduring Powers of Attorney Act 1985, which is only applicable to individuals.

⁶ *Montreal Assurance Co v M'Gillivray* (1859) 13 Moo PC 87; 15 ER 33; *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653; *LCC v Att-Gen* [1902] AC 165.

⁷ See above, paras 5.4 - 5.6.

⁸ It is sometimes said that an express power to appoint an attorney is required. The contrary view is that, because a corporation cannot act by its own person (*Ferguson v Wilson* (1866) LR 2 Ch App 77, 89), it has by implication a general power to appoint and act by agents, including an attorney. In the case of a company formed under the Companies Acts the position appears to be that the power to bind the company must be conferred by the articles, either directly, or by delegation under a power contained in them. The articles will usually give the directors power to appoint an attorney (see below, n 9). Failing that, the company may still appoint an attorney, but it seems that the sanction of the company in general meeting is required (see *Buckley on the Companies Acts* (14th ed 1981), pp 98-99).

⁹ Eg, Companies Act 1985, Table A, SI 1985 No 805, para 71, and Companies Act 1948, Table A, Part I, para 81. If there is no express power then it has been argued that an appointment may also be made under the general delegation of the company's business to the directors under an article such as Companies Act 1985, Table A, para 70. However an express power is preferable, since there is otherwise an argument that the principle preventing further delegation by an agent without express authority (*delegatus non potest delegare*) means that such an appointment would require the approval of the company in general

no express authority to do so under the articles may be saved, so far as a person dealing with the company is concerned, by sections 35A and 35B of the Companies Act 1985, discussed above.¹⁰ In any event, even where a power has been validly granted, it will still be necessary for a third party dealing with an attorney to check both that the power remains in existence and that the terms of the power of attorney authorise the attorney to execute the relevant deed in any transaction.¹¹

- 8.6 A corporate trustee is subject to the same restrictions on the delegation of its powers and duties as trustee as apply in the case of an individual trustee.¹²
- 8.7 A corporation may act as an attorney where it has power under its memorandum of association or other constitutional document.¹³ Only a trust corporation may be appointed under an enduring power of attorney.¹⁴
- 8.8 There is a statutory power for the board of directors, council or other governing body of a corporation aggregate to appoint an agent to execute on behalf of the corporation any agreement or other instrument which is not a deed, and which falls within the corporation's powers.¹⁵ This has, however, largely been superseded by more recent statutory provisions which have been considered above.¹⁶
- 8.9 By section 38 of the Companies Act 1985, a company may appoint an attorney under its common seal, either generally or in respect of specific matters, for the purpose of executing deeds on its behalf outside the United Kingdom. Such a deed takes effect as though executed under the company's common seal. The fact that the section (and

meeting: *Palmer's Company Law* (25th ed 1992) Vol I para 3.108. See further *TCB Ltd v Gray* [1986] Ch 621, 634-635, and *Industrial Development Authority v William T Moran* [1978] IR 159.

¹⁰ Paras 5.7 - 5.10.

¹¹ What acts the power authorises the attorney to do is a matter of construction (see further *Halsbury's Laws of England* (4th ed re-issue 1990) Vol 1(2), paras 46-48, and 52). The position of a third party dealing with an attorney is governed by general agency principles, subject now to Companies Act 1985, ss 35, 35A, 35B and 36, so far as applicable. As to the duration of a power of attorney, see further below, paras 8.24 and 8.38.

¹² See further *The Law of Trusts: Delegation by Individual Trustees* (1994) Law Com No 220. In the case of trusts of land, see also now *Trusts of Land and Appointment of Trustees Act* 1996, s 9.

¹³ The appointment may also authorise the corporation to nominate one of its officers to carry out its functions. See T M Aldridge, *Powers of Attorney* (8th ed 1991) p 39.

¹⁴ *Enduring Powers of Attorney Act* 1985, s 2(7).

¹⁵ *Law of Property Act* 1925, s 74(2). In *Wright v Romford Borough Council* [1957] 1 QB 431, 437, *per* Goddard CJ, it was held that s 74(2) did not override the then common law rule requiring contracts by a corporation to be under seal, but was only applicable to contracts falling within the various exceptions to the rule: see above, para 7.2. The words "which is not a deed" were substituted for "not under seal" in s 74(2) by *Law of Property (Miscellaneous Provisions) Act* 1989, s 1(8), Sched 1, para 3.

¹⁶ *Companies Act* 1985, s 36(b) and *Corporate Bodies' Contracts Act* 1960, s 1.

its statutory predecessors) were enacted has occasionally caused doubt as to the ability of a company to grant a power of attorney to execute deeds inside the UK. If there is a general ability to grant a power of attorney then why is section 38 necessary? We see no reason, however, to think that section 38 has any such effect, and the better view is that the purpose of section 38 is merely to put beyond doubt the ability of a company to grant a power to execute deeds outside the UK where there is no express power in the articles.¹⁷ This was also the view taken by the Irish Supreme Court on similarly worded legislation.¹⁸

Method of execution by an attorney

- 8.10 The methods of execution of a deed by an attorney appointed by a corporation which appear to be acceptable in practice are summarised in the following paragraphs. These raise a number of difficult technical questions, which we comment upon as we go through them, and which are summarised in Part XI.¹⁹ In Part XVIII we invite views on how far these questions constitute a real problem in practice, and require further attention.

WHERE THE ATTORNEY IS AN INDIVIDUAL

(i) SECTION 7 OF THE POWERS OF ATTORNEY ACT 1971

- 8.11 Such an attorney executes either by signing the name of the corporation followed by their own name as attorney, or by signing their own name stated to be as attorney on behalf of the donor. In either case, since execution is by an individual, the safer course is to have the signature witnessed and the deed delivered in order to comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.²⁰
- 8.12 At common law an individual attorney had to execute in the name and on behalf of the donor: in other words he or she should sign the donor's name and use the donor's seal.²¹ Failing that, the execution was ineffective. Execution in this way also avoided

¹⁷ See *Brooke's Notary* (11th ed 1992) p 133. The contrary view would render Law of Property Act 1925, s 74(3) redundant in the case of companies (see below, para 8.15). Since a corporation must act through its agents, there seems to be no reason in principle why it should not grant a power of attorney to execute deeds on its behalf in the UK, and particularly where there is an express power to appoint an attorney in the articles. The practice of granting such powers is commonplace and of longstanding.

¹⁸ *Industrial Development Authority v William T Moran* [1978] IR 159.

¹⁹ See below, paras 11.75 - 11.82.

²⁰ This is discussed further below, at para 8.22.

²¹ *Combe's Case* (1613) 9 Co Rep 75a; *Frontin v Small* (1726) 2 Ld Raym 1418; 92 ER 423; *White v Cuyler* (1795) 6 T R 176; 101 ER 497; *Lawrie v Lees* (1880) 14 Ch D 249, and see *Norton on Deeds* (2nd ed 1928) p 25. The application of this rule to execution on behalf of a corporate donor is not entirely certain. Whether an attorney may affix the company seal would appear to depend on the articles. In practice, execution by signing the corporation's name, but without affixing any seal, appears to be widely accepted: see, eg, Land Registry Practice Leaflet No 17, para 29.1 (we understand that Practice Leaflet No 17 is shortly to be updated and replaced). See also *Industrial Development Authority v William T Moran* [1978] IR 159, where the Irish Supreme Court justified execution by a receiver holding a power of

the risk of the attorney being held personally liable on the deed.²² On the other hand, the exact form of words might not matter, if it was clear that the attorney was signing for the donor.²³

8.13 Execution by the attorney in his or her own name has, however, long been permitted by statute. Section 7(1) of the Powers of Attorney Act 1971²⁴ now provides that an attorney who is an individual may execute any instrument with his own signature by the authority of the donor, and that any such instrument will be as effective as if executed by the attorney with the signature of the donor of the power.²⁵ Such an attorney may also do any other thing in their own name.²⁶ It is generally accepted that section 7(1) is available where an individual attorney executes a deed on behalf of a corporate donor,²⁷ although the wording of the section is perhaps not particularly apposite, since execution under it is said to be as effective as if done with the signature of the donor, and a corporation does not execute by its signature.²⁸

attorney in this way on the straightforward basis that the corporate donor had given the attorney its authority, by deed (ie, by the power of attorney) to execute on its behalf by signing its name.

²² The general rule remains that where an agent is a party to a deed and executes it in his own name, he or she is personally liable and entitled on it, even when described in the deed as acting for and on behalf of a named principal: *Appleton v Binks* (1804) 5 East 148; 102 ER 1025. See further *Halsbury's Laws of England* (4th ed re-issue 1990) Vol 1(2) para 171, and *Bowstead and Reynolds on Agency* (16th ed 1996) pp 426-428 and 586-587. To escape liability on a deed, it must be clear that the deed is executed *as* the principal's deed. Notwithstanding this it now seems to be generally accepted that an attorney will not incur personal liability so long as it is clear on the face of the deed that the attorney is not acting on his own behalf (*Brooke's Notary* (11th ed 1992) p 144).

²³ Eg, "A by B his attorney" or "B for A": *Wilks v Back* (1802) 2 East 142, 144; 102 ER 323, 324. The point is usually now regarded as largely unimportant: see, eg, *Williams on Title* (4th ed 1975) p 431. It should also be remembered that at common law an individual could use any seal so long as he acknowledged it to be his seal, and that in practice, with the use of wafer seals, the question of whether the seal used was that of the donor or the attorney would be largely irrelevant.

²⁴ As substituted by the Law of Property (Miscellaneous Provisions) Act 1989, Sched 1, para 7(1).

²⁵ It is generally considered: (1) that despite s 7 the donor must still be named in the deed, otherwise this would effectively abolish the rule that an undisclosed principal cannot intervene on a deed (*Harmer v Armstrong* [1934] Ch 65); (2) that it is good practice in any event for the attorney to express that he executes as attorney or on behalf of the principal (see *Re Whiteley Partners Ltd* (1886) 32 Ch 337, 340); and (3) that despite the words "by the authority of the donor" there is no need for the attorney to have specific authority from the donor to act in his own name (this appears to have been assumed in the comments of Francis Ferris QC, sitting as a deputy High Court judge, in *Clauss v Pir* [1988] Ch 267, 272, but the point was not addressed directly): see further *Bowstead and Reynolds on Agency* (16th ed 1996) p 428.

²⁶ *Ibid*, s 7(1)(b). Clearly this is limited to any other thing falling within the terms of the power: see *Clauss v Pir* [1988] Ch 267, 272 (ie, s 7 is procedural, it does not widen the scope of the power of attorney).

²⁷ Eg, Land Registry Practice Leaflet No 17, para 29.1 (see above, n 21), *Brooke's Notary* (11th ed 1992) p 144, and T M Aldridge, *Powers of Attorney* (8th ed 1991) p 63.

²⁸ The application of s 7(1) where the donor is a corporation is confirmed by s 7(2), by which it is expressly made an alternative to s 74(3) of the Law of Property Act 1925, which is only relevant where the donor is a corporation. The scheme of Law of Property Act 1925, ss 74

8.14 Section 7(1) is expressly made “without prejudice to any statutory direction requiring an instrument to be executed in the name of the estate owner within the meaning of [the Law of Property Act 1925]”.²⁹ It has been suggested that there *may* be such a statutory direction in section 7(4) of the Law of Property Act 1925, and that as a result, it is safer for an attorney executing a conveyance to sign in the name of the donor, and not with their own name.³⁰ But this would severely restrict section 7(1) of the 1971 Act, and we do not see that it can be correct.³¹ Execution of a conveyance in accordance with section 7(1) is certainly widely accepted in practice.³²

and 123 (the precursor to section 7 of the 1971 Act) suggest that s 74(3) may originally have been intended to be the only statutory method of execution by an individual attorney for a corporate donor: see eg, *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed 1932) Vol I pp 345 and 442, and the heading of s 74: “Execution by or on behalf of corporations”. The purpose of s 7(2) of the 1971 Act was, however, to make it clear that execution by such an attorney could be in one of three ways, in accordance with s 7(1), s 74(3), or (it seems) in accordance with the old common law rule, in the name of the donor: see our previous papers Powers of Attorney (1967) Working Paper No 11, para 52, and (1970) Law Com No 30, para 37.

²⁹ Powers of Attorney Act 1971, s 7(3).

³⁰ Eg, *Emmet on Title* (19th ed 1986) Vol I, para 11.017. The reference to “any statutory direction” is generally taken to apply in particular - though not exclusively - to Law of Property Act 1925, s 7(4). That section provides that: “Where any such power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name and on behalf of the estate owner.” The words “such power” refer back to s 7(3) of the 1925 Act, which states that “any ... statutes conferring special facilities or prescribing special modes ... for disposing of or acquiring land ...” shall remain in force. Section 7(4) of the 1925 Act has been described as giving “a statutory power of attorney to convey in the name of the estate owner, for it is simpler to trace a title from A to B and then from B to C, than from A to B and then from X, a person in whom it is not vested, to C. For instance in a conveyance by a receiver for debenture holders, or by a liquidator, or person authorised by the court to convey”: *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed 1932) Vol I, p 248 (the passage cited was retained but shortened in the 13th ed). Execution by an attorney in accordance with s 7(1) of the 1971 Act would satisfy this purpose, so long as the donor is named as the vendor in the deed. It may also be that s 7(4) of the 1925 Act is not, in fact, a “statutory direction requiring an instrument to be executed in the name of the estate owner”, since it refers to the exercise of any power to dispose of land, rather than to the execution of the deed. The position is more fully discussed in *Prideaux's Forms and Precedents in Conveyancing* (25th ed 1959), pp 857-858.

³¹ It would produce a curious result, given that s 7(1) of the 1971 Act is, by s 7(2), expressly made an alternative to Law of Property Act 1925, s 74(3) (see above, n 27). Since s 74(3) only applies where an attorney executes a conveyance on behalf of a corporation, the implication is that execution in accordance with s 7(1) of the 1971 Act must also be effective to convey property in the name of a corporation.

³² Eg, Land Registry Practice Leaflet 17, para 29.1 (see above, n 21).

(ii) SECTION 74(3) OF THE LAW OF PROPERTY ACT 1925

- 8.15 In the case of a conveyance of property owned by a corporation, an attorney may also execute it as a deed by signing the name of the corporation in the presence of a witness in reliance on section 74(3) of the Law of Property Act 1925.³³ The section provides that where there is authority under a power of attorney, or by any statutory or other power to convey any interest in property³⁴ in the name or on behalf of another, then a person so authorised to convey on behalf of a corporation (whether aggregate or sole) may execute the conveyance as attorney by signing the name of the corporation in the presence of at least one witness. Such execution is as effective and valid as if the conveyance had been executed by the corporation. Both section 74(3) and section 74(4) (which we explain below) are permissive, so that any other mode of execution recognised by law remains effective.³⁵

WHERE THE ATTORNEY IS A CORPORATION

(i) GENERALLY

- 8.16 Where the attorney is itself a corporation, the general practice is that it executes a deed in the manner appropriate to the attorney corporation.³⁶ A company therefore executes on the donor's behalf either under its own common seal or by the signature of two of its directors or of a director and the secretary, in accordance with section 36A of the Companies Act 1985. If the attorney is a foreign company then it may execute in the same way, in accordance with section 36A as adapted by the Foreign Companies (Execution of Documents) Regulations.³⁷ Where the corporation is one to which section 36A does not apply, execution will be in the normal form for the corporation.³⁸
- 8.17 Following amendment by the Law of Property (Miscellaneous Provisions) Act 1989, section 7(1) of the Powers of Attorney Act 1971 is expressly limited to individual attorneys. Prior to this, it was arguable that it applied equally to a corporate attorney, although the wording was always somewhat inappropriate for execution by a

³³ As amended by the Law of Property (Miscellaneous Provisions) Act 1989, Sched 2. Before amendment, it was also necessary for the attorney to affix his own seal.

³⁴ "Property" includes any thing in action, and any interest in real or personal property, whilst "conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest in it by any instrument except a will: Law of Property Act 1925, s 205(1), paras (xx) and (ii) respectively.

³⁵ *Ibid*, s 74(6).

³⁶ Eg, Land Registry Practice Leaflet No 17, para 29.1(see above, n 21).

³⁷ SI 1994 No 950 (see above, para 4.29).

³⁸ See above, paras 4.20 - 4.24.

corporation, referring as it did to execution by the attorney “with his own signature”.³⁹

(ii) SECTION 74(4) OF THE LAW OF PROPERTY ACT 1925

- 8.18 There is, again, a statutory alternative in the case of a conveyance of property, which is given by section 74(4) of the Law of Property Act 1925. The section provides that where a corporation aggregate has authority under a power of attorney, or by any statutory or other power to convey any interest in property in the name or on behalf of another, the deed or other instrument may be executed in the name of the owner by an officer appointed for that purpose by the board of directors, council, or other governing body of the attorney corporation. This applies whether the owner of the property is an individual or another corporation. In favour of a purchaser the instrument is deemed to have been executed by an officer duly authorised by the corporation.⁴⁰

OTHER FORMS OF AUTHORISATION

- 8.19 If a company has an official seal for execution outside the UK, it may authorise a person by writing under its common seal, to affix the official seal and certify on the deed the date and place of sealing.⁴¹
- 8.20 We have also explained that a deed may be executed by a foreign company by the signature of any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of the company, so long as the deed is expressed to be executed by the company.⁴² It seems likely that this extends to execution by an attorney (that is, by a person deriving their authority by way of a power of attorney granted by the company, rather than by virtue of being an officer of the company). If so, the common law rule in *Steiglitz v Egginton*,⁴³ that authority to execute a deed on behalf of another must be given by deed,

³⁹ Section 7(2) formerly stated that s 7(1) was an alternative to execution under Law of Property Act 1925, s 74(4), which only applies to a conveyance by a corporate attorney. This may, however, have been intended to cover the situation where a power of attorney in favour of a company authorised execution by any officer of the attorney: see above, para 8.7 n 13.

⁴⁰ Where execution was in this form, the traditional view seems to have been that the seal to be affixed by the relevant officer was that of the donor, even if the donor was another corporation. See *Prideaux's Forms and Precedents in Conveyancing* (25th ed 1959), pp 856–857, and 886. The purpose of the section appears to have been to allow a corporate attorney to execute a deed “in the name of” an individual donor, since the Law of Property Act 1925 introduced a requirement for an individual to sign a deed, and a corporation could not sign the name of an individual, or of another corporation, but could only execute under seal: *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed 1932) Vol I p 346.

⁴¹ Under the Companies Act 1985, s 39: see above, para 4.15. The appointment may, of course, also be by the signature of two officers under s 36A(4).

⁴² The Foreign Companies (Execution of Documents) Regulations 1994, SI 1994 No 950: see above para 4.29.

⁴³ (1815) Holt 141; 171 ER 193: see above, para 8.3.

is no longer applicable to foreign companies within the Regulations. We return to this in Part XI.⁴⁴

THE EFFECT OF SECTION 1 OF THE LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989 ON EXECUTION BY AN ATTORNEY

- 8.21 Before leaving the subject of powers of attorney, there are two rather more general points to be addressed. First, we have explained that one of the requirements of a deed under section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 is that it must be validly executed as a deed *by the person making it or the parties to it*, as the case may be. Section 1(3) requires a deed executed by an individual, among other things, to be signed by him or at his direction and in his presence. Section 36A of the Companies Act 1985 refers to execution *by the company*. There is no reference in either 1(2)(b), 1(3) or 36A to a deed being executed on behalf of such person or parties, and it has been suggested that, on the face of it, execution on behalf of the donor by an attorney is precluded, although it is quite clear that this was not intended.⁴⁵ There is no difficulty where section 74(3) of the Law of Property Act 1925 applies, since it provides that execution by the attorney is as effective as if the principal had itself executed. This does not, however, work with section 74(4), which merely allows execution by an officer in the name of the donor, nor with section 7(1) of the Powers of Attorney Act 1971, by which execution by the attorney with his own name is merely as effective as if done by the attorney signing the donor's signature. A deed executed by an attorney must therefore be taken to comply with section 1(2)(b), either because execution by an attorney is simply treated as being execution by the maker or relevant party to the deed for this purpose, or because the section is to be construed as allowing execution "by or on behalf of" the maker or relevant party.⁴⁶ An alternative construction of section 1(2)(b) would be to treat the attorney as the maker or a party to the deed for this purpose, but this is less satisfactory on general principles.

ARE THE FORMALITIES THOSE APPLICABLE TO THE DONOR OR THE ATTORNEY?

- 8.22 Secondly, where, for example, there is execution by an individual attorney for a corporate donor, there is a question whether the relevant formalities are those for

⁴⁴ See below, para 11.50.

⁴⁵ *Brooke's Notary* (11th ed 1992) p 185. The fact that the Law of Property (Miscellaneous Provisions) Act 1989 was not intended to prevent the execution of deeds by an attorney is amply demonstrated by the fact that it amended Powers of Attorney Act 1971, ss 7(1) and (2), and Law of Property Act 1925, s 74(3).

⁴⁶ There is authority against the implication of words allowing signature by an agent where statute requires a personal signature: *Re Prince Blücher* [1931] 2 Ch 70, and *Hyde v Johnson* (1836) 2 Bing NC 776; 132 ER 299, but this is a matter of construction of the statute in each case, and we do not consider that these decisions would prevent the court implying words such as "or on behalf of" in the context of s 1(2)(b) - always assuming that this was considered necessary - given the longstanding practice of execution by attorney. See also *LCC v Agricultural Food Products Ltd* [1955] 2 QB 218; *Re Whiteley Partners Ltd* (1886) 32 Ch 337; and *Re British Games* [1938] Ch 240.

execution by an individual or by a corporation.⁴⁷ Although it seems wrong in principle to treat the attorney as if a party to the deed, it appears necessary to do so for the purpose of establishing the relevant formalities to be observed.⁴⁸ The safer view is probably that in this situation the relevant formalities are governed by the nature of the attorney. An individual attorney should therefore comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989, by executing in the presence of a witness who attests, whilst a company acting as attorney will execute in accordance with section 36A of the Companies Act 1985.⁴⁹

DELIVERY

- 8.23 An attorney with authority to execute a deed has authority to deliver it on behalf of the donor.⁵⁰ It is uncertain whether the various presumptions as to execution and delivery contained in sections 36A(5) and (6) of the Companies Act 1985 and in section 74(1) of the Law of Property Act 1925 apply where execution is by an attorney.⁵¹

OTHER STATUTORY PROVISIONS

- 8.24 A number of other statutory provisions are relevant to a person dealing with a corporation executing under a power of attorney, but an examination of these would go beyond the scope of this Paper.⁵²

The insolvent company⁵³

⁴⁷ See further *Brooke's Notary* (11th ed 1992) p 186.

⁴⁸ If there is a corporate donor but an individual attorney, then unless the formalities are those applicable to the attorney, there is no means of execution prescribed by law which is available unless the transaction is one to which Law of Property Act 1925, s 74(3) applies. Nevertheless, if *Wolstenholme & Cherry's Conveyancing Statutes* is correct as to the purpose of Law of Property Act 1925, s 74(4) (see above, n 40), then it is clear that the relevant formality was originally treated for this purpose as that applicable to the donor, not the attorney.

⁴⁹ This is what is suggested by both Land Registry Practice Leaflet No 17, paras 29.1 and 29.3 (see above, n 21), and by *Brooke's Notary* (11th ed 1992) p 186.

⁵⁰ If the power is a general one then it confers power to do whatever can lawfully be done by an attorney (Powers of Attorney Act 1971, s 10(1), subject to s 10(2)), which clearly includes authority to deliver a deed. Any express power of attorney, whether general or restricted to a particular transaction, carries with it an implied authority to do all that is necessary to carry it into effect: *Re Wallace, ex p Wallace* (1884) 14 QBD 22. As to the ability of an agent to deliver a deed generally see above, para 6.3.

⁵¹ On the face of it, ss 36A(6) or 74(1) would apply where the attorney is a company or corporation, so long as execution can be taken as being by the attorney for this purpose. Where the attorney is an individual but the donor a company, a case could be made for the application of s 36A(5), but this seems doubtful. See further below, paras 11.35 and 18.7.

⁵² Eg, Law of Property Act 1925, s 125(2) (purchaser entitled to copy of power of attorney); Powers of Attorney Act 1971, s 3, as amended (proof of contents of power); *ibid*, s 4 (irrevocable power to secure proprietary interest or performance of obligation); *ibid*, s 5 (protection of attorney and third party where power is revoked), and see also Land Registration Rules 1925, r 82(4) (as substituted by SI 1986 No 1537). See also the Land Registration (Powers of Attorney) Rules 1986, SI 1986 No 1537.

⁵³ We use this term as a convenient shorthand heading to this section. The company will not be insolvent where it is a members' voluntary winding up, and a company which defaults under a secured loan, allowing a receiver to be appointed, will not necessarily be insolvent, though it

- 8.25 There are additional complications where a deed is executed on behalf of a company by a liquidator, administrator, or receiver. In particular, we are aware that practitioners have sometimes found it frustratingly difficult to establish exactly how a deed should be executed in such cases, and a number of points have been specifically referred to us.
- 8.26 Some of the matters mentioned so far in this Part are equally relevant where a deed is executed on behalf of a company by a receiver under a power of attorney, although we will explain that there are added complications for a receiver if the company goes into liquidation. In the case of execution in the company's name by a liquidator or administrative receiver, however, our concern is more with potential technical uncertainties with their powers under the Insolvency Act 1986. To complete the picture, we end by looking very briefly at execution by a court appointed receiver and by a mortgagee.

Liquidators

Introduction

- 8.27 A liquidator has “power to do all acts, and to execute in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal”.⁵⁴ Accordingly, execution will generally be by the liquidator affixing the company seal and signing to attest this. This authority extends to delivery of the deed.⁵⁵
- 8.28 Such execution will not be in accordance with the company's articles, but there is no objection to this, because the power is conferred by statute, and because conflict with the normal running of the company in the manner laid down by the articles is inherent in the process of winding up. A liquidator cannot, however, take advantage of section 36A(4) of the Companies Act 1985,⁵⁶ since execution by signature under that section is only available to the directors and secretary of the company.
- 8.29 Since the property of a company in liquidation generally remains vested in the company,⁵⁷ the company will be named as the seller in any conveyance or transfer. It has been suggested that the liquidator should also be a party, in order to demonstrate

is of course likely to be so.

⁵⁴ Insolvency Act 1986, ss 165 and 167, Sched 4, para 7. See further Totty and Jordan, *Insolvency* (1995) para H29.02.

⁵⁵ Either because the word “execute” includes delivery for this purpose, or under the words “to do all acts”, or under the sweep-up provision in Insolvency Act 1986, Sched 4, para 13, or by necessary implication.

⁵⁶ See above, para 4.5.

⁵⁷ Subject to the court making an order at the request of the liquidator to vest the property in him under Insolvency Act 1986, s 145(1).

the exercise of his statutory powers, and to give a receipt,⁵⁸ but this is not usual practice, and there is no necessity for it.⁵⁹

Execution without the seal

8.30 If the company has no seal or the seal has been lost, then the manner of execution becomes less certain. It may be that the liquidator can execute by signing the deed in the name and on behalf of the company, having his signature attested, and delivering it.⁶⁰ On the other hand, the statutory power in paragraph 7 of Schedule 4 to the Insolvency Act 1986 is to execute documents and “for that purpose to use, when necessary, the company’s seal”. As will be explained below, administrators and administrative receivers are given a power to use the company seal, and a separate power to execute documents, without any suggestion that the two are inter-dependent.⁶¹ This has caused doubt as to the ability of a liquidator to execute other than by affixing the company’s seal.⁶² The other possibilities are:-

- (a) That the liquidator simply acquires a new seal for the company. A seal can be obtained quickly and cheaply, but there is no authority as to whether a liquidator has power to adopt a seal on behalf of the company, and if the articles make no provision for the company to have a seal, then this route may not be open to the liquidator.⁶³
- (b) If the deed is a conveyance of property within section 74(3) of the Law of Property Act 1925, then there seems no reason why the liquidator should not simply sign the name of the company in the presence of a witness, as permitted under the section.⁶⁴

⁵⁸ *Emmet on Title* (19th ed 1986) para 11-192.

⁵⁹ *Re Wyvern Developments* [1974] 1 WLR 1097, 1101.

⁶⁰ This is suggested in *Brooke’s Notary* (11th ed 1992), p 184. *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (1994) para 34-25 indicates that execution by the liquidator in the name and on behalf of the company is acceptable in the case of a transfer of property, but this may be in reliance on Law of Property Act 1925, s 74(3): see above, para 8.15.

⁶¹ Para 8.32.

⁶² Eg, *The Encyclopaedia of Forms and Precedents* (5th ed 1991) Vol 38, para 794, n 5.

⁶³ There seems to be no reason, however, why a liquidator should not be able to rely on the power “to do all such other things as may be necessary for the winding up of the company’s affairs and distributing its assets” (Insolvency Act 1986, Sched 4, para 13), to adopt a new seal, at least in a case where the articles provide for the company to have a common seal. The position where the articles make no provision for a common seal is less certain, and may be a matter of construction of the articles. Under general principles, however, a corporation may adopt any seal, whether or not there is an express power in its constitution to have a seal: see above, para 4.13. Moreover, it has already been explained that execution by the liquidator is not, strictly, in accordance with the articles in any event.

⁶⁴ Section 74(3) says that a person may “*as attorney* execute the conveyance” (our emphasis), but this should not prevent a liquidator using the section as being a person authorised to convey “under any statutory or other power”, within the meaning of the section. A liquidator has a power to sell the company’s property and to do all acts in the name of the company by virtue of Insolvency Act 1986, Sched 4, paras 6 and 7.

- (c) If the directors and secretary remain in office then they may be able to sign under section 36A(4) of the Companies Act 1985, with the liquidator signing to show his consent, and with the sanction of the liquidation committee (if any) or the creditors, if necessary.⁶⁵
- (d) It is possible that section 7(4) of the Law of Property Act 1925 offers some assistance. As explained above, it has been described as giving a liquidator a statutory power of attorney to convey in the name of the estate owner, but the section is problematical.⁶⁶

8.31 We understand that in practice liquidators sometimes execute simply by signing their own name, with or without a witness. It is, however, difficult to see the legal basis for this, since the statutory power is to execute documents in the name of the company, and it appears to carry an increased risk of personal liability on the deed.⁶⁷

Administrators and administrative receivers

8.32 An administrator⁶⁸ and an administrative receiver⁶⁹ both have a statutory power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document.⁷⁰ There is a separate power to use the company's seal.⁷¹ Accordingly, execution may again be under the company seal, as described above in the case of a liquidator.⁷²

Powers of an administrative receiver

8.33 In the case of an administrative receiver, section 42(1) of the Insolvency Act 1986 provides that the powers conferred upon him by the debenture under which he was appointed automatically include those mentioned in the preceding paragraph (and set out in Schedule 1 to the Act), except insofar as inconsistent with the other provisions of the debenture. In practice, the debenture usually extends "the Schedule 1 powers".

⁶⁵ For the position of the directors on the commencement of a liquidation see Insolvency Act 1986, ss 103 and 127.

⁶⁶ For the view that s 7(4) confers a statutory power of attorney see above, para 8.14 n 30.

⁶⁷ See above, para 8.12 n 22. For an illustration in the case of a liquidator see *Plant Engineers (Sales) Ltd v Davis* QB 8 May 1969, unreported (noted in (1969) 113 Sol J 484). Deeds (or the antecedent agreement) executed on behalf of a company by an insolvency practitioner often carry a widely worded exclusion of personal liability.

⁶⁸ Appointed under Insolvency Act 1986, s 8, where the court considers that an order is likely to achieve one or more of the purposes set out in s 8(3).

⁶⁹ A receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and other securities: *ibid*, s 29(2).

⁷⁰ Insolvency Act 1986, ss 14(1) and 42(1) respectively, applying the power in Sched 1, para 9. An administrator also has power to "do all such things as may be necessary for the management of the affairs, business and property of the company" *ibid*, s 14(1).

⁷¹ *Ibid*, Sched 1, para 8.

⁷² See also Law of Property Act 1925, s 9(1) on the effect of a conveyance by a person authorised under any statutory power.

It has, however, been suggested⁷³ that if the powers are purely contractual, being conferred by the debenture, there is an element of doubt whether the chargor company could authorise a person such as a receiver to use its seal in the absence of authority to do so in the articles,⁷⁴ and whether the power would survive the liquidation of the company.⁷⁵ We think it highly unlikely, however, that the courts would give section 42(1) such a narrow effect, as this would defeat the clear statutory intention of enabling an administrative receiver to use the company seal and to execute documents in the name of the company unless this power is excluded by the debenture. We consider that the powers given to an administrative receiver by Schedule 1 are better seen as statutory powers in this respect.⁷⁶

8.34 In contrast to a liquidator, the statutory powers of both an administrator and an administrative receiver to execute deeds and documents in the name of and on behalf of the company on the one hand, and to use the company's seal on the other, are quite distinct. Whether or not the company has a seal, there seems, therefore, to be no reason why they should not be able to execute simply by signing the company's name, followed by their own, making it clear that execution is by the company.⁷⁷

8.35 The debenture under which an administrative receiver is appointed will generally contain a power of attorney in favour of the receiver, in which case they may also execute under that power.⁷⁸ Alternatively, it appears that an administrative receiver or administrator may execute a conveyance in accordance with section 74(3) of the Law of Property Act 1925, since each has a statutory power to convey an interest in property in the name or on behalf of the estate owner.⁷⁹

Non-administrative receivers

Introduction

⁷³ Totty and Jordan, *Insolvency* (1995) para H29.02.

⁷⁴ But cf *Re Emmadart Ltd* [1979] Ch 540, 547, per Brightman J, holding that the powers of the board are not co-terminous with those of a receiver, who derives his powers from the power in the memorandum and articles to create charges, and the powers conferred by the charge. Moreover, where the articles allow a company to create a floating charge over its property and undertaking, and statute gives a receiver appointed under such a charge a power to use the company's seal unless the charge provides otherwise, it is arguable that by implication, the use of the seal by the receiver is permitted by the articles.

⁷⁵ See below, para 8.38. The agency of an administrative receiver for the chargor company ceases on its going into liquidation (Insolvency Act 1986, s 44(1)(a)).

⁷⁶ Execution under the company seal is stated to be acceptable in *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, para 34-19.

⁷⁷ See *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, para 34-19. In view of the comment made at para 8.22 above, the safest course is to have the execution attested.

⁷⁸ For the position on the company going into liquidation see below, para 8.38.

⁷⁹ Section 74(3) permits an attorney to execute a conveyance on behalf of a corporate donor by signing the name of the corporation in the presence of a witness: see above, para 8.15.

8.36 The ability of a non-administrative receiver (commonly referred to as a fixed-charge receiver or as an “LPA receiver”) to execute a deed on behalf of the mortgagee company depends on the terms of the mortgage or charge under which they are appointed, and also on the terms of the appointment.⁸⁰ Such a receiver is usually able to execute deeds on behalf of the company under a power of attorney conferred by the charge, or, it seems, where the charge contains a separate power for the receiver to execute deeds in the name and on behalf of the company. Either of these should be sufficient to enable execution of a conveyance under section 74(3) of the Law of Property Act 1925.⁸¹ It is doubtful whether such a receiver can execute by using the company seal since - quite apart from any lack of express authority to do so in the mortgage - its use in this way would not, as a rule, be permitted by the articles.⁸² In any event, such a receiver will not usually have access to the company seal.

8.37 If the mortgage allows a receiver to be appointed under hand, then a receiver appointed in this way may nonetheless execute a deed on behalf of the mortgagor so long as the mortgage itself was made by deed, and conferred a power of attorney on the receiver.⁸³

Position following liquidation of the company

8.38 A non-administrative receiver almost invariably acts as agent of the mortgagor in exercising his or her powers.⁸⁴ Upon the liquidation of the company, that agency terminates, but the receivership continues, and most of the receiver’s powers are unaffected, including the power to hold and dispose of the charged property.⁸⁵ It is

⁸⁰ As to the distinction between administrative receivers and other receivers, see Lightman and Moss, *The Law of Receivers of Companies* (2nd ed 1994) pp 3-6. A non-administrative receiver is usually appointed under a legal mortgage or fixed charge, and either by virtue of an express contractual power or by the power conferred by Law of Property Act 1925, s 101(1)(iii) where the mortgage is made by deed: hence the usual description of such receiver as a fixed charge or LPA receiver. But the powers given to such a receiver by Law of Property Act 1925, s 109 are very limited, and any well drawn charge will vary and extend the statutory powers. What is said in this section, however, relates to any receiver (appointed by a security holder) who is not within the statutory definition of an administrative receiver (see above, n 69).

⁸¹ See above, para 8.15. A power given by the charge is probably some “other power to convey” for the purpose of s 74(3), but see below, n 90.

⁸² *Industrial Development Authority v William T Moran* [1978] IR 159. But this may not matter, see above, para 8.33 n 74.

⁸³ *Phoenix Properties Ltd v Wimpole Street Nominees Ltd* [1992] BCLC 737. Although Mummery J clearly favoured the view that, in the absence of a power of attorney, a receiver can only execute a deed if himself appointed by deed, the position in such a situation remains uncertain where the appointment is under hand.

⁸⁴ See Law of Property Act 1925, s 109(2). There is usually an express provision to the same effect in the charge, to avoid any doubt where the statutory power to appoint a receiver has been varied and extended by the charge (see *ibid*, ss 103(3) and (4), and *Deyes v Wood* [1911] 1 KB 806).

⁸⁵ *Gosling v Gaskell* [1897] AC 575 affirming the dissenting judgement of Rigby LJ in the Court of Appeal [1896] 1 QB 669; *Thomas v Todd* [1926] 2 KB 511; *Gough’s Garages Ltd v Pugsley* [1930] 1 KB 615; *Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22. However, the liquidation prevents the receiver creating debts which are provable against the company personally, since this would be inconsistent with the statutory scheme for liquidation set out

uncertain whether a power of attorney in favour of a receiver contained in the charge survives the liquidation of the chargor. In *Barrows v Chief Land Registrar*,⁸⁶ it was held that such a power is revoked on liquidation, being neither a power coupled with an interest under the common law rule in *Smart v Sandars*⁸⁷ nor otherwise irrevocable by virtue of section 4 of the Powers of Attorney Act 1971,⁸⁸ but the decision is open to question on this point.⁸⁹

- 8.39 Even if liquidation has this effect, however, the court went on in the *Barrows* case to hold that a separate power (as opposed to a power of attorney) given to the receiver by the terms of the charge to dispose of the charged property and to do so in the name and on behalf of the company survives the liquidation of the company. The reasoning of the decision is open to criticism, because it results in an apparent distinction between a power of attorney and a contractual power to convey which is somewhat difficult to justify.⁹⁰ However, the survival of the power to convey in the company's name is consistent with the earlier decisions on the effect of liquidation cited above.⁹¹ Moreover, the practical result is a welcome one, as there seems to be no policy reason to deprive a receiver of the ability to dispose of the charged property merely because the company has gone into liquidation. Execution in this way is accepted by the Land Registry, and hence, we understand, by practitioners without question.⁹² A sale by a receiver after the chargor company has gone into compulsory liquidation is not void under what is now Insolvency Act 1986, section 127, because the relevant disposition

in what is now the Insolvency Act 1986. Following liquidation of the company the receiver either acts as principal in his own right, or as agent for the chargee: *American Express International Banking Corp'n v Hurley* [1985] 3 All ER 564.

⁸⁶ *The Times*, 20 October 1977. This and the following paragraph are based on the Lexis transcript.

⁸⁷ (1848) 5 CB 895, 917; 136 ER 1132, 1140.

⁸⁸ By virtue of s 4(1), a power of attorney which is expressed to be irrevocable and is given to secure a proprietary interest of the attorney, or the performance of an obligation owed to the attorney, is not revoked by (among other things) the winding up of the donor, so long as the attorney retains such interest or is owed such obligation. In the *Barrows* case, it was held that s 4 was inapplicable, because the relevant interest was held by or obligation owed to the chargee rather than the receiver.

⁸⁹ The arguments to the contrary were rehearsed by Goulding J in *Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22, 30, where the point did not need to be decided. See also the persuasive arguments to the contrary in Peter Millett QC "The Conveyancing Powers of Receivers After Liquidation" (1977) 41 Conv 83.

⁹⁰ Law of Property Act 1925, s 1(7) provides that "powers" to convey a legal estate not held by the transferor operate only in equity, save in certain specified cases, so the nature of the contractual power to convey is somewhat uncertain. See further, however, *ibid*, s 7(4), discussed above at para 8.14 n 30.

⁹¹ See above, n 85.

⁹² For a discussion of the difficult question of how far a receiver can create obligations on the part of the company as part of any disposal of property in the period after liquidation see Lightman and Moss, *The Law of Receivers of Companies* (2nd ed 1994), p 163.

of the property was the creation of the charge by the company rather than the later sale.⁹³

Receivers appointed by the court

- 8.40 A receiver may be appointed by the court in a number of circumstances.⁹⁴ Such a receiver is an officer of the court, and derives his authority from the court's order. It has been suggested that if he has to execute a deed on behalf of the corporation then this should be done in the manner appropriate for an individual.⁹⁵

Mortgagee

- 8.41 On a sale of the secured property by a legal mortgagee,⁹⁶ the mortgagee may execute any transfer under a power of attorney in its favour (if the charge contains one), or by virtue of the special provisions contained in the Law of Property Act 1925.⁹⁷ The transfer may be executed by the mortgagee in its own name in the usual way, or in the name of the mortgagor.⁹⁸ A sale by the mortgagee has the sometimes important advantage that it overreaches any subsequent mortgage or charge,⁹⁹ in contrast to a sale by any receiver.¹⁰⁰

⁹³ *Sowman v David Samuel Trust Ltd*, above.

⁹⁴ For a summary of the position see Lightman and Moss, *The Law of Receivers of Companies* (2nd ed 1994) cap 22.

⁹⁵ *Brooke's Notary* (11th ed 1992) p 184.

⁹⁶ For the position of an equitable mortgagee see *Fisher & Lightwood's Law of Mortgage* (10th ed 1988) pp 402-3.

⁹⁷ ss 9(1), 88(1), 89(1), 104(1), and 106(1).

⁹⁸ There seems to be no reason why any conveyance should not also be executed in accordance with Law of Property Act 1925, s 74(4) (see above, para 8.18) if the mortgagee is a corporation aggregate.

⁹⁹ *Ibid*, ss 88(1) and 89(1) which apply to a sale under either the statutory or an express power of sale.

¹⁰⁰ Except in the case of an administrative receiver with the assistance of the court under Insolvency Act 1986, s 43.

PART IX

THE USE OF FACSIMILE SEALS AND SIGNATURES

Introduction

- 9.1 One of the matters which is perceived to cause difficulty in practice, and which we have been asked to consider, is whether documents may be executed by corporations by means of facsimile seals and signatures. This has obvious practical importance in any situation where a corporation has a large number of documents to execute under seal, for example deeds of release, or share certificates.¹
- 9.2 We have explained that a deed must be in writing, but may be on any substance.² There is no express restriction to some permanent substance, but in practice the requirement for writing and the permitted methods of execution as a deed limit the substances used. Having reviewed this question comparatively recently, we do not propose to re-open it, for example by asking for further views on the merits of allowing deeds to be on a computer disk, or in some other electronic form.³ Our main concern here is therefore how far, within the existing requirements for a deed, a corporation should be able to execute an instrument in writing other than by affixing a common seal in the traditional form, and/or the personal signature of its officers. We set out the present law in this Part, and comment further and invite views below.⁴

Sealing

- 9.3 The power to possess and use a seal has already been considered.⁵ Section 350 of the Companies Act 1985 refers to “the seal” of the company. The Act also makes express provision for a company to have an official seal for use abroad, and an official seal for sealing share certificates,⁶ and the implication seems to be that a company may

¹ A share certificate need not be sealed: Companies Act 1985, s 185. The articles will, however, often require every share certificate to be sealed: eg Companies Act 1985, Table A, SI 1985 No 805, para 6. If given under the common seal, the certificate is prima facie evidence of title to the relevant shares: *ibid*, s 186. A company may also execute share certificates under an official seal: Companies Act 1985, s 40, see above, para 4.16. Despite the introduction of the CREST system permitting securities to be held and settlement made in paperless form, shareholders may still chose to hold certificates in the traditional way. Moreover, the introduction of progressively shorter rolling settlement periods has highlighted the need for companies to be able to execute large numbers of share certificates rapidly.

² See above, para 3.2.

³ See Transfer of Land: Formalities for Deeds and Escrows, (1985) Working Paper No 93, para 8.2(i), and Deeds and Escrows, (1987) Law Com No 163, para 2.3. The whole area of “digital information and requirements of form” is, however, under review by a working party of the Society for Computers and Law.

⁴ See below, paras 11.87 - 11.90, and 14.14 - 14.18.

⁵ See above, paras 4.13 - 4.14.

⁶ See above, paras 4.15 - 4.17.

otherwise only have one original seal. In the absence of such statutory provisions, it is uncertain whether a corporation may have a number of duplicate seals.⁷

9.4 At common law, there is authority that a print made in ink with a wooden block is sufficient to constitute sealing, and that a physical impression made by the seal is unnecessary.⁸ As mentioned above, however, if a company registered under the Companies Acts has a common seal, then the company's name must be engraved on the seal in legible characters. Failure to do so renders the officer and the company liable to a fine, but it is uncertain whether this in itself would be sufficient to make the execution ineffective.⁹ Since an official seal for share certificates or use abroad must be a facsimile of the common seal, the company's name must also be engraved on such a seal.

9.5 The requirement for the name to be *engraved* on the seal might be seen to serve a number of purposes. For example, an engraved metal seal is difficult to alter. But it seems more likely that the purpose of the requirement is that affixing an engraved seal leaves a physical impression on a deed, either on a wax or paper seal, or on the paper itself. If so, then there is an argument that execution in a manner which has the same effect will also be valid, and will not constitute an offence by the company or the relevant officers. One possibility (subject to the point made above about the use of duplicate seals) is execution by a laser printed seal, which leaves a raised or indented impression of the company's name, although it is likely that the articles of the company would need to be amended to permit this. It is just arguable that the name of a company on a rubber seal could be said to be "engraved" on the seal, but execution with such a seal in ink leaves no physical impression on the deed, and it must be doubtful whether this would be sufficient to comply with the requirement for engraving.

Signatures

9.6 It also needs to be considered whether the signatures of the attesting officers can be added automatically as part of the same process. A similar point arises where a company takes advantage of section 36A(4) to execute by the signature of two officers.

⁷ In *Sutton's Hospital Case* (1612) 10 Co Rep 23a, 30b; 77 ER 960, 970, it is stated that the implied powers of any corporation include power: "To have a seal, &c. that is also declaratory, for when they are incorporated, they may make or use what seal they will." It is understood that the use of duplicate or facsimile seals is common in the case of building societies. See above, para 4.23.

⁸ *R v St Paul's Covent Garden* (1845) 7 QB 232; 115 ER 476 (ink impression sufficient where document purported to be given under the hands and seals of the justices, and was in fact signed and delivered by them).

⁹ See above, para 4.14.

9.7 There is authority that where statute requires a document to be signed, a stamp bearing the facsimile signature¹⁰ of an individual may be sufficient in the case of a notice,¹¹ or on a summons,¹² and that a stamp bearing a “handwritten” business name may also be adequate when it has been affixed by the person whose signature is required.¹³ There is authority for the execution of a will by means of an engraved signature applied by the testator’s agent at his direction.¹⁴ What is required will, however, be a matter of construction of the relevant statute. In *Goodman v J Eban Ltd* Denning LJ (dissenting) argued that a person can only sign by writing his name or making his mark by his own hand. Otherwise, it will generally be impossible to tell whether the facsimile signature has been affixed by the person whose signature is required.¹⁵ He returned to this in another decision shortly afterwards, noting that there was no authority for a company to sign by its printed name affixed with a rubber stamp.¹⁶

¹⁰ In this Part we use the expression “facsimile signature” to connote any signature which is reproduced other than by being written out by the signatory. However, the same question can arise in a situation where a signed document is required, and the document has been *transmitted* by being faxed, since the signature may be said to have been made by the machine receiving and printing out the faxed document. See *Re a Debtor (No 2021 of 1995)*, *ex parte Inland Revenue Commissioners v the Debtor* and *Re a Debtor (No 2022 of 1995)*, *ex parte Inland Revenue Commissioners v the Debtor* [1996] 2 All ER 345, *per* Laddie J (signed proxy form sent by fax was effective for the purpose of the Insolvency Rules SI 1986 No 1925, r 8.2(3) which required the form to be “signed by the principal or by some person authorised by him”). It is clear that Laddie J would also have accepted as valid a document where the “signature” was stored in and generated by a word processor system (p 351). However, the decision is expressly restricted to the requirement for a signed form of proxy under rule 8 of the Insolvency Rules (p 352).

¹¹ *Bennet v Brumfitt* (1867) LR 3 CP 28. Reference may also be made to the numerous decisions on what constitutes a sufficient signature for a will, or for the purpose of Law of Property Act 1925, s 40, and now Law of Property (Miscellaneous Provisions) Act 1989, s 2 (eg, *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567: typewritten name was not a sufficient signature, as this would give the word “signature” a meaning which would not be readily recognised by a layman).

¹² *R v Brentford Justices ex p Catlin* [1975] QB 455.

¹³ *Goodman v J Eban Ltd* [1954] 1 QB 551. In *Re a Debtor (No 2021 of 1995)*, *ex parte Inland Revenue Commissioners v the Debtor* and *Re a Debtor (No 2022 of 1995)*, *ex parte Inland Revenue Commissioners v the Debtor* above at pp 349 and 351, it was conceded by counsel with the approval of Laddie J that a proxy form could be “signed” by the use of a stamp, and that a form which has a signature impressed on it by a printing machine (in the way that share dividend cheques are frequently signed by company secretaries) can be said to be signed. The decision contains (at p 351) a helpful analysis of the function of a signature for the purpose of the Insolvency Rules, r 8.

¹⁴ *Jenkins v Gaisford, Re Jenkins (decd)’s Goods* (1863) 3 Sw & Tr 93; 164 ER 1208 (execution of codicil in this manner sufficient to satisfy Wills Act 1837, s 9).

¹⁵ Above, at p 561. This view was quoted with approval by the Court of Appeal in *Firstpost Homes Ltd v Johnson*, above.

¹⁶ *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 710.

- 9.8 What is clear is that where a deed is executed by an individual, then, whatever may be effective to constitute a signature, it must be the personal act of the maker.¹⁷ That is because Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 requires signature *by* the maker, but makes specific provision for execution at the direction and in the presence of the maker.¹⁸ By the same token, it is difficult to see how the mere reproduction of the signatures of a director and secretary (for example as part of the process of sealing by laser, or by a facsimile signature applied by some other person) can readily amount to attestation of the affixing of the seal,¹⁹ still less to signature *by them*, as required for section 36A(4). On the other hand, as mentioned above, section 36A(2) merely requires execution by affixing the common seal, and leaves the company free to determine by its articles what additional formalities are required (for example whether attestation is required, and by whom).²⁰
- 9.9 The Land Registry requires any person signing a transfer (whether as an individual party, as a witness, or in the capacity of director or secretary of a company), to sign manually and not in facsimile, save where signature in facsimile is authorised by any statute or statutory instrument having the force of law in England and Wales.²¹

¹⁷ What is required is personal authentication of the document by hand-written signature or other individual mark. By Law of Property (Miscellaneous Provisions) Act 1989, s 1(4), “sign” includes “making one’s mark on the instrument”.

¹⁸ See above, para 3.6 n 17.

¹⁹ See also above, para 4.8 for the argument that such officers do not attest the affixing of the seal, but sign as part of the process required for execution.

²⁰ See above, para 4.11.

²¹ Land Registration (Execution of Deeds) Rules 1994, SI 1994 No 1130, note (7), but see below, para 14.17 n 17.

PART X

THE PRESENT LAW - SUMMARY

10.1 Having explained the law which governs the execution of documents by corporations in detail in the preceding Parts, we set out below a summary of the present law.

The legal nature and effect of deeds

10.2 A deed is a written instrument which is executed in solemn form with the necessary formality. It must also perform one or more functions: namely it must pass or confirm the passing of an interest, property or right, or create or confirm the creation of a binding obligation.¹

10.3 A deed has a number of effects which distinguish it from other instruments, such as simple contracts, of which the most important are probably that it will generally be effective even in the absence of valuable consideration,² and that as a specialty, it carries the longer limitation period of twelve years, as opposed to six for most simple contracts.³

10.4 Certain transactions are only fully effective if carried out by deed, including the transfer or creation of most legal estates in land.⁴

The formalities required for a deed

10.5 The formal requirements of a deed are as follows:-

- (a) It must be in writing, but may be on any substance.
- (b) It must be clear on the face of the instrument that the person or persons making it intend it to be a deed, whether by the instrument describing itself as a deed, or expressing itself to be executed or signed as a deed, or otherwise (the “face-value” requirement).
- (c) It must be validly executed as a deed by the person making it or parties to it.
- (d) It must be delivered.⁵

We comment below that there appears to be a degree of uncertainty as to what is required to satisfy the face-value requirement, and ask whether this needs to be clarified.⁶

¹ See above, para 2.7.

² See above, para 2.8.

³ See above, para 2.9.

⁴ See above, para 2.12.

⁵ See above, para 3.2.

⁶ See below, paras 11.13 and 13.4.

Execution by corporations

Execution under section 36A of the Companies Act 1985

10.6 A company incorporated under the Companies Acts,⁷ or to which section 36A otherwise applies,⁸ may execute a document as a deed in two ways:-

- (a) The document may be executed by the company by affixing its common seal, which must (it seems) be done in accordance with the articles of association.⁹ These will usually require the seal to be affixed by the authority of the board of directors, and the instrument signed by two directors or by a director and the secretary.¹⁰
- (b) Whether or not the company has a seal, the instrument may be signed by two directors or by a director and the secretary and expressed to be executed by the company. This has the same effect as if executed under the common seal.¹¹

We consider below whether it is appropriate to retain this “dual system”, and whether there should be changes in the method of execution without a seal.¹²

10.7 Such a document has effect upon delivery as a deed, so long as it is clear on its face that it is intended to be a deed by the person or persons making it.¹³

Corporations aggregate outside the Companies Act

10.8 At common law such corporations execute by affixing their seal accompanied by the formalities prescribed by their constitution. They may not execute without a seal in the absence of a specific statutory power to do so. Many are, however, subject to specific statutory provisions governing the manner of execution. The result is that there is considerable variety in the manner of execution, and we ask below whether it is possible to introduce greater uniformity into the law.¹⁴

Corporations sole

10.9 Execution is either under the seal of the corporation, or in some other manner in accordance with the practice or constitution of the corporation. Where a corporation sole has no common seal, the practice is understood to be to execute using a wafer seal.¹⁵ We also ask below whether it is either possible or appropriate to provide a common formula for execution by all corporations sole.¹⁶

⁷ See above, para 4.5.

⁸ See above, para 4.18.

⁹ We ask below whether this point requires clarification: para 15.5.

¹⁰ See above, para 4.8.

¹¹ See above, para 4.6.

¹² See below, Part XIV.

¹³ See above, para 4.7.

¹⁴ See below, Part XVI.

¹⁵ See above, para 4.26.

¹⁶ See below, para 16.15.

Foreign corporations

- 10.10 Foreign companies may execute a document as a deed in the following ways:-
- (a) By affixing the common seal, or in the manner permitted for the execution of documents by such a company by the laws of the territory in which it is incorporated.
 - (b) By the signature of any person or persons acting under the express or implied authority of the company (in accordance with the laws of the territory in which the company is incorporated). The document must be expressed to be executed by the company.¹⁷

We invite comments generally upon these rules, and ask whether it is appropriate to extend them to all foreign corporations, or at least to define what is a foreign company for this purpose.¹⁸

- 10.11 It seems that a foreign corporation which is not a “company” (if any), may execute under a plain wafer seal, so long as this has been adopted as its seal for this purpose.¹⁹

Due execution

- 10.12 There is a rebuttable presumption at common law that a deed has been duly sealed by a corporation where the corporate seal has been affixed by those having custody of the seal.²⁰
- 10.13 Where a deed appears to have been executed in accordance with a corporation’s constitutional documents, a person dealing with the corporation in good faith may rely on the deed despite any internal irregularity in the corporation’s procedures in the execution of the deed.²¹
- 10.14 A person dealing with a company in good faith may, at least where the transaction has been decided on by the company’s board, be able to rely on sections 35A and 35B of the Companies Act 1985 to validate the deed, despite the fact that the directors have failed to execute the deed strictly in accordance with the articles.²²
- 10.15 In favour of a purchaser from a corporation acting in good faith, a deed is deemed to have been duly executed, despite anything to the contrary in the articles or other constitutional documents, if the deed has been executed under the common seal and attested by a director and secretary (or their equivalent), or in the case of a company, the deed has been signed on behalf of the company by two directors or by a director

¹⁷ See above, para 4.30.

¹⁸ See below, paras 15.28 - 15.29.

¹⁹ See above, para 4.35.

²⁰ See above, para 5.22.

²¹ See above, para 5.23.

²² See above, paras 5.9, 5.14, and 5.23.

and the secretary.²³ There are, however, serious difficulties in the construction of the relevant presumptions, and inconsistencies between them, which we explain below.²⁴

- 10.16 Where a deed has been forged it will be a nullity, and is not saved by the presumptions and protective provisions mentioned above, although the position is not entirely certain.²⁵

Delivery

- 10.17 A deed executed by a corporation requires a separate act of delivery before it will take effect.²⁶ It may, however, be delivered in one of three ways:-

- (a) to take immediate effect;²⁷
- (b) as an escrow, in which case it cannot be recalled by the maker, but will not take effect unless and until certain conditions are met;²⁸ or
- (c) by being executed but handed to a third party for delivery. That third party must be authorised to deliver the deed on behalf of the maker, but that authority need no longer be given by deed. The document may be recalled before it is delivered.²⁹

- 10.18 Where the deed creates or disposes of an interest in land, there is a conclusive presumption in favour of a purchaser that any solicitor, licensed conveyancer or notary who purports to deliver the deed on behalf of the maker was duly authorised to do so.³⁰

- 10.19 The sealing or other execution of a deed raises a rebuttable presumption at common law of delivery.³¹

- 10.20 When a deed is executed by a company, there are two additional statutory provisions as to delivery:-

- (a) a rebuttable presumption that a document executed as a deed is delivered on execution;³²

²³ See above, paras 5.24 - 5.26.

²⁴ See below, paras 11.29 - 11.44.

²⁵ See above, paras 5.29 - 5.32.

²⁶ See above, para 6.4.

²⁷ See above, para 6.5.

²⁸ See above, paras 6.5 - 6.7.

²⁹ See above, paras 6.16, 6.19 - 6.20.

³⁰ See above, para 6.19.

³¹ See above, para 6.4.

³² See above, para 6.22.

- (b) in favour of a purchaser, a document executed as a deed by a company by means of the signature of two directors or by a director and the secretary is deemed to have been delivered upon execution.³³

As we explain in Part XI, these presumptions are difficult to construe. They create serious inconsistencies with the overlapping provisions in the Law of Property Act 1925 and the Law of Property (Miscellaneous Provisions) Act 1989, and hence also with the way in which documents are, as a matter of routine, sent to corporations for execution. There may also be different presumptions of delivery (or no presumption at all) depending not only upon the type of corporation in question, but also, it seems, upon how a company chooses to execute a deed.³⁴

Contracts

10.21 In the case of a company incorporated under the Companies Acts,³⁵ or to which section 36 of the Companies Act 1985 otherwise applies,³⁶ a contract may be made in two ways:-

- (a) *by the company* by writing under its common seal; or
- (b) *on behalf of the company* by any person acting under its authority, express or implied.³⁷

The ability for a company to execute deeds without using its common seal, and the division between the rules for contracts (in section 36) and the execution of documents (in section 36A) has left potential uncertainty on the distinctions between contracts under hand, under seal, specialties, and deeds. We explain these more fully in Part XI, and invite views on whether there is any need for clarificatory reform in Part XIII.³⁸

10.22 Any other body corporate, wherever incorporated, may make contracts in a similar manner, under the Corporate Bodies' Contracts Act 1960.³⁹ There may, however, be a case for harmonising the drafting of the 1960 Act with the Companies Act 1985, and we consider this further in Part XVII.⁴⁰

10.23 In the case of a foreign company, a contract may be made in the following ways:-

- (a) *by the company* by writing under its common seal or as otherwise permitted by the laws of its place of incorporation; or
- (b) *on behalf of the company* by any person acting under its authority, express or implied, as determined by the laws of its place of incorporation.⁴¹

³³ See above, para 6.23.

³⁴ See below, Part XI.

³⁵ See above, para 4.5.

³⁶ See above, para 4.18.

³⁷ See above, para 7.3.

³⁸ See below, paras 11.4 - 11.10 and 13.3 - 13.10 respectively.

³⁹ See above, para 7.7.

⁴⁰ See below, para 17.3.

⁴¹ See above, para 7.6.

Since this adapts section 36 of the Companies Act 1985 to foreign companies, any changes made to that section would also need to apply to foreign companies.

Execution of deeds on behalf of corporations

Execution under a power of attorney

- 10.24 The ability of a corporation to grant a power of attorney depends on its constitution. If there is no power for the directors to appoint an attorney (and there generally will be such a power), then unless there is a prohibition in the constitution, an attorney may be appointed by the company in general meeting.⁴² A person dealing with an attorney purportedly appointed by a company may be protected by sections 35-35B of the Companies Act 1985.⁴³
- 10.25 The methods by which an attorney commonly executes a deed on behalf of a corporation in practice are the following:-
- (a) Where the attorney is an individual:-
 - (i) by signing the name of the corporation followed by their own as attorney, or by signing their own name as attorney on behalf of the donor (in reliance on section 7 of the Powers of Attorney Act 1971), and in either case the safer course is to have this attested;
 - (ii) alternatively, where the instrument is a conveyance, by signing the name of the corporation, and having this attested, in reliance on section 74(3) of the Law of Property Act 1925.
 - (b) Where the attorney is a corporation:-
 - (i) by executing the deed in the manner appropriate for the attorney corporation;
 - (ii) alternatively, where the instrument is a conveyance, by an officer appointed by the attorney corporation, who executes by signing in the name of the donor, in reliance on section 74(4) of the Law of Property Act 1925. Again, it seems prudent to have this attested.⁴⁴
- 10.26 We have explained that there are some difficulties in applying the underlying law to current practice, and that there has been criticism that the changes made in 1989 to the law which governs the execution of deeds made no provision for execution by an attorney. We summarise the difficulties in Part XI, and invite views on possible reforms in Part XVIII.⁴⁵

Liquidators

⁴² See above, para 8.5.

⁴³ See above, paras 5.4 - 5.10.

⁴⁴ See above, paras 8.18 and 8.22.

⁴⁵ See below, paras 11.75 - 11.82 and 18.1 - 18.9.

10.27 A liquidator of a company has a statutory power to execute a deed on its behalf, and to use the company seal for that purpose.⁴⁶ Where the company has no seal, then the liquidator may probably execute by signing on behalf of the company or may adopt a seal for the company, but the matter is not free from doubt.⁴⁷ We invite views in Part XVIII on whether the position requires clarification.⁴⁸

Administrators and administrative receivers

10.28 Both administrators and administrative receivers have a statutory power to execute deeds on behalf of the relevant company, and a separate statutory power to use the company's seal.⁴⁹ The debenture under which he or she is appointed will generally also give an administrative receiver a power of attorney from the company.⁵⁰ Doubts have been expressed as to the nature of an administrative receiver's powers (namely whether they are statutory or contractual), and, again, we invite views in Part XVIII on whether clarification is needed.⁵¹

Non-administrative receivers

10.29 Such a receiver appointed over the property of a company may generally execute deeds on its behalf by virtue of a power of attorney or contractual power, in each case contained in the relevant mortgage or charge.⁵² Such a contractual power, but not (it seems) a power of attorney, survives the liquidation of the company.⁵³ This results in a position which, whilst accepted in practice, is somewhat unsatisfactory, and we consider possible reforms in Part XVIII.⁵⁴

⁴⁶ See above, para 8.27.

⁴⁷ See above, para 8.30.

⁴⁸ See below, paras 18.10 - 18.11.

⁴⁹ See above, para 8.32.

⁵⁰ See above, para 8.35.

⁵¹ See below, paras 18.12 - 18.13.

⁵² See above, para 8.36.

⁵³ See above, paras 8.38 - 8.39.

⁵⁴ See below, paras 18.14 - 18.15.

Facsimile seals and signatures

- 10.30 At common law, a corporation may adopt any seal for the execution of documents, and there is authority that a print made in ink will suffice.⁵⁵ Execution in such a way by a company registered under the Companies Acts *may* also be effective, but the company and its officers commit an offence if they use a seal which does not have the company's name engraved upon it.⁵⁶
- 10.31 There is authority for the use of a facsimile signature for certain purposes, but it is very doubtful whether signature in this way will be effective either for the execution of a deed by a company by means of the signature of its officers, or for the purpose of attesting execution under seal, particularly where the facsimile signature is not affixed by the relevant officer personally.⁵⁷ Purported execution in either of these ways will be ineffective where the deed requires registration at the Land Registry. We invite views in Part XIV on whether there should be any change in the permissible methods of execution to enable companies and other corporations to execute other than by means of an engraved seal or the personal signature of its officers.⁵⁸

⁵⁵ See above, paras 4.13 and 9.4.

⁵⁶ See above, paras 4.14 and 9.4.

⁵⁷ See above, paras 9.7 - 9.8.

⁵⁸ See below, paras 14.14 - 14.18.

PART XI

CRITICISMS OF THE PRESENT LAW

Introduction

- 11.1 We have three main general criticisms of the present law. First, there are serious uncertainties, and problems of statutory interpretation. Indeed, as we mentioned at the outset, the problems of interpretation seem quite disproportionate to the area of law under review. Secondly, there are inconsistencies between the various statutory provisions which govern the execution of deeds. Thirdly, there is a lack of uniformity in the law as between different types of corporation. To this, we would add the comment that a review of this sort also provides the opportunity to ask whether the basic methods of execution prescribed by the law are meeting current business needs, and whether they can be improved in any way.
- 11.2 In this Part we draw together our criticisms of the existing law, and expand on the general criticisms mentioned above. We follow broadly the same order as we have used to set out the present law in the previous Parts, by looking at the requirements for deeds in general, and then taking each of those requirements in turn, examining how a deed is executed by a company or other corporation, what constitutes due execution, how a deed is delivered, and how a deed is executed on behalf of a corporation by an attorney.
- 11.3 We start by raising a limited number of issues on deeds generally, concentrating on the consequences which have followed from the abolition of the requirement for a company to execute a deed under its common seal, and from the new requirement that the intention to create a deed must be clear from the face of the instrument. We explain in a little more detail why we criticise the law for lack of uniformity as between different types of corporation. We then set out our detailed criticisms of section 36A of the Companies Act 1985 - including the section as adapted to execution by foreign companies - and examine the inconsistencies which it creates with other statutory provisions. This is followed by an appraisal of the need for presumptions of due execution and delivery, before turning to contracts made by corporations, and deeds executed on behalf of corporations. We finish by returning to the question of execution by the use of facsimile seals and signatures, which completed our survey of the present law.

The legal nature and effect of a deed

Introduction

- 11.4 This Paper does not propose any change to the situations when a deed is necessary, or to those effects of a deed which distinguish it from other documents, since this would be beyond our terms of reference. In particular, whether it is appropriate for an instrument to attract a longer limitation period merely because it is a specialty is a question which we intend to address in a separate project on the limitation of actions, and nothing in this Paper should be taken to pre-judge the issue. Within these

parameters, however, it is necessary to say something more about the relationship between deeds and other documents, to ensure that there is sufficient clarity in the operation of the present law.

Contracts under seal

11.5 In Part II, we have described a contract under seal as being both a specialty and a deed, but we are aware that differing views have been expressed on the exact relationship between these types of document. It has, for example, been doubted whether, in the case of an individual, a document which is not executed under seal will still be a “specialty”, and so subject to the longer limitation period given by section 8 of the Limitation Act 1980, and enforceable in the absence of valuable consideration.¹ Put simply, the argument is that a specialty is required to be a “contract under seal”, that what gives such a document its distinctive status is a seal, and that this point was overlooked in the 1989 reforms.

11.6 We consider this to be misconceived, but in explaining why that is so, another issue arises. A deed is an instrument in solemn form. Such an instrument (or, depending on how the term “specialty” is used, any obligation contained in it) is a specialty because it is in solemn form.² Whilst it is true that a specialty has often been said to include a contract under seal,³ such a contract had long been recognised as being a type of deed.⁴ That also followed from the definition of a deed given in Part II,⁵ since, looking for the moment at the position before 1989, every contract under seal was a written instrument executed in solemn form, which, at the least, created or confirmed an obligation binding on some person. Since 1989, the underlying principle remains the same, save that the rules for execution in solemn form (namely for the execution of a deed) have changed. A contract which is executed by an individual as a deed (that is by attested signature), and which makes it clear on its face that it is intended to be a deed, will therefore be both a deed and a specialty. The absence of any seal is immaterial.

¹ Eg, Philip J Horn, “To seal or not to seal” LSG 9 September 1992 at p 25, and correspondence in LSG 30 September 1992 at p 17, and 28 October 1992 at p 15.

² See above, paras 2.2, 2.8 n 15, and 2.10.

³ For the meaning of the term “specialty”, see above, para 2.10.

⁴ See Joseph Chitty, *A Practical Treatise on the Law of Contracts Not under Seal* (2nd ed 1834) p 3: “Contracts or obligations under seal, or specialties, (as deeds, bonds, &c.,) are instruments not merely in writing, but *sealed* and *delivered over* as deeds, by the party bound, to or for the benefit of the person to whom the liability is incurred: such sealing and delivery being a particular form and ceremony, which alter the nature and operation of the agreement.” See also *Chitty on Contracts* (27th ed 1994) p 21: “At common law, contracts under seal, or specialties, were an important example of deeds...”; Sir Robert Megarry and Sir William Wade *The Law of Real Property* (5th ed 1984) p 739: “A covenant is a promise under seal, ie, contained in a deed”; and *Barclays Bank Ltd v Beck* [1952] 2 QBD 47, 54 *per* Denning LJ.

⁵ In short, a written instrument executed in solemn form, which passes or confirms the passing of an interest property or right, or which creates or confirms a binding obligation: see above, para 2.6.

11.7 Before 1989, the principle that contracts under seal were deeds appears to have applied equally to corporations,⁶ although it has long been common practice to refer to them simply as contracts under seal, and the position is now clearly otherwise in other jurisdictions.⁷ Since 1989, a company may - and many other types of corporation must - of course still execute deeds by sealing them. There is, however, the additional requirement that an instrument will not be a deed unless the intention to make it so is clear on the face of the instrument. Moreover, in the case of companies, section 36(a) of the Companies Act 1985 now states that a contract may be made by a company under its common seal.⁸

11.8 The mere fact that a contract is executed under seal - whether by an individual or a corporation - may be sufficient to make it clear that it is intended to be a deed. Indeed it has very recently been held to have exactly this effect.⁹ However, this seems wrong in principle.¹⁰ In the case of registered companies it would, for example, diminish the additional requirement in section 36A(5) of the Companies Act 1985 that a document “executed” by a company must also make the intention to create a deed clear on its

⁶ Eg, *Ludlow Corporation v Charlton* (1840) 6 M & W 815, 820; 151 ER 642, 644, *per* Rolfe B: “The rule of law on this subject, as laid down in all the old authorities, is, that a corporation can only bind itself [ie, enter into a contract] by deed”. See also *County Council of the County of Southampton v Commissioners of Inland Revenue* (1905) 92 LT 364, 369 *per* Phillimore J (obiter): “apparently it is the law - though I once slightly hesitated as to whether it was to be entirely accepted - that every contract under seal by a corporate body is thereby a deed”. There appears to be no modern English authority on the point. See also *Palmer’s Company Law* (25th ed 1992) Vol I para 3.106: “it would seem that every *contract* under seal is a deed, save only that by the Bills of Exchange Act, 1882, s 91, a corporation is empowered to seal, instead of signing, acceptances, indorsements and the like” (emphasis in original). The work has contained a statement to this effect for nearly a century: see 2nd ed 1898 p 177.

⁷ Eg, in Australia, where the question has remained important for stamp duty (and other) purposes, it is now clearly established that the mere affixing of the common seal does not make a document a deed. At common law in Australia, a sealed document will only be a deed if the seal was affixed with the intention of the document operating as a deed: see, eg, *Comptroller of Stamps (Vic) v Associated Broadcasting Services* [1990] VR 335, 341; *Electricity Meter Manufacturing Co Ltd v Manufacturers’ Products Pty Ltd* (1930) 30 SR (NSW) 422, 425-426; and *Rose and Rose v Commissioner of Stamps* (1979) 22 SASR 84, 87-88. However, the Australian decisions have been said to reflect a view that the seal of a corporation is equivalent to a company’s signature (see *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119, 155-156), and also somewhat confusingly equate intention to create a deed with the English authorities on intention to deliver a deed (though *cf* *Comptroller of Stamps (Vic) v Associated Broadcasting Services*, above, at p 341). They also open up the prospect that it may only be possible to determine whether a deed was intended by reference to extrinsic evidence.

⁸ On this point see also Law of Property Act 1925, s 74(2) (above, para 8.8), which originally permitted the board of any corporation aggregate to appoint an agent to execute on behalf of the corporation any agreement or other instrument “not under seal”. As amended by Law of Property (Miscellaneous Provisions) Act 1989, s 1(8), Sched 1, para 3, the words “not under seal” are replaced with the words “which is not a deed”.

⁹ *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others*, 10 May 1990, transcript, para D(III) 15. See further above, paras 1.17 and 6.18. See also *Chitty on Contracts* (27th ed 1994) p 22, discussing execution by individuals: “It is questionable whether, while no longer required, the affixing of a seal to an instrument would in itself be considered sufficient to ‘make clear on its face’ that it was intended to be a deed”.

¹⁰ See further below, para 13.9.

face if it is to take effect as a deed. Where the deed was executed under seal in accordance with section 36A(2), the additional requirement in section 36A(5) would be meaningless. It seems clear that section 36A is intended to provide two equally effective means of execution, namely with or without a seal. If the mere fact of affixing a seal is sufficient to show the intention to create a deed, then it means that the mere manner of execution is sufficient to show the intention to create a deed for one of these methods (where execution is under seal), but not, presumably, for the other (where execution is by the signature of two officers).¹¹

11.9 What, then, is the status of a contract made by a corporation which is under seal but not a deed (because the intention to create a deed is not clear from the face of the instrument)? As we have explained in Part II, the term “contract under seal” remains in current judicial use to describe a specialty.¹² Whether a contract under seal which is not a deed is still a specialty remains to be determined. Our view is that it would be wrong in principle if it was, since it would not be an instrument executed in solemn form. It would mean that an individual could only create a specialty by creating a deed, but that a deed was not required in the case of a company or other corporation.¹³ It seems likely, therefore, that the reforms of 1989 have created a new species of instrument, namely a contract which is made by a company by affixing its seal, but which is not a deed (because the intention to create a deed is not clear from the face of the instrument), and hence not a contract under seal in the traditional sense. In consequence, the contract will not be a specialty.¹⁴ Where a specialty is required, any difficulty is, of course, avoided if the document identifies itself as a deed, for example simply by stating that it is “executed as a deed”.¹⁵

¹¹ The court might hold that a document expressed to be “executed by the company” and signed by two directors also showed sufficient intention to create a deed, but this seems to depart still further from the intention behind the 1989 reforms that the intention should be expressed in some explicit way on the face of the document (eg, simply by saying that it was “executed as a deed”). It would mean that the additional requirement in section 36A(5) was completely redundant since either method of execution would carry the intention to create a deed.

¹² See above, para 2.10. The term contract under seal is also used in Companies Act 1985, s 428(5), as an example of a contract which is enforceable in the absence of consideration.

¹³ See Law Com No 163, para 2.16: “It could certainly produce anomalous results if [a document with both individual and corporate parties] did not need to be clear on the face of it that it was intended to be a deed so far as concerns the corporation parties but did so need so far as concerns the individuals. For corporations, presumably an appropriate formula would be ‘executed as a deed’”.

¹⁴ Law of Property (Miscellaneous Provisions) Act 1989, s 1(7) provides that where any earlier Act requires an instrument under seal constituting a deed, any requirement for signing, sealing and delivery by an individual has effect as a requirement for execution in accordance with s 1. The draft Bill included in Law Com No 163 (Sched 1, para 1(a) at p 18) suggested a provision that in any earlier enactment, any reference to an instrument under seal should, as necessary, have effect as a reference to an instrument executed as a deed. There is, however, no such provision in the Law of Property (Miscellaneous Provisions) Act 1989, nor in the Companies Act 1985 (as amended).

¹⁵ We note that this is in fact the practice adopted in the standard forms of building contract published by the Joint Contracts Tribunal.

- 11.10 It seems deeply unsatisfactory that there should be any possible uncertainty on such fundamental issues, and in Part XIII we invite views on how this should be addressed.¹⁶

The formalities required for a deed

Introduction

- 11.11 This Paper is an examination of the way in which a corporation executes a deed, not of the formalities required for deeds generally. However, the rules governing execution by a corporation cannot be considered in isolation from the underlying formalities for deeds, and we have felt free to invite views on those formalities where any reform affecting corporations alone might otherwise be unsatisfactory.
- 11.12 In particular, we have just explained that the relationship between the terms specialty, simple contract, contract under seal and contract under hand, turns in part on what is required to make an instrument a deed. In the following paragraphs, we comment further on one of those requirements - that the intention to create a deed must be clear on the face of the document.

The “face-value” requirement

- 11.13 There appear to be differing views in practice as to what is sufficient to satisfy this requirement, which was created by section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, and is reflected by sections 36A(5) and (6) of the Companies Act 1985. The position where a document is sealed, but there is no other indication that it was intended to be a deed, has been considered above in the context of “contracts under seal”.¹⁷ Moreover, the Land Registry’s stated practice is that a document which describes itself as being a type of instrument which, by its nature, is required by law to be by deed (for example a document commencing “This Conveyance”) is sufficient for the purpose of section 1(2)(a).¹⁸ This may be justified by the words “(whether by describing itself as a deed or expressing itself to be executed or signed as a deed *or otherwise*)” (our emphasis) in section 1(2)(a), and also, perhaps, by section 57 of the Law of Property Act 1925.¹⁹ Nonetheless, there are difficulties. If correct, this practice might be considered tantamount to abolishing this particular

¹⁶ See below, para 13.10.

¹⁷ See above, para 11.8.

¹⁸ Practice Leaflet No 17, para 3.2. The Land Registry will also, of course, accept an instrument in one of its prescribed forms. It is, however, notable that the form prescribed for execution by a company transferor under seal does not describe itself as a deed: see the Land Registration (Execution of Deeds) Rules 1994, SI 1994 No 1130. It is understood that Practice Leaflet No 17 will shortly be updated, and those responding to this Paper may care to obtain a copy of the revised version from the Land Registry in due course.

¹⁹ Section 57 provides that any deed, whether or not an indenture, may be described as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease, or otherwise according to the nature of the transaction intended to be effected. The purpose of the section, however, was probably to make it clear that such a document did not need to be described as an indenture.

formality altogether.²⁰ It is also difficult to reconcile this approach with the principle that a purported lease which fails to meet the necessary formalities may nonetheless take effect as an equitable lease.²¹

11.14 Where it is not, however, completely clear on the face of a document that it is a deed, then the question would have to be settled by determining the intention of the parties, looking at the document as a whole, which would include how it describes itself, and how it has been executed.²² For example, a document describing itself as a lease but not as a deed may satisfy section 1(2)(a) when examined in this way. What the Land Registry practice does do, of course, is to provide a simple and practical way of resolving the point. We ask for views in Part XII on whether section 1(2)(a) adequately fulfills its purpose of enabling deeds to be distinguished from other instruments.²³

11.15 It should also be noted that sections 36A(5) and (6) of the Companies Act 1985 simply refer to a document which makes it “clear on its face that it is intended by the person or persons making it to be a deed”, omitting the words “(whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)” which follow in section 1(2)(a). It is uncertain how much these words add, if anything, and whether they could be implied in sections 36A(5) and (6) in any event, on the basis that those sections require intention to create a deed, and that this is governed by section 1(2)(a). We suggest, however, in Part XIII that the wording of sections 1(2)(a) and 36A should be brought into line on the point.

Lack of uniformity for different types of corporation

11.16 Before giving our detailed comments on the way in which a corporation may currently execute a deed, we should say a little more to explain our general criticism of the lack of uniformity as between different types of corporation. We have explained in Part IV that the rules applicable to the execution of deeds vary considerably depending on the type of corporation.²⁴ It may be necessary to distinguish between the following types of corporation:-

²⁰ We have previously rejected the suggestion that the mere use of words like “lease” or “mortgage” would suffice. “It seems essential to avoid a situation where a document is held to be a deed simply because it was used in a transaction where a deed is required. This would amount to abolishing formalities for deeds altogether”: Law Com No 93, para 8.3(ii).

²¹ *Parker v Taswell* (1858) 2 De G & J 559; 44 ER 1106; *Walsh v Lonsdale* (1882) 21 Ch D 9. For a view that following Law of Property (Miscellaneous Provisions) Act 1989, s 2, a “defective” lease can no longer constitute a contract for the grant of a lease, see Jean Howell, “Informal Conveyances and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989” [1990] Conv 441. See further *Chitty on Contracts* (27th ed 1994) p 285.

²² It should be noted that we did not envisage in Law Com No 163 that the new requirement would displace decisions such as *Re Stirrup* [1961] 1 WLR 449 (see above, para 2.7 n 12): *ibid*, para 2.16.

²³ See below, para 13.3. The point is also relevant if there is to be any change in the basic formalities for execution by a corporation, eg, if this could be done by a single signature, there would be arguably be less evidence of intention to create a deed.

²⁴ See above, paras 4.2 - 4.3 and Part IV generally.

- (a) companies formed and registered under the Companies Acts;²⁵
- (b) unregistered companies which are nonetheless subject to the provisions of the Companies Act 1985 which govern execution formalities;²⁶
- (c) corporations outside the Companies Act, where execution may be regulated by other statutory provisions, or solely by the constitution of the corporation, or even by custom and practice, subject in each case to any applicable presumptions of execution;²⁷
- (d) corporations aggregate and corporations sole;²⁸
- (e) foreign companies;²⁹
- (f) other foreign corporations.³⁰

11.17 Thus a company governed by section 36A of the Companies Act 1985 may either execute under its common seal, or by the signature of two officers, whilst other corporations may generally only execute under their common seal. The presumptions governing due execution and delivery vary between different types of corporation, and, possibly, depending on the method by which a company chooses to execute a deed.³¹ Even when such presumptions are broadly similar (as between section 74(1) of the Law of Property Act 1925 and section 36A(6) of the Companies Act 1985 in the case of due execution), there are differences in drafting and inconsistencies.³² The existence of these separate regimes for different types of corporation causes potential difficulty to persons dealing with a corporation, and to bodies such as the Land Registry. At the very least, it is inconvenient that persons dealing with a corporation may have to make specific enquiries in order to satisfy themselves how the corporation executes a deed.

11.18 There are clearly many parts of the Companies Act 1985 which would be inappropriate or inapplicable to certain types of corporation.³³ It is, however, difficult to see why the rules for the execution of deeds and other documents should not be substantially the same for all corporate bodies, so far as this is compatible with the different management structures of such corporations. We consider in Part XVI whether some of these inconsistencies can be removed, and whether it might be possible to introduce greater uniformity into the law in this area.

²⁵ See above, para 4.5.

²⁶ See above, para 4.18.

²⁷ See above, para 4.20.

²⁸ See above, para 4.25.

²⁹ See above, para 4.29.

³⁰ See above, para 4.35.

³¹ See below, para 11.39.

³² See below, para 11.38.

³³ Eg, in the case of a non-profit making corporation, or a company limited by guarantee and having no share capital.

11.19 It follows from this that where the law allows a particular type of corporation to execute deeds in more than one way, as under sections 36A(2) and (4) of the Companies Act 1985, the consequences of execution should be the same whichever method of execution is used.

Execution by companies under the Companies Act

11.20 We now turn in greater detail to the various methods of execution by corporations, and start by setting out our main criticisms of section 36A of the Companies Act 1985. For the sake of completeness, we include a number of points which have also been made by other commentators, which we do not necessarily accept as constituting real difficulties. As before, our hope is that those responding to this Paper will let us know where they see these points as genuine difficulties, or as matters where confirmation or clarification would be helpful. We have mentioned that this Paper also presents the opportunity to ask whether there should be any more fundamental change in the methods of execution prescribed by section 36A, but we deal with this separately in Part XIV below.

Basic terms - does “execution” include “delivery”?

11.21 It has been said that the term “executed” is used in different ways in section 74 of the Law of Property Act 1925, section 36A of the Companies Act 1985, and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.³⁴ In section 36A it excludes delivery. For example, section 36A(5) states that a document which is “executed by a company” has effect “upon delivery” as a deed. By implication it may be “executed” but not delivered until a later date. There is no reference at all to delivery in section 74, and this may be one of the reasons why there has been uncertainty as to the need for a separate act of delivery by a corporation, and whether a deed “executed” in accordance with section 74(1) must be taken to have been delivered. It now seems to be established that the word excludes delivery in section 74(1).³⁵ On the other hand, in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989, the execution of a deed by an individual requires both attested signature and delivery.

11.22 However, the term used in section 1 is not simply “executed”, but “executed as a deed”. The way the term “executed” is used in section 36A permits the section to cover documents such as share certificates, which, since they are not deeds, do not need to be delivered. Subject to that, section 36A seeks to follow section 1 by making it clear that a document intended to be a deed does not have effect until delivery. If, therefore the position is to be made more obviously consistent, it would seem necessary to separate out “execution” and “execution as a deed” in section 36A. We invite views on this in Part XV.³⁶

³⁴ See the report by a joint working party of the City of London Law Society (above, para 1.3 n 3), at para 2.

³⁵ See above, para 6.4.

³⁶ See below, para 15.2.

- 11.23 The term “executed” is, of course, used elsewhere. For example for stamp duty purposes a deed is taken to be “executed” when it is delivered, unless it is delivered subject to conditions, when it is treated as executed when the conditions are fulfilled.³⁷ There is no obvious difficulty with this, since the requirement for delivery is made explicit, and the period for stamping of the document clearly runs from the date of delivery. A deed delivered in escrow would presumably be treated as a deed delivered subject to conditions for this purpose. Section 414 of the Companies Act 1985 (which concerns the date of creation of a registrable charge) is potentially more of a problem, for the reasons mentioned in Part VI, but it is uncertain whether this will ever be given effect in its current form.³⁸
- 11.24 The older authorities speak of the formal requirements for a deed, rather than those for the execution of a deed.³⁹ There is authority suggesting that the term “executed” is more correctly used to include delivery, but recognition that it may also be used in the sense which excludes it.⁴⁰ Whilst consistency is, of course desirable, the term is undoubtedly a convenient shorthand for the formalities required up to the point of delivery, and, as long as the concept of delivery remains, it is likely to continue to be used to cover both situations.⁴¹

Section 36A(2): execution under seal

- 11.25 We explained in Part IV that section 36A(2) does not, in our view, override a company’s articles, by allowing it, for example, to execute by simply affixing its seal, and dispensing with a requirement in the articles that two directors, or a director and the secretary, must also sign.⁴² Nevertheless, if this is correct the wording of section 36A(2) is potentially misleading in this respect, and might be considered to be inconsistent with section 74(1) of the Law of Property Act 1925, which makes it clear that the section can only be relied on where the seal is “attested”. This also raises the wider question, to which we return below, how far it is appropriate to require the affixing of the seal to be in accordance with the articles, when section 36A(4) provides an alternative method of execution for which there may be no specific provision in the articles.⁴³

³⁷ See above, para 6.10.

³⁸ See above, para 6.11.

³⁹ Eg, *Goddard’s Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 398-399; and see *Norton on Deeds* (2nd ed 1928) Cap 1.

⁴⁰ *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 198, *per* Nourse LJ.

⁴¹ Eg, practitioners will continue to send documents to their clients “for execution” (excluding delivery), and after completion to the other side “duly executed” (including delivery).

⁴² See above, para 4.9. Though such a document might be “saved” by Companies Act 1985, ss 35A and 35B if the board had resolved to execute it: see above, para 5.14.

⁴³ See below, para 15.5.

Sections 36A(3) and (4): execution without a seal

- 11.26 The principal change made by section 36A was to allow a company to execute by the signature of two officers, as provided by section 36A(4), rather than under its common seal. There was some concern at the time of its introduction that this would lead to increased fraud, or at least to greater difficulty for bodies such as the Land Registry in checking that deeds had been properly executed, since execution under a distinctive seal could be replaced by the signatures of two officers, who might not even be named in the attestation clause. We return to this point in Part XIV, where we seek views on whether there should be any change in the basic formalities required when a company executes a document. In this Part, we mention two specific doubts which have been raised about section 36A(4).
- 11.27 First, it has been questioned whether section 36A(4) can be used when there is no specific provision in the company's articles for execution in this way.⁴⁴ For the reasons given in Part IV, we consider that it can, and that any such criticism is unjustified.⁴⁵
- 11.28 Secondly, it has been suggested that it is uncertain whether execution in accordance with section 36A(4) is sufficient to satisfy a requirement in another document to which the company is a party for it to enter into a further document under its common seal, or into a deed under seal.⁴⁶ A similar point would arise if the company's articles required it to execute documents of a particular nature under seal, or where a document under seal is required by statute.⁴⁷ Since, however, section 36A(4) provides that a document so executed "has the same effect as if executed under the common seal of the company", we see no reason to doubt that execution in accordance with section 36A(4) would be sufficient for these purposes.⁴⁸

Sections 36A(5) and (6): the statutory presumptions

- 11.29 In Parts V and VI, we explained the general effect of the presumptions contained in these sections. We draw attention below to a number of uncertainties in their application, and inconsistencies with other statutory provisions. We consider separately below whether it would be better not to have these statutory presumptions of due execution and delivery in the light of the difficulties which they create.⁴⁹

⁴⁴ See above, para 4.10.

⁴⁵ See above, para 4.10.

⁴⁶ Eg, a requirement in a floating charge to execute a legal mortgage under seal of property which is subsequently acquired, or, in the case of the chargee, that a receiver may only be appointed by deed under seal.

⁴⁷ Where execution is by an individual, see Law of Property (Miscellaneous Provisions) Act 1989, s 1 (7) on this point.

⁴⁸ Execution under s 36A(4) should, for example, be sufficient to constitute a contract under seal for the purpose of Companies Act 1985, s 428(5).

⁴⁹ Part XV.

WHEN DO THE PRESUMPTIONS APPLY?

11.30 The first part of section 36A(5) provides that a document executed by a company which makes it clear on its face that it is intended to be a deed “has effect” on delivery as a deed. This is, in effect, the equivalent of the requirement in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 for “execution as a deed”. It is followed by a rebuttable presumption of delivery on execution. As explained above, this seems to do no more than repeat the existing common law presumption of delivery.⁵⁰ Section 36A(5) applies whether a company executes a deed under its common seal or by the signature of two officers under section 36A(4).⁵¹ There is no specific requirement for good faith.

11.31 We have already mentioned that the wording of section 36A(6) (deemed due execution and delivery in favour of a purchaser in good faith) suggests that it is limited to execution without the use of a seal under section 36A(4), leaving section 74(1) of the Law of Property Act 1925 to do the same job where execution is under seal. It has recently been held in *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others* that, on the contrary, section 36A(6) applies whether execution is by the signature of two officers or under seal.⁵² However, whilst there is much good sense in this, in that it would overcome a number of the other difficulties mentioned below, we are not entirely satisfied that this construction of the section is justified. The reference in section 36A(6) to a document which purports to be signed by two directors, or by a director and the secretary, closely follows the wording of section 36A(4). This is in contrast to section 36A(2), which as already seen,⁵³ is silent on the need for signature or attestation by such officers where this is required by the articles. The reference in section 36A(6) to a document being signed seems to require something more than the signature of two officers who are merely attesting or signing as part of the affixing of the seal.⁵⁴ The decision on this point in *Johnsey Estates* was reached “with some hesitation”,⁵⁵ and the matter must be seen as remaining in need of clarification.

⁵⁰ See above, para 6.22.

⁵¹ Companies Act 1985, s 36A(3).

⁵² Chancery Division (Cardiff), 10 May 1996, transcript, paras D(III) 1-22. See further above, paras 1.17 and 6.18. Judge Mosley added that even if section 36A(6) is restricted to execution under section 36A(4), he would regard a deed executed under seal and attested by two directors as nonetheless falling within section 36A(4), the attestation by two directors amounting to signature by the directors for the purpose of that section: *ibid*, paraD(III) 20.

⁵³ See above, para 4.9.

⁵⁴ Section 36A(4) has, however, been held to operate in the case of a stock transfer signed by two directors and expressed to be sealed by the company, but where the seal had not in fact been affixed: *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1993] BCLC 814 (see above, para 4.10 n 23).

⁵⁵ The judgement undertakes a careful and lengthy analysis of ss 36A(5) and (6), which we will not attempt to reproduce in full. One of the factors which influenced the court in deciding that s 36A(6) should, like s 36A(5), apply whatever the method of execution, was the presence of the words “intended by the person or persons making it to be a deed” in both sections. It was held that the “person or persons” refer to the director(s) and secretary who sign the deed, whether by way of execution under s 36A(4), or to attest the affixing of the seal, but this seems incorrect. These words

- 11.32 Depending on whether the decision in *Johnsey Estates* is correct on this point, the position of a purchaser in good faith from a company may depend on which method of execution is used. When a company executes the transfer under section 36A(4) there is an irrebuttable presumption (or rather deeming) of due execution and delivery by virtue of section 36A(6). When execution is under seal there is a rebuttable presumption of delivery by virtue of section 36A(5). If *Johnsey Estates* is correct, there is also an irrebuttable presumption of due execution and delivery under section 36A(6). If not, there is no statutory presumption of delivery, and whether or not there is any statutory presumption of due execution depends on whether section 74(1) of the Law of Property Act 1925 applies. This is considered further below.⁵⁶
- 11.33 Like section 36A(5), section 36A(6) restricts the presumption of *delivery* to a document which makes it clear on its face that it is intended to be a deed. However, the first part of the section, which presumes *due execution* in favour of a purchaser where a document purports to have been signed by two directors or a director and the secretary, is not so limited. On the face of it, the presumption of due execution in favour of a purchaser is therefore applicable to any document signed by two such officers, so long as it has been so signed by way of execution by the company. If so, this is inconsistent with section 74(1), which is expressly restricted to deeds. The significance of this depends partly on whether all documents executed by corporations under seal are deeds, which has been discussed above.⁵⁷
- 11.34 As is pointed out by the court in *Johnsey Estates*, it is perhaps curious that there is an express requirement in section 36A(4) that the document must be expressed to be executed by the company, but no repetition of this requirement in section 36A(6).⁵⁸ We think, however, that the relationship between sections 36A(6) and 36A(4) is so close that the failure to repeat the requirement causes no real difficulty, and that the irrebuttable presumption would only apply where the document is, in some way, expressed to be executed by the company.
- 11.35 The wording of section 36A(6) is clearly inapplicable to execution by a company through an individual attorney: there is no signature by the relevant officers for the company. The position is less clear with section 36A(5). There is, however, no reference in that section to execution “by or on behalf of a company”, and the natural

clearly relate back to the “face-value” requirement introduced by Law of Property (Miscellaneous Provisions) Act 1989, s 1(2). On that basis, the “person or persons making it” must be the party or parties to the deed (ie, the company, not its officers). The court’s interpretation of the “person or persons making it” also underlies the view that, even if s 36A(6) is limited to execution under s 36A(4), a deed is nonetheless executed under s 36A(4) when two directors sign to attest the affixing of the seal (transcript: para D(III) 20): see above, n 52.

⁵⁶ See below, para 11.39.

⁵⁷ See above, para 11.7.

⁵⁸ *Ibid*, transcript, para D(III) 6.

meaning of the words “executed by a company” is to refer back to execution by the methods specified in sections 36A(2) and (4). The position where the attorney is a corporation has been considered in Part VIII.⁵⁹ Once again, the root of the problem is whether execution is taken as being by the donor or the attorney for this purpose.⁶⁰

THE RELATIONSHIP BETWEEN THE PRESUMPTIONS AND DIFFERENT METHODS OF DELIVERY

- 11.36 We commented in Part VI that it is not obvious how the first part of section 36A(5) relates to the concept of delivery in escrow, since it provides that a document to which it applies “has effect, upon delivery, as a deed”. It now seems to be established, however, that the presumptions of delivery in sections 36A(5) and (6) may, in appropriate circumstances, be of delivery in escrow.⁶¹ The presumption in section 36A(5) may be rebutted to allow delivery by the maker’s solicitor on completion, although it seems that clear evidence may be required to do so.⁶² However, the apparently irrebuttable presumption (or rather deeming) of delivery on execution (whether in escrow or with immediate effect) in section 36A(6) is inconsistent with execution on the basis that delivery is to be by a third party on completion. If a company is deemed to have delivered the deed upon execution, it cannot also have handed it to a third party for delivery at a later date. The practical importance depends on who is a purchaser for the purpose of section 36A(6), and so able to take advantage of the presumption. We consider this further below.⁶³

A COMPARISON OF THE PRESUMPTIONS WITH SECTION 1(5) OF THE LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989

- 11.37 The presumption in section 36A(5) of delivery upon execution (unless the contrary is proved) sits a little oddly with the conclusive presumption in favour of a purchaser in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 that a solicitor or other advisor who purports to deliver an instrument as a deed on behalf of a party to the instrument has authority to do so.⁶⁴ The presumption of delivery on execution in section 36A(6), however, is plainly inconsistent with the presumption in section 1(5). If the vendor company is deemed to have delivered the deed upon execution, then it cannot also be deemed to have been handed it to its solicitor with authority to deliver it as a deed on completion.

⁵⁹ See above, para 8.23.

⁶⁰ See above, paras 8.21 - 8.22.

⁶¹ See above, para 6.25.

⁶² See above, para 6.22.

⁶³ Para 11.44.

⁶⁴ See above, para 6.19.

A COMPARISON OF THE PRESUMPTIONS WITH SECTION 74(1) OF THE LAW OF PROPERTY ACT 1925

11.38 A comparison of sections 36A(5) and (6) with section 74(1) of the Law of Property Act 1925 reveals no less than six possible inconsistencies.⁶⁵

(i) DELIVERY

11.39 We have explained in Part VI that section 74(1) is, it seems, a presumption of due execution, but not of delivery.⁶⁶ That means that the position of a purchaser from a corporation may vary depending on whether section 36A applies to the vendor, and if it does on how a vendor company chooses to execute. Delivery upon execution is deemed by virtue of section 36A(6) where a company executes without seal under section 36A(4). There is no deemed delivery if the vendor is a corporation to which section 36A does not apply. Whether delivery is also deemed in the case of a registered company executing under seal depends upon the application of section 36A(6), which we have considered above.⁶⁷ One of the factors which influenced the court in *Johnsey Estates* was the assumption that Parliament cannot have intended to create this anomaly, by which the position of a purchaser from a company may vary depending on how the purchase deed is executed.⁶⁸ As we have said, we see the good sense of the construction of section 36A(6) in *Johnsey Estates* in this respect, but we think that the position is, at best, uncertain. If there is indeed such an anomaly, this would have come about inadvertently. It seems likely to us that section 36A(6) was intended to extend the protection offered to a purchaser by section 74(1) to a case where the company chooses to execute without using a seal. We understand section 36A(6) to have been drafted on the basis that section 74(1) itself imported delivery.⁶⁹ If that had been, or remained correct, there would have been no such inconsistency between sections 36A(6) and 74(1). Moreover, even if the presumption of delivery in section 36A(6) operates when a company executes a deed under seal, there still remains the anomaly that there is, it seems, no such presumption of delivery by virtue of section 74(1) in the case of a corporation to which section 36A does not apply.

(ii) IDENTITY OF THE OFFICERS SIGNING

11.40 Due execution is deemed under section 74(1) where the seal is affixed in the presence of and attested by the corporation's clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council, or other governing body. Section 36A(6) - and of course section 36A(4) itself - requires signature by a director and the secretary, or by two directors. The difference in terminology is partly explained

⁶⁵ How far, if at all, these "inconsistencies" might be justified by the fact that s 74(1) extends to corporations other than companies should be seen in the light of Part XVI below.

⁶⁶ See above, para 6.4.

⁶⁷ See above, para 11.31. There is of course a rebuttable presumption of delivery in the case of a company which executes under seal, by virtue of s 36A(5).

⁶⁸ Transcript, para D(III) 14.

⁶⁹ See above, para 6.4.

by the passage of time between the two provisions, and the fact that section 74(1) extends to corporations aggregate generally, where the management structure is more likely to vary than in the case of a registered company. However, if two directors are sufficient to execute by signing for the purpose of sections 36A(4) and (6), it is difficult to see why they should not also be sufficient for section 74(1) when they attest the seal (section 74(1) requires one of those attesting to be the secretary or his deputy). At present, there is therefore a statutory deeming of due execution in favour of a purchaser in good faith when two directors of a company execute by signing a document, but not when two directors of a corporation to which section 36A does not apply affix and attest the common seal. Whether there is such a presumption when two directors of a company affix and attest the seal depends on whether section 36A(6) is applicable in such a case, which we have considered above.⁷⁰

⁷⁰ See above, para 11.31.

(iii) SECRETARY OR DEPUTY SECRETARY?

- 11.41 One of those attesting the seal may be the deputy secretary for the purpose of section 74(1), but the reference to “the secretary” is quite specific in sections 36A(4) and (6), and it is doubtful whether the deputy secretary would suffice for this purpose.⁷¹

(iv) PURPORTED SIGNATURE

- 11.42 Section 36A(6) refers to a document which “purports to be signed by a director and the secretary of the company, or by two directors of the company ...”, whilst section 74(1) refers to a seal “purporting to be the seal of the corporation” and “attested by persons purporting to be persons holding such offices as aforesaid...”. It is, perhaps, unfortunate that the two forms of wording differ, although we are unable to ascertain any difference in meaning between them.

(v) RESTRICTION TO DEEDS

- 11.43 Section 74(1) is expressly limited to deeds. It appears that section 36A(6) is capable of extending to any document which is executed in accordance with section 36A(4), whether or not a deed.⁷²

(vi) INTENDING PURCHASERS

- 11.44 As defined in the Law of Property Act 1925 the term “purchaser” includes an intending purchaser, where the context so requires.⁷³ In contrast, there is no reference to an intending purchaser in the definition of a “purchaser” in section 36A.⁷⁴ If the purpose of the omission is to exclude an intended purchaser from the protection of section 36A(6),⁷⁵ then it would be preferable - for the sake of consistency - to make it clear that an intended purchaser is also unable to rely on section 74(1). We return to this in Part XV.⁷⁶ We should also mention that in *Johnsey Estates* it was held that the absence of any definition of “property” in the Companies Act 1985 (implicitly in contrast to the Law of Property Act 1925), did not restrict the ambit of section 36A(6) so as to exclude choses in action.⁷⁷

A COMPARISON OF THE PRESUMPTIONS WITH THE COMMON LAW PRESUMPTION OF DELIVERY

⁷¹ See further Companies Act 1985, s 283(3). The section makes reference to any deputy or assistant secretary, but this appears to be relevant only when the office of secretary is vacant or the secretary is incapable of acting. Cf *Brooke's Notary* (11th ed 1992) p 182 n 44. In contrast, there is a wide definition of the term “director” in *ibid*, s 741. At the least, it seems likely that signature by an alternate director would suffice.

⁷² See above, para 5.26.

⁷³ *Ibid*, s 205(1)(xxi). See above, para 5.25 n 66.

⁷⁴ See above, para 5.25.

⁷⁵ See above, para 5.25.

⁷⁶ See below, para 15.14.

⁷⁷ Transcript, paras D(III) 16-18. See above, paras 1.17 and 6.18.

- 11.45 There is a rebuttable presumption of delivery at common law where the seal of a corporation has been affixed, but only a statutory presumption (by virtue of section 36A(5)) where execution is by a corporation to which section 36A applies.⁷⁸

Corporate directors

- 11.46 We have mentioned that there is no obvious provision in section 36A(4) for execution by a company when the relevant directors or secretary of the company are themselves other companies or corporations. That is because the section seems to envisage personal signature by the secretary or director(s) in question. There is authority that where a statute requires a personal signature, a contract signed on behalf of a company by an authorised signatory will suffice,⁷⁹ but none yet to confirm that this extends to section 36A(4), or indeed to the presumption of execution and delivery in section 36A(6). A similar point is sometimes made in respect of section 74(1) of the Law of Property Act 1925, which requires the affixing of the common seal to be “attested” by a director and secretary. We understand that in practice where there are corporate directors execution has in the past generally been under the common seal of the company making the deed, attested by a person authorised to sign on behalf of each relevant corporate director. If need be, certified copies of the board resolutions appointing such persons to sign for the corporate directors are provided. In theory, each corporate director could itself execute the document (for example under its common seal), in a way which itself might attract one of the statutory presumptions of due execution and/or delivery, but it would seem unduly complicated to make this a requirement. We also understand that companies are now purporting to make use of section 36A(4) in a similar way, and to execute by the signatures of two persons authorised to sign for its corporate directors. We invite views on this in Part XV.⁸⁰

Execution by foreign companies

- 11.47 Having looked in detail at section 36A, we now turn more briefly to the section as it is adapted to execution by foreign companies. So far as we are aware, the Foreign Companies (Execution of Documents) Regulations 1994 have generally been welcomed, providing a method for foreign companies to execute deeds in accordance with English law, without trying to force concepts and structures of English law and practice upon them which they may not share. We would, however, make a few comments on the Regulations, and we invite views in Part XV.

⁷⁸ See above, paras 6.4, 6.22.

⁷⁹ *Re British Games* [1938] Ch 240. See above, para 7.3 n 6.

⁸⁰ See below, para 15.7.

What is a “foreign company” for the purpose of the Regulations?

- 11.48 First, the Regulations apply to “companies incorporated outside Great Britain”, but there is no attempt to define this further. It appears that there may be certain types of foreign corporation which are not companies for the purpose of the Regulations.⁸¹ If this is correct, then the ability of such corporations to execute a deed under English law remains somewhat uncertain unless they possess a seal. There seems no reason why they should not be able to adopt a seal for the purpose, but this is at the least cumbersome when set against the flexibility given by the Regulations. The Regulations are necessarily restricted to “companies” incorporated outside Great Britain by the primary legislation under which they are made.⁸² It is, however, difficult to see why the principles embodied in the Regulations should not be extended to all foreign corporations, in particular given the width of the provision allowing execution in any manner permitted by, or by persons with authority under, the laws of the territory of incorporation.⁸³

Relationship of the Regulations with requirements of local law

- 11.49 Secondly, it has been suggested that it would be helpful if the Regulations could be amended to state that execution under them would not override any additional requirements for execution imposed by the law of incorporation of the foreign company.⁸⁴ That would mean that, just as the Regulations provide that the question of authority of the person signing is governed by the relevant foreign law, so any other requirement under the relevant foreign law for the execution of documents by foreign companies would also have to be observed. However, this would appear to introduce potential difficulty and uncertainty into what is essentially an English law formality requirement, particularly in situations where the relevant formalities are clearly governed by English law, for example in the case of a conveyance of real property.⁸⁵

Relationship with common law rules for the creation of a power of attorney

- 11.50 Thirdly, we have explained the common law rule, followed in section 1 of the Powers of Attorney Act 1971, which requires authority to execute a deed on behalf of another person to be given by deed.⁸⁶ As it relates to registered companies, section 36A(4) of the Companies Act 1985 only authorises execution by the signature of the directors

⁸¹ See above, para 4.34.

⁸² Companies Act 1989, s 130(6).

⁸³ This would, of course, apply the relevant provisions of the Companies Act, as adapted by the Regulations, more widely than is done in the case of “unregistered companies” by s 718: see above, para 4.18. The only argument we can see against this is that it might lead to situations where a foreign organisation which was not a corporation, and so lacked the legal personality to contract in its own right, purported to execute a document in reliance on the Regulations. It seems to us, however, that the purported method of execution in such a case would be merely incidental to the wider issue of contractual capacity.

⁸⁴ Made by a working party of the Law Society’s Standing Committee on Company Law at the time of preparation of the Regulations.

⁸⁵ See above, para 4.28.

⁸⁶ See above, para 8.3.

and secretary. The common law rule still applies if the company wishes to appoint someone to execute a deed as its attorney. As amended by the Regulations, however, section 36A(4) allows execution by *any person* acting under the authority of the foreign company, without restricting it to the company's officers. Moreover, a document executed in this way is expressed to be executed *by* the company. Accordingly, it seems that the common law rule no longer applies to a foreign company. It may execute a deed by an agent who has sufficient authority under the law of its place of incorporation for the purpose of section 36A(4) (as amended) without having to appoint the agent by deed.

- 11.51 It has been questioned whether a common law rule can be abolished (so far as foreign companies are concerned) by regulations under section 130(6) of the Companies Act 1989.⁸⁷ We are not, however, convinced that there is any difficulty,⁸⁸ and if the rule remained effective the Regulations would be deprived of much of their effect. It might, for example, make it necessary to determine on what basis the person was acting (as an officer of the company or its agent, with the latter requiring authority by deed). The intention of the Regulations seems to be that it should only be necessary to check that the person signing is duly authorised under the relevant law. On the other hand, if that person is only authorised under the relevant law by virtue of being an attorney, and the relevant law requires such a person to be appointed by a deed - as may be the case in some common law jurisdictions - then it would seem that section 36A(4) (as amended by the Regulations) would not obviate the need for their appointment to be by deed. That is, however, a requirement of the relevant foreign law, rather than an application of the English common law rule.

Execution by corporations outside the Companies Act

- 11.52 Our main criticism of the law governing execution by such corporations (including corporations sole) is a lack of consistency and uniformity, and we do not therefore propose to comment further at this stage on the different regimes governing execution by such corporations. Section 74(1) of the Law of Property Act 1925 gives a semblance of uniformity to corporations aggregate, but it will be noted that, whilst it overrides the constitution of a corporation (and hence may be said to have a substantive effect), it remains a deeming provision, in contrast to section 36A(4), which provides a substantive method of execution, and that it only operates in favour of a purchaser.

Due execution

⁸⁷ Section 130(6) allows the Secretary of State to make regulations applying (among others) section 36A to foreign companies "subject to such exceptions, adaptations or modifications as may be specified in the regulations".

⁸⁸ The Regulations arguably do no more than adapt s 36A. For the question whether the common law has been amended by statute, see *Société Co-opérative Sidmetal v Titan International Ltd* [1966] 1 QB 828, 848.

- 11.53 Having commented upon the methods of execution by a corporation, we should add something more generally about the concepts of due execution and delivery.
- 11.54 The preceding paragraphs have examined in detail the wording of the presumption in favour of a purchaser of due execution in section 36A(6) and in section 74(1), but not whether such a presumption is still needed. A person dealing with a corporation may be protected against an irregularity in the manner of execution by the internal management rule, or, where execution is by a company or other corporation to which they apply, by sections 35A and 35B.⁸⁹
- 11.55 However, the internal management rule only assists where execution is, on the face of it, in accordance with the articles. This may be less relevant to section 36A(6) (since there will probably be no express provision in the articles which covers execution by the signature of two officers in any event), but the protection given by general agency principles is at least reinforced by the references in the section to a document which “purports” to be signed by two officers of the company. Sections 35A and 35B may only apply where there has been a decision by the board, and, at least until the sections have been judicially considered, there is a degree of uncertainty about their operation.⁹⁰ The presumptions of due execution in sections 74(1) and 36A(6) mean that a purchaser in good faith can rely on a document executed as mentioned in those sections, without further enquiry. Such a person need not, for example, obtain certified copies of the board minutes at which the affixing of the common seal (where execution is under seal) was approved. Section 74(1) is particularly valuable in this respect, because it applies to any corporation aggregate, and may assist where it would be difficult to check the proper method of execution by the corporation, and in the case of corporations to which sections 35A and 35B do not apply.
- 11.56 So far as the vendor corporation is concerned, there are two further possible problems. First, it has been explained that the effect of the presumptions is not entirely clear in the case of a forged document, although we do not think that they would override the rule that such a document is a nullity.⁹¹ Secondly, section 74(1) has been held to operate in circumstances where the seal has been affixed without the authority of the board,⁹² which means that, theoretically, a deed might take effect against the decision

⁸⁹ See above, paras 5.7 - 5.10.

⁹⁰ The meaning of “good faith” has yet to be firmly established for this purpose, and the proposed statutory abolition of the doctrine of constructive notice for all purposes is yet to be given effect, and is qualified. In short, there is uncertainty in practice how far it remains prudent to rely on sections 35A and 35B without making further enquiries, and we anticipate that there would be reluctance to depart from the familiar protection afforded by Law of Property Act 1925, s 74(1). See above, Part V.

⁹¹ See above, para 5.32.

⁹² Eg, *D’Silva v Lister House Development Ltd* [1971] Ch 17.

of a board,⁹³ and could not safely be sealed ahead of the relevant board meeting. We see no objection to this, however, since the whole purpose of the presumptions is to protect a purchaser, and a vendor now always has the option of executing on the basis that delivery will be by its solicitor on completion, so that the document can be recalled before then.

Delivery

The concept of delivery

- 11.57 We have explained that the final requirement for the creation of a deed is delivery.⁹⁴ The very concept of delivery, however, continues to attract criticism. Recent decisions have shown the difficulty of ascertaining the parties' intentions as to delivery.⁹⁵ For example, in a case such as *Longman v Viscount Chelsea*,⁹⁶ where a deed is sealed and returned to the maker's solicitor, but completion does not take place, it might still be necessary to establish whether the deed had in fact been delivered in escrow, or whether it has not been delivered at all, having been returned for delivery by the solicitor. In *Johnsey Estates*, the need to establish intention meant that considerable importance attached to the judge's assessment of the reliability of the individual witnesses, since there was conflicting oral evidence as to what had been intended.⁹⁷
- 11.58 It has recently been suggested once again that delivery is not a useful concept, that it usually creates an obstacle to transactions rather than assisting, particularly in the context of international transactions where delivery is an alien concept in the other jurisdictions involved, and that it should be abolished.⁹⁸ The suggestion is that execution (without delivery) and the completion of the transaction should be sufficient to entitle a third party to enforce the document.⁹⁹ This would put deeds onto a basis much closer to simple contracts.
- 11.59 In our working paper *Transfer of Land: Formalities for Deeds and Escrows*, we also provisionally recommended that the concept of delivery should be abolished.¹⁰⁰ In the light of the responses received, however, our final report accepted that whilst the law of delivery as it then stood was not entirely satisfactory, no changes could be identified

⁹³ See eg, *Barnsley's Conveyancing Law and Practice* (3rd ed 1988), at p 400, describing this as an "absurd result".

⁹⁴ See above, paras 3.2 and 6.2.

⁹⁵ Eg, *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42: see above, para 6.15.

⁹⁶ (1989) 58 P & CR 189.

⁹⁷ See above, para 6.18.

⁹⁸ See "Execution of Deeds by Companies" [1992] 1 LSG 28, publication of a report by a joint working party of the City of London Law Society.

⁹⁹ *Ibid.*

¹⁰⁰ (1985) Working Paper No 93, para 8.2(iv).

which would be sufficiently practicable to warrant their recommendation.¹⁰¹ We concluded that delivery serves the purpose of fixing the date on which a deed takes effect. Without such a concept a deed would take effect immediately on execution, unless express conditions were spelt out in the deed postponing its effect, which would be highly inconvenient, and possibly dangerous.¹⁰² On the whole, we remain persuaded that these arguments in favour of retaining the concept of delivery continue to hold good. We should, however, be interested to know whether attitudes have changed since we last considered the question a decade ago, and to receive views on whether the concept of delivery remains a necessary or useful one.

11.60 The same is true for the concept of escrows. In some respects it is unsatisfactory that the concepts of delivery in escrow and of delivery by a third party continue side by side. When a deed is “executed” by the maker before the transaction is completed, it may still be necessary to establish whether it had been executed either in escrow, or on the basis that it was to be delivered on the maker’s behalf on completion. It will be capable of recall in the latter case, but not the former. Such difficulties are, however, inherent in the law of delivery, and we remain of the view that the scheme established by the Law of Property (Miscellaneous Provisions) Act 1989 was an improvement on what preceded it.¹⁰³ Delivery by the solicitor on completion accords with usual conveyancing practice. At the same time, there will be situations where the parties to a transaction might still wish to make use of the concept of delivery in escrow, as opposed to setting out the conditions in the document. It is easy to underestimate the difficulties which can arise in busy everyday practice, particularly in a somewhat arcane area of the law such as delivery, but we think that it should be perfectly possible for practitioners to make it clear to the client on what basis the deed is sent to them for execution.¹⁰⁴

¹⁰¹ Deeds and Escrows (1987) Law Com No 163, paras 2.7 - 2.10. The ability to authorise delivery by a third party without doing so by deed was, of course, an exception to this statement.

¹⁰² It is possible to envisage the frequent need for last minute alterations to such conditions, and subsequent doubts as to their satisfaction.

¹⁰³ For a further discussion of these points, see Law Com No 163, paras 3.1 - 3.6.

¹⁰⁴ A transfer might, for example, be sent under cover of a letter asking the client “to execute and return it to me for delivery on your behalf on completion”, which would make it clear that “delayed delivery” rather than delivery in escrow was intended.

Presumptions of delivery

- 11.61 It is, however, necessary to look further at the presumptions of delivery in sections 36A(5) and (6) of the Companies Act 1985, to ask what purpose they serve, and how consistent they are with the underlying rules governing delivery.

SECTION 36A(5) OF THE COMPANIES ACT 1985

- 11.62 Our provisional view is that the presumption of delivery in section 36A(5) causes no great difficulty in practice, although we are aware of views to the contrary.¹⁰⁵ It restates a common law presumption where execution is by a corporation, and can be rebutted by appropriate wording in the attestation clause if appropriate. It does not prevent delivery in escrow, although if the maker of the deed wishes to reserve the right to withdraw from the transaction and withdraw the deed, it seems that they will need to take very careful steps to make sure that execution is demonstrably on the basis that delivery will be on their behalf by a third party (for example their solicitor) on completion.¹⁰⁶ On the whole, we think it sensible to have the common law presumption spelt out in this way. There is, however, a lack of consistency in that there is a rebuttable *statutory* presumption of delivery only on execution by a company or other corporation to which section 36A(5) applies. If the presumption is appropriate, it is difficult to see why it should not be extended to all corporations.

SECTION 36A(6) OF THE COMPANIES ACT 1985

- 11.63 Given the difficulties of construction explained above,¹⁰⁷ there seems to be a strong case for removing any possible inconsistency between sections 36A(6) and 74(1), either by extending section 74 to include delivery, or by removing the presumption of delivery from section 36A(6). We invite comments in Part XV, but our provisional view is that the latter is preferable, for four reasons.

¹⁰⁵ Eg, for a suggestion that the presumption of delivery in s 36A(5) undoes much of the “good work” done by the Court of Appeal in *Longman v Viscount Chelsea* (above), by recreating the “old problems of premature delivery and the need to postulate delivery as an escrow”, see Howel Lewis, “Execution of Deeds” (1991) NLJ p 1122.

¹⁰⁶ The decision in *Johnsey Estates* (see above, paras 1.17, 6.18) demonstrates that s 36A(5) might “catch out” a party in this situation. The court held that, had the counterpart lease not been invalid by reason of the blanks left in it on execution, there would have been insufficient evidence to rebut the presumption of delivery (albeit in escrow) on execution by virtue of s 36A(5): transcript, paras D(IV) 1-9. Once the conditions of the escrow were fulfilled, or the only obstacle to their fulfillment was the obstruction of the makers of the deed (para D(IV) 3), the deed would have bound the makers, but for the gaps. As mentioned above, the court did not accept the principle that the statutory presumptions could be rebutted in the circumstances where the negotiations remained subject to contract: see above, para 6.17. Neither did it regard the gaps in the counterpart lease as being sufficient to rebut the statutory presumptions, since there was no evidence that those executing the document took any account of them, or intended that it should not be delivered until they were completed (para C(II) 4). It is perhaps surprising that there is no direct consideration in the decision of the possibility of “delayed delivery” by the makers’ solicitors on completion, but this probably stems from the fact that at the time of execution, all parties believed there to be a binding agreement for lease, so there would have been no contemplation at the time of execution of recalling the counterpart lease.

¹⁰⁷ See above, paras 11.30 - 11.38.

- 11.64 First, the presumption (or rather deeming) of delivery in section 36A(6) is inconsistent with the scheme of “delayed delivery” introduced by the Law of Property (Miscellaneous Provisions) Act 1989, by which delivery can be by the maker of the deed’s solicitor or other legal advisor on completion, and in particular with section 1(5) of that Act.
- 11.65 Secondly, since it operates in favour of a “purchaser”, many of the deeds to which it applies will be transfers, which will be sent to the Land Registry. When a dated transfer deed is received, accompanied by an application for registration of the dealing, it appears to us that the Land Registry could generally be satisfied that the deed had been delivered without the need for further enquiry, or reliance on any statutory deeming of delivery.¹⁰⁸ Indeed, difficulties would be more likely to arise when the deed contained wording designed to rebut any presumption of delivery on execution, which might cast doubt as to whether the deed had been delivered at all.¹⁰⁹
- 11.66 Thirdly, where execution is in accordance with section 36A(6) there is already a rebuttable presumption of delivery by virtue of section 36A(5), although this is of no assistance for corporations outside section 36A.
- 11.67 Fourthly, there is no statutory presumption of delivery equivalent to section 36A(6) when a deed is executed by an individual. Section 1(3)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 simply states that valid execution as a deed by an individual includes a requirement that the relevant instrument is “delivered as a deed by him or a person authorised to do so on his behalf”. The presumption of authority to deliver in section 1(5) applies. On the assumption that these provisions work satisfactorily in practice where the maker of a deed is an individual, it is questionable whether a presumption of delivery is necessary merely because a deed is executed by a company or other corporation.¹¹⁰
- 11.68 It will be seen that even if the decision in *Johnsey Estates* is correct as regards section 36A(6) - so that there is the same irrebuttable presumption of delivery in favour of a purchaser whether the vendor company executes by affixing its seal or by the signature of its officers - it does not follow that any such presumption of delivery must be either necessary or desirable.¹¹¹ Had there not been blanks in the counterpart lease in *Johnsey Estates*, the irrebuttable presumption in section 36A(6) would have enabled the landlord to enforce the counterpart lease once the conditions attached to its execution in escrow had been satisfied. The presumption would have prevented the tenant and

¹⁰⁸ See Practice Leaflet 17, para 4.9.

¹⁰⁹ See above, para 6.22 n 49.

¹¹⁰ This was one of the factors which influenced the court’s view in *Longman v Viscount Chelsea* (above, at p 199) that s 74(1) does not extend to delivery, citing *Williams on Title* (4th ed 1975) pp 656-657 with approval on the point.

¹¹¹ See above, para 11.31.

surety withdrawing from the transaction. But the only reason why it was necessary to invoke the presumption of delivery at all was the failure to conclude a proper binding agreement for lease before the tenant took possession of the property in the first place. Had the purported agreement for lease been valid, the tenant and surety would have been contractually bound to complete the lease. It does not seem to us that the undoubted assistance of the statutory presumption in cases such as *Johnsey Estates* is necessarily a reason to retain it.

Authority to deliver

- 11.69 Before leaving the subject of delivery, we should add something on the question of authority to deliver on behalf of another. Although section 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989 abolished the rule that such authority had itself to be given *by deed*, it remains the case that authority must be given in some form.¹¹² Such authority can generally be obtained quite simply when a deed is sent to the client for execution.¹¹³ It is sometimes suggested that it is advisable to include an express authority in the document to date it and deliver it as a deed, or to obtain a separate letter of authority which can be handed over on completion. This would avoid any dispute on completion as to the existence or extent of the solicitor's or other advisor's authority, and would be useful evidence that the party signing or sealing the document had no intention of an immediate delivery.
- 11.70 Such authority may certainly be included or obtained, adapted as necessary to the circumstances of the transaction,¹¹⁴ but we think that it will generally be unnecessary. It would therefore simply be an unwelcome additional requirement in the great majority of transactions, with the potential to cause difficulties.¹¹⁵ As the law stands, a person receiving a deed executed by a company on completion of a transaction will not usually need further evidence of authority to deliver, because they may rely on one of the presumptions of delivery in sections 36A(5) and (6), on the common law presumption of delivery by a corporation,¹¹⁶ or on the presumption of authority to deliver contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989. In the case of land, once the transfer has been registered at the Land Registry, there should be no further need to establish that there was actual authority to deliver it.

¹¹² See above, para 8.3.

¹¹³ See, eg, the suggestion at n 104 above.

¹¹⁴ It would be inappropriate where a deed was to be handed over on completion by a director of the company, and the form of wording would have to make it clear that delivery had actually taken place, to avoid the need to attach evidence of the identity of the person delivering the deed.

¹¹⁵ Eg, where circumstances change immediately before completion, making the form of wording inapplicable.

¹¹⁶ See above, para 6.4.

11.71 Moreover, we agree with the view that a client which entrusts its solicitor or other legal adviser with a document which has already been signed or sealed impliedly represents that its solicitor or other advisor has ostensible authority to deliver and date the document on its behalf.¹¹⁷ We ask, in Part XV, whether it would be appropriate to put this onto a statutory basis, for example by extending section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 to cover any deed purportedly delivered by a solicitor, licensed conveyancer or duly certificated notary public. Section 1(5) is currently restricted to transactions involving the disposal or creation of an interest in land.

Contracts

11.72 The question of “contracts under seal” has already been considered,¹¹⁸ and we make no further comment on contracts made under hand by persons acting under the company’s authority, or on company contracts generally.

11.73 So far as corporations outside section 36 of the Companies Act 1985 are concerned, the formal requirements for execution of a contract are similar, but section 1 of the Corporate Bodies’ Contracts Act 1960 is perhaps less clear than section 36, distinguishing as it does between contracts which are required by law to be in writing and those which may be made “by parol” (that is orally). Section 1 reflects the drafting of earlier Companies Acts,¹¹⁹ and there seems to be a good case to bring it into line with section 36.

11.74 We have also explained that the Corporate Bodies’ Contracts Act overlaps with the Foreign Companies (Execution of Documents) Regulations, in that both apply to companies incorporated outside Great Britain. We are not aware of this causing difficulty in practice, but it seems undesirable in principle. If the definition of “foreign company” can be expanded for the purpose of the Regulations, as suggested above, then the overlap can be removed.¹²⁰

¹¹⁷ Made by the joint working party of the City of London Law Society in “Execution of Deeds by Companies” [1992] 1 LSG 28. There is an interesting discussion of a solicitor’s authority to bind his or her client in *Johnsey Estates (1990) Ltd v Newport Marketworld Ltd and Others* (see above, paras 1.17 and 6.18), transcript, part C(III), but the question of authority to deliver did not arise, since the deed in question was held to have been delivered by the companies themselves in escrow.

¹¹⁸ See above, para 11.5.

¹¹⁹ Eg, Companies Act 1948, s 32(1): see above, para 7.3 n 4.

¹²⁰ See above, 11.48 - 11.49. See also Part XV below, para 15.29.

Execution of deeds on behalf of corporations

Powers of attorney

- 11.75 The law and practice relating to the execution of deeds and other documents by an attorney on behalf of a corporation has been described in Part VIII. The lack of recent authority on execution by attorneys may be taken to suggest that the current law works reasonably well in practice, or at least that execution in this way is seldom challenged, but it is highly unsatisfactory that it should have to do so despite the technical uncertainties already mentioned.¹²¹ We summarise the difficulties in the following paragraphs.
- 11.76 Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 is open to the criticism that it makes no obvious provision for a deed to be executed by an attorney “on behalf of” the relevant party to a deed.¹²² The same may be said of section 36A of the Companies Act 1985. Other jurisdictions have generally made no such omission in recent legislation.¹²³
- 11.77 There is a lack of clarity as to which formalities govern execution by an attorney. For example, where execution is by an individual attorney on behalf of a company, must the attorney comply with the formalities applicable to execution of a deed by an individual, in particular the requirement for the signature to be witnessed?¹²⁴ Given that a failure to have the signature attested where execution is by an individual will render the deed invalid,¹²⁵ the point is of considerable practical importance.
- 11.78 As regards the Powers of Attorney Act 1971, execution by an individual attorney in his or her own name on behalf of a corporation is widely accepted in practice, but the wording of section 7(1) of the 1971 Act is not entirely appropriate to cover execution in this way.¹²⁶ The provision in section 7(3) that section 7(1) is without prejudice to any statutory direction requiring execution in the name of the estate owner has led to doubts whether this method of execution is effective for a conveyance. We think it is likely that such doubts are unfounded, and they are disregarded in practice, but the relationship between these provisions and section 7(4) of the Law of Property Act 1925 is certainly obscure.¹²⁷

¹²¹ It is difficult to avoid the impression that the provisions originally set out in the Law of Property Act 1925, ss 74 and 123 (replaced by Powers of Attorney Act 1971, s 7) for execution by attorneys, and still substantially in place, appear to be somewhat stretched to accommodate current practice.

¹²² See above, para 8.21.

¹²³ See Appendix B, para B.10.

¹²⁴ See above, para 8.22.

¹²⁵ See eg, *Campbell v Campbell* [1996] NPC 27.

¹²⁶ See above, para 8.13.

¹²⁷ See above, para 8.14.

- 11.79 It is uncertain whether any of the statutory presumptions of due execution and delivery apply when a corporation executes by way of an attorney.¹²⁸
- 11.80 In view of all these points, we think that it would be helpful if there could be a provision setting out how an attorney appointed by a corporation should execute a deed, and we make some provisional proposals in Part XVIII.¹²⁹
- 11.81 It is not entirely clear whether the directors or other governing body of a corporation - as opposed to the corporation itself in general meeting - can grant a power of attorney on behalf of the corporation, in the absence of an express power conferred by the articles or other constitutional document.¹³⁰ This is, however, a question of corporate capacity and management, subject now to sections 35, 35A and 35B of the Companies Act 1985, which is outside our terms of reference, and on which we therefore make no proposals.¹³¹
- 11.82 It has been questioned whether a company may appoint an attorney to execute deeds in the UK, since section 38 of the Companies Act is restricted to the appointment of an attorney to execute deeds outside the UK.¹³² We do not consider such doubts to be well-founded, or that any reform is required, unless it is felt that clarification of the point would be welcomed.

Liquidators, administrators, and receivers

- 11.83 We have also explained that deeds may generally be executed on behalf of a corporation by a liquidator, administrator, or receiver. The difficulties already mentioned in Part VIII are summarised in the following paragraphs.

LIQUIDATORS

- 11.84 We have explained that there is uncertainty as to the way in which a liquidator should execute a deed on behalf of a company which has no common seal.¹³³ Any such uncertainty is undesirable, and we provisionally recommend in Part XVIII that it should be removed.¹³⁴

ADMINISTRATIVE RECEIVERS

¹²⁸ Companies Act 1989, ss 36A(5) and (6) and Law of Property Act 1925, s 74(1): see above, paras 8.23 and 11.35.

¹²⁹ See below, para 18.9.

¹³⁰ See above, para 8.5.

¹³¹ See above, para 5.3.

¹³² See above, para 8.9.

¹³³ See above, para 8.30.

¹³⁴ See below, para 18.11.

- 11.85 The drafting of section 42(1) of the Insolvency Act 1986 has led to suggestions that the powers of an administrative receiver, including the ability to execute deeds, derive from the debenture as a matter of contract, and so are subject to the terms of the chargor company's articles, and may not survive liquidation of the chargor company. For the reasons given in Part VIII, we do not consider this to be correct, but we invite comments in Part XVIII.¹³⁵

NON-ADMINISTRATIVE RECEIVERS

- 11.86 The main difficulty with execution by non-administrative receivers is the technical uncertainty surrounding the law on the execution of a deed following the liquidation of the chargor company.¹³⁶ We see no policy reason why such a receiver should not continue to be able to dispose of assets over which security was validly created, and to do so in the name of the company, notwithstanding the liquidation of the chargor company. We provisionally recommend in Part XVIII that the ability to do so should be clarified.¹³⁷

Facsimile seals and signatures

- 11.87 Finally, we return to the question of what should be necessary to constitute sealing and signature, which was considered in Part IX. We have mentioned that one of the functions of formalities for deeds is to provide evidence of authenticity.¹³⁸ This function must always, however, be balanced against the inconvenience and cost which formality requirements may entail, particularly where a company has to execute large numbers of deeds.
- 11.88 The purpose of requiring a deed to be signed by an individual, or by two directors, is to have some personal authentication of the document, and the same can be said about the affixing of a corporation's seal. We are inclined to think that personal signature should continue to be a requirement. The personal signature of two officers, or the attestation of the seal by two officers also serves what we have referred to in Part II as the management aspect of the cautionary function of formalities, by giving a company a measure of control over the obligations which it enters into by deed. As explained in Part IV, so long as the articles allow it, this would not prevent a company from authorising a relatively wide class of officers to attest the affixing of the seal, if need be for certain categories of document. Whether section 36A(4) should be widened to allow execution by the signature of officers other than the directors or secretary is dealt with in Part XIV below.¹³⁹

¹³⁵ See below, para 18.13.

¹³⁶ See above, para 8.38.

¹³⁷ See below, para 18.15.

¹³⁸ See above, para 2.18.

¹³⁹ See below, para 14.13.

- 11.89 We have explained that the validity of a deed is uncertain where it has been purportedly executed by a company by means of a seal which does not have the company's name engraved upon it.¹⁴⁰ It would be preferable if this were to be clarified, but, since execution in this way is a criminal offence, this raises issues which go beyond the scope of this Paper. Such clarification would also offer no practical assistance to companies and their officers, since clearly they could not be advised to execute in a way which amounted to a criminal offence whatever the validity of the resulting document.
- 11.90 More to the point is whether the requirement for the name to be engraved on the seal should be modified or abandoned, and we invite views on this in Part XIV.¹⁴¹

¹⁴⁰ See above, para 4.14.

¹⁴¹ See below, para 14.18.

PART XII OPTIONS FOR REFORM - INTRODUCTION

- 12.1 In the remaining Parts of this Paper we set out options for reforming the law governing the execution of deeds and documents by companies and other corporations, and we invite comments.
- 12.2 We begin by asking in Part XIII whether the present formality requirements allow deeds to be distinguished adequately from other documents. Our main concerns are with the status of contracts made by corporations under seal, and the related question of whether the “face-value” requirement of a deed, introduced in 1989, is working adequately in practice. This raises issues which are equally relevant where the maker of a deed is an individual.
- 12.3 The two following Parts invite detailed comments on the current regime for execution by companies. In Part XIV we raise general issues, principally whether the methods of execution permitted by section 36A of the Companies Act 1985 are appropriate, or could be improved upon. We also invite views on the question of facsimile seals and signatures. In Part XV we make proposals for more detailed changes to section 36A. The intention is to see whether it is possible to remove both the uncertainties and difficulties within the section, and also the inconsistencies with other statutory provisions. Any recommendations which we eventually make about section 36A may clearly be affected by views expressed to us on the more general issues raised in Part XIV, but we think it right in the context of this Paper to invite detailed comments on section 36A in addition to raising these wider questions. If there is no consensus for any more general reform, this will allow us to consider specific changes to section 36A and the other statutory provisions with which it inter-relates.
- 12.4 Having invited views on the ways in which companies should execute deeds, we go on to ask in Part XVI whether, and to what extent, these rules should be extended to other types of corporation, to achieve greater consistency and uniformity in the law.
- 12.5 Part XVII looks briefly at contracts made by corporations, but again our recommendations are likely to be influenced mainly by views expressed on the more general issues raised in Part XIII as to how simple contracts should be distinguished from specialties.
- 12.6 Part XVIII addresses the difficulties relating to the execution of deeds on behalf of a corporation by an attorney, liquidator, administrator, or receiver.
- 12.7 Finally, Part XIX contains a summary of the matters on which we would welcome comments.

PART XIII

THE DISTINCTION BETWEEN DEEDS AND OTHER DOCUMENTS

Introduction

- 13.1 We have explained that it remains important to be able to distinguish between deeds and other documents. Deeds are still necessary for certain transactions, and differ from other documents in their legal effect and construction.¹ Before 1989 all deeds had to be executed under seal.² It seems that all contracts under seal were deeds, whether made by an individual or a corporation, but some other types of instrument under seal (for example share certificates) were - and still are - not deeds. Since 1989, however, whether an instrument such as a contract is a deed is no longer determined by whether it is under seal. An instrument is not a deed unless it is both executed as a deed, and the intention that it should be a deed is clear on the face of the document.
- 13.2 It may be that these rules are seen to be working satisfactorily in practice, but we mentioned in Part XI that there appears to be potential uncertainty on a number of fundamental points. Moreover, our previous work in this area has concentrated on the execution of deeds by individuals, where sealing is now neither generally required nor practised.³ Corporations may still, of course, execute deeds, and make contracts under seal, and there has been no comprehensive review of how the changes introduced in 1989 have affected corporations. In the circumstances, we wished to give an opportunity for views to be expressed.

Does the “face value” requirement adequately distinguish deeds from other documents?

- 13.3 Given that a seal is no longer generally required for a deed, we remain of the view that there must be something else to distinguish deeds from other documents. The present requirement, set out in section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, is that the intention to create a deed must be clear from the face of the document, whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise. The requirement is easily fulfilled, for example by stating that the document is “executed as a deed”. Where the document does not call itself a deed, the question is to be determined by looking at the document as a whole. That has the advantage that - short of rectification - the intention to create a deed is not thwarted by the accidental omission of the word “deed” in a document which is otherwise clearly intended to be, say, a conveyance or lease, and which may have been executed under seal in the case of a corporation.

¹ See above, Part II.

² See above, para 3.2.

³ See above, para 1.2 n 2 and 3.6 n 17.

- 13.4 On the other hand, the fact that section 1 does not prescribe any form of attestation clause, or make it essential that the term “deed” is used means that there may be doubts in practice as to what is sufficient. We have given two examples. The first is whether the necessary intention is shown if the document merely calls itself by a description of instrument for which a deed is required.⁴ The second is whether the mere fact that a seal is affixed is sufficient.⁵ We have not reached a firm view whether the requirement for intention to be clear from the face of the document adequately serves its purpose in its present form, and would welcome comments. The choice is broadly whether to leave the requirement in its current form, which is flexible but somewhat uncertain, or to make it more specific - for example by prescribing a mandatory form of execution clause or requiring a specific reference to the instrument being a deed.
- 13.5 Even if no other change is made, however, we provisionally recommend that sections 36A(5) and (6) of the Companies Act should be amended to bring the wording used more fully into line with section 1(2)(a).⁶ Either the words “(whether by describing itself as a deed or expressing itself to be executed [or signed] as a deed *or otherwise*)” (our emphasis) are used in each of the sections or they should be used in neither.⁷

Specialties and contracts under seal

- 13.6 We have explained that the term “specialty” is used to describe a number of different instruments or obligations. We do not propose here that the term should be replaced, which would take us into areas beyond the scope of this Paper, but it is important for present purposes that it is clear what categories of document it includes. For the reasons explained in Parts III and XI, our understanding is that an instrument (or any obligation which it creates or confirms) is generally only a specialty if it is a deed (or is made by deed).⁸ If we are also correct that, after 1989, a document is not a deed merely because it has been executed under seal, then it follows that there are now two categories of instrument which might be called contracts under seal, those which are deeds (and hence also specialties and true contracts under seal in the traditional sense of the phrase), and those which are not.⁹

⁴ See above, para 11.13.

⁵ See above, para 11.8.

⁶ See above, para 11.15.

⁷ The words “or signed”, which appear in s 1(2)(a), should probably be omitted from s 36A, because they seem inappropriate given that a deed executed under s 36A is expressed to be executed “by the company”, even when s 36A(4) is used.

⁸ See above, para 11.6. For an exception, see Companies Act 1985, s 14.

⁹ Compare the position in Australia, where it is well established that it is possible to have a binding contract executed by a corporation under seal which is not a deed: see above, para 11.7.

- 13.7 This means, for example, that two similar looking contracts may have different legal effects. For example, if a building contract is executed under seal as a deed it carries a twelve year limitation period. If the same contract (supported by consideration) is executed under seal but is not a deed, the limitation period is six years.¹⁰ Moreover, until 1989, it seems that all contracts under seal were deeds, and the term “contract under seal” remains in current judicial use as an example of a specialty.¹¹ This appears to us to prompt two related questions, upon which we invite views.

Should a specialty include a deed and also any contract under seal?

- 13.8 Our provisional view is that a specialty should - in the context of deeds and documents - remain limited to deeds. That accords with the principle that the particular status of a specialty derives from, and is justified by the fact that it is an instrument executed in solemn form. If it is indeed now possible to have a contract which is sealed by a company but which is not a deed, and such a contract is a specialty, then it would be necessary to determine the status of such a document. It would attract a twelve year limitation period, and be enforceable though gratuitous, but what other attributes of a deed would it have? It seems best to avoid this situation by restricting specialties to deeds.

Should any contract executed by a corporation under seal be a deed?

- 13.9 The possible confusion mentioned above would be avoided if all contracts under seal were made deeds, as appears to have been the position before 1989. This could be done within the present framework by providing that the intention to create a deed was shown by sealing (or, of course, by execution without a seal in accordance with section 36A(4)).¹² Such a contract would, of course, still need to be delivered. It would also overcome the difficulty that the current form of transfer prescribed by the Land Registry for a corporate transferor does not describe itself as a deed.¹³ However, we see four objections to this. First, it would attach an importance to the seal which is at variance with the reforms made to the law of deeds in 1989, and undermine the “face-value” requirement. Secondly, whatever the position before 1989, some companies - particularly small ones - may find it convenient to affix the seal to all manner of documents, without wishing to make them deeds. Thirdly, the use of seals by individuals had become wholly artificial by 1989, and any suggestion that a document executed under seal by an individual should acquire a special status by virtue of being sealed would conflict with the thinking behind section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Any change would therefore have to be limited to corporations, which would still have the alternative of making simple contracts

¹⁰ See above, para 2.9.

¹¹ See above, para 2.10 n 22.

¹² This may in fact remain the position if the decision in *Johnsey Estates* is correct in this respect: see above, para 11.8.

¹³ See above, para 11.13 n 18.

under hand by the signature of an authorised officer or other agent. This would, however, reduce the degree of uniformity between corporations and individuals in the creation of a deed. Fourthly, as mentioned above, if a specialty is to be created, any doubts can very simply be avoided by the contract expressly saying that it is “executed as a deed”. In the light of these points, as an alternative, provision could be made that an instrument is not a deed merely because it is executed under seal. Our view, which is very much a provisional one at this stage, is in favour of such an alternative.

OPTIONS FOR REFORM

- 13.10 (a) **Should the “face-value” requirement in section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 be made more specific? If so, would you favour a requirement that an instrument is not a deed unless:-**
- (i) it expressly describes itself as a deed; or**
 - (ii) it contains a prescribed form of attestation clause?¹⁴**
- (b) **Do you agree with our provisional view that the “face-value” requirement as expressed in sections 36A(5) and (6) of the Companies Act 1985 needs to be harmonised with section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989? If so:-**
- (i) Assuming there to be no other changes in the face-value requirement, should this be done by adding after the words “which makes it clear on its face that it is intended by the person or persons making it to be a deed” the words “(whether by describing itself as a deed or expressing it to be executed as a deed or otherwise)”?¹⁵**
 - (ii) Alternatively, should the words “(whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)” be omitted from section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989?**
- (c) **Do you agree with our provisional view that the term “specialty” needs to be clarified in the context of deeds and other documents? If so, would you favour:-**
- (i) a provision that no instrument (or obligation created or confirmed in an instrument) is a specialty unless it is a deed,¹⁶ or**

¹⁴ This approach would necessitate consequential amendments to section 57 of the Law of Property Act 1925.

¹⁵ We have omitted the words “or signed”, which appear in s 1(2)(a) because they seem inappropriate given that a deed executed under s 36A is expressed to be executed “by the company”, even when s 36A(4) is used.

¹⁶ If this is favoured in principle, considerable care would be needed to preserve specialty obligations which did not derive their status by virtue of being contained in a deed, for example where an obligation is expressly made a specialty by statute.

(ii) a provision that a specialty should include all deeds and any contract made by a corporation under seal (or in accordance with section 36A(4)), whether or not a deed; or

(iii) some other method of clarification, and if so what?

We are provisionally in favour of option (i) above.

(d) Do you agree with our provisional view that the relationship between contracts under seal and deeds also needs to be clarified? If so, would you favour:-

(i) making all contracts executed under seal by a corporation deeds (for example by amending section 1 of the Law of Property (Miscellaneous Provisions) Act 1989) so that intention to create a deed is sufficiently shown in the case of a company or other corporation by execution under seal (and also by execution without a seal but in accordance with section 36A(4) by a company, and any other type of corporation to which this method of execution might be extended); or

(ii) making it clear that the “face-value” requirement is not satisfied merely because an instrument is executed under seal; or

(iii) some other form of clarification, and if so what?

We are provisionally in favour of option (ii) above, although we see some disadvantages to this.

(e) Should there be any other change in the present rules governing what is required to make an instrument a deed?

13.11 Whether there should be any change in these basic rules for deeds depends in large part on experience of them in operation since 1989. It may be that practitioners have simply adjusted so that in any case where, traditionally, a “contract under seal” would have been required, the document will be prepared stating that it is “executed as a deed”, implicitly recognising the change introduced by the new face-value requirement. If it is, indeed, the position that execution under seal is sufficient, in the case of a corporation, to satisfy the face-value requirement of intention to create a deed,¹⁷ then it may be felt by practitioners that the present law is operating satisfactorily. This would, however, continue to give the use of a corporation’s seal a significance which sits oddly with the reforms of 1989. Our provisional view is that there are, at the least, potentially serious technical uncertainties, which could usefully be removed. So far as contracts under seal are concerned, if our provisional views are accepted (options (c)(i) and (d)(ii) above), a company would be able to contract under seal, but that contract would not be a deed, nor a specialty, unless there was some additional indication that it was intended to be a deed: it might, for example, simply say that it was “executed as a deed”. The “face-value” requirement would then become all important. The disadvantage with this is that it would leave a situation where some contracts made

¹⁷ As was held to be the case in *Johnsey Estates*: see above 11.8.

under seal were deeds, whilst others were not.

Defective deeds

13.12 As we mentioned in Part II, we have also been asked to consider the question whether a document which was intended to be a deed but which is not executed with the necessary formality can nonetheless take effect as a contract.¹⁸ For example, a document may be drawn up as a deed, and describe itself as a deed, but be signed by only one director. It cannot take effect as a deed - because the signature of two directors is required for a deed under section 36A(4) of the Companies Act 1985 - but should it take effect as a simple contract under hand? We welcome views on this, and would be interested to learn of instances where the problem has arisen in practice. It has been suggested to us that a rule might be introduced to the effect that an instrument which is expressed to be a deed (but which is not required by law to be a deed), which is not properly executed as a deed, but which has all the necessary ingredients for a simple contract, will have effect as a contract, despite the fact that this will have different legal consequences to those intended.

13.13 Our provisional view is against recommending any such rule. We do not believe that there is any principle under the present law that an instrument which was intended to be a deed cannot take effect as some other kind of instrument. Indeed, there is authority that it can.¹⁹ We doubt, however, whether it would be appropriate to specify that such an instrument had effect as an instrument under hand in every case. An instrument may fail to take effect as a deed for a number of reasons, and in a variety of circumstances. For example it may not make it clear on its face that it is intended to be a deed. It may not be properly executed, or it may be defective because it has been altered after execution. If signed by only one director, that may have been the only signature, or there may have been a second signatory who lacked authority to sign. Execution may or may not have been authorised by the board. There may be circumstances where the company is estopped from denying that the instrument has been validly executed as a deed. Each of these may have different legal consequences, and we are inclined to leave the position to the present law to be determined in each case. In many cases it seems likely that the issue will come down to whether the person or persons purporting to execute the instrument as a deed had authority to bind the company to a simple contract, and any attempt to lay down a general principle might cause a confusing overlap with sections 35A and 35B of the Companies Act 1985 and the general agency principles, which deal with the powers of the directors to bind the company.²⁰

13.14 **Our provisional view is against recommending that there should be a rule of**

¹⁸ See above, para 2.16.

¹⁹ See above, para 2.16 n 37.

²⁰ See above, Part V.

law that an instrument which fails to take effect as a deed may nonetheless still have effect as a contract or other instrument under hand, but comments are invited.

PART XIV

THE METHOD OF EXECUTION OF DEEDS AND DOCUMENTS BY COMPANIES

Method of Execution

- 14.1 In this Part, we address a number of general issues on the way in which deeds and other documents are executed by companies. The Companies Act 1989 permitted companies for the first time to execute deeds by the signature of two officers, in addition to the traditional method of execution under the common seal. The first question is whether, in the light of experience since 1989, there should be any change in the basic methods of execution of a deed which are available to a company. For example, should execution under the common seal be abolished, or execution be permitted by the signature of a single director? The second question is whether there should be any change in what is required in order to comply with the permitted methods of execution, and in particular, whether the affixing of an engraved seal and/or personal signature are still appropriate.

The advantages of execution under seal

- 14.2 Execution under the common seal has the following advantages:-
- (a) Because it carries the company's name and usually also its registered number, execution under the common seal probably offers a greater guarantee of authenticity than execution by the signature of two officers alone. There is still a sense in which the common seal represents the separate legal personality of the company, and the "ritual" of a director and the secretary affixing the seal and signing sits well with the concept of execution in solemn form.¹
 - (b) We understand that many companies still prefer to execute deeds under seal, and it seems likely that - apart from ingrained habit - this is because execution under seal generally serves what we have described as the managerial aspect of the cautionary function of formalities better than the signature of two officers. The company may make arrangements for the custody and use of the common seal which assist in controlling the obligations which it enters into by deed.
 - (c) The ability to execute under seal is likely to assist where documents are executed in this country for use abroad in a jurisdiction which still requires execution under seal.
 - (d) Where execution is under seal, the articles may extend the range of those authorised to "attest" the sealing to categories of officers or employees other than directors and the secretary.² Equally, they may provide that attestation is not required, or that it may be by a single officer. This may be particularly helpful where the company has large numbers of deeds to execute, perhaps of a routine nature, and directors are either not always available, or it is inappropriate to trouble them with

¹ There is an obvious contrast to execution by individuals, where the use of wafer seals had come to serve little or no purpose.

² As to whether such signature should be described as "attestation" see above, para 4.8.

execution in every case. Unless the categories of those authorised to execute deeds by signature in accordance with section 36A(4) were to be widened, the abolition of execution under seal might cause difficulties for such companies.

The advantages of execution without sealing

- 14.3 The following points, however, favour execution other than under seal:-
- (a) Some companies may regard the need to use a seal for execution as an administrative burden, as opposed to a useful means of controlling obligations entered into by deed. There is also something undoubtedly archaic about the ritual of affixing the seal to a document, which sits oddly with the advances made in telecommunications and computing in recent decades.
 - (b) Now that a document will not be a deed unless this is clear on the face of the document, it may be said that execution under seal no longer serves any necessary function in distinguishing deeds from other documents.
 - (c) Execution in this way brings the rules for execution by corporations closer into line with those for execution by individuals, and also with other jurisdictions where the concepts of a deed and of execution under seal are not recognised.
 - (d) Many companies are now incorporated without having a common seal. Re-imposing a requirement to execute under seal would cause serious inconvenience to such companies, which would have to amend their articles and acquire a seal.
 - (e) Where execution is under seal, and a number of associated companies are parties to the same deed, each must affix its own seal, and, typically, this must be attested by two directors, or a director and secretary for each company. In practice, those attesting the affixing of the seal sign directly below or beside the seal. If the same two people are directors of each company, they must sign separately for each company. However, if the deed is executed by the mere signature of the officers, in reliance on section 36A(4) of the Companies Act 1985, this seems to open up the possibility that those persons may sign once only, but in their capacity as director of each company.³

Our provisional view

- 14.4 There are therefore good arguments - to put it at the very lowest - for allowing companies to continue to execute without a seal. Our enquiries do not suggest that the ability to execute without using the common seal has led to any substantial increase in

³ A single signature by a person in his or her capacity as director or secretary of more than one company might be effective even when made for the purpose of attesting the seals of each company. We understand, however, that the practice of what has been called "bulk execution" has only arisen since 1989, and is clearly more appropriate where execution is not under seal. The practice might be considered incompatible with the concept of the deed being the "act" of each company, but it would certainly appear permissible on the particular wording of s 36A(4). It will require careful drafting to make it clear that the deed is executed by each company, and that those signing have the requisite capacity for each company. Despite these points, there may be considerable administrative convenience in allowing each director to sign once only where there are many companies with common directors (eg, when a parent and its subsidiary companies are all required to execute a single mortgage debenture), and any concerns about whether each company has approved the execution could be overcome by appropriate board minutes.

fraud.⁴ However, we would of course be interested to learn of any cases where company deeds have been forged by the purported signature of two officers. Assuming that there has been no substantial increase in the forgery of company deeds, we can see no real case for reversing the change made in 1989, and re-imposing a requirement for execution by companies to be only under seal.

14.5 The existence of two methods of execution (namely with or without a seal) certainly has the potential to cause confusion, and may be seen as representing in some ways an uneasy compromise between the approaches of common law and civil law jurisdictions to execution. The abolition of execution under seal would probably result in a more modern and uniform set of rules for execution of documents. However, the advantages suggested above for execution under seal lead us to think that it would be inappropriate to recommend abolition without first establishing that there was very strong support for such a course. Given the point mentioned in paragraph 14.2(d) it is likely that abolishing the ability to execute under seal would have to be accompanied by an expansion in the categories of persons authorised to execute by signing, which might also cause difficulties, for reasons given below.⁵ It might also be difficult to extend such a reform to other types of corporation.⁶

14.6 **Do you agree with our provisional view that, despite its shortcomings, the present “dual regime” should be retained, so that companies may continue to execute deeds either under the common seal or by the signature of two officers?**

Method of execution without a seal

14.7 The next issue is whether the method of execution without a seal adopted by section 36A(4) is the appropriate one. The options are broadly:-

- (a) No change, so that execution without using the seal will continue to be by the unattested signature of two directors or of the secretary and a director.
- (b) Widening the range of those eligible to sign beyond directors and the secretary.
- (c) Allowing execution by a single signatory.

Extending the range of those authorised to sign

14.8 It might be convenient for certain companies to permit execution by the signature of officers or employees other than the secretary and directors, for example by extending

⁴ We are particularly grateful for the assistance received from HM Land Registry and the Council of Mortgage Lenders on this issue.

⁵ Para 14.8.

⁶ See below, paras 16.2 - 16.3.

this to “authorised signatories”.⁷ We are inclined, however, to think that this would produce too much uncertainty as to the identity of those authorised to sign, and the potential for greater forgery of deeds, unless accompanied by additional safeguards. Director and secretary⁸ are recognisable offices, and details of those appointed must be sent to the Registrar of Companies, and are available for public inspection.⁹ This arrangement could be expanded into a central registry of authorised signatories, but we doubt that the expense and inconvenience to companies would be justified. An alternative would be to leave it to those dealing with companies to ask for confirmation of those authorised to execute deeds where the signatories are other than a director or the secretary.¹⁰ However, this would probably lead bodies such as the Land Registry to require the production of evidence of authority where the signatories were other than those of a director or secretary, unless the presumptions of due execution were also expanded to include such signatories. On the whole, we doubt that the categories of signatories permitted could readily be expanded without introducing unwanted additional steps into standard transactions (such as the need to obtain evidence that a particular signatory was authorised to execute) which would be unwelcome in practice.

Two signatures or one?

14.9 It may be said that it no longer serves any purpose to require two signatories to execute a deed. After all, a foreign company may now execute a deed by a single signatory,¹¹ and a company may enter into a simple *contract* under hand committing it to massive obligations by the signature of a single director. A simple contract may also, it seems, specify a limitation period longer than six years,¹² and problems stemming from any lack of consideration can usually be overcome by inserting nominal consideration. Moreover, where a deed is used the requirement that a document must make it clear on its face that it is a deed means that the use of a seal or two signatures is no longer the only formality distinguishing it as a deed.

14.10 We see considerable force in this, and have not reached any firm view on whether the

⁷ Eg, in the situation mentioned above in para 14.2(d). There is also a parallel with the way in which foreign companies may execute documents by the signature of a single person acting under the authority of the company.

⁸ As to the position of a deputy secretary, see below, para 15.13.

⁹ See above, para 5.21. Particulars of the directors and secretary are, of course, also included in a company’s annual return.

¹⁰ It is already common for large companies to carry lists of authorised signatories, often subdivided between those authorised to sign or execute for different categories or values of transactions, and to produce certified copies of the lists on request.

¹¹ See above, para 4.30.

¹² *Halsbury’s Laws of England* (4th ed 1979) Vol 28, para 644; *Encyclopaedia of Forms and Precedents* (5th ed 1994) Vol 5, para 140 ; Law Reform Committee’s Twenty-First Report (Final Report on Limitations of Action)(1977) Cmnd 6923 p 21.

requirement for two signatures should be reduced. However, the points made above are perhaps better directed to the question whether it remains appropriate for the law to distinguish between deeds and documents under hand, and that goes beyond our remit in this Paper. So long as there is such a distinction, there remains a case for requiring a method of execution which differs from that used for execution of a simple contract under hand. This additional formality could be served by permitting a company to execute a deed by the signature of a single director, so long as this was attested. However, that would not serve what we have referred to as the management aspect of the cautionary function of formalities so well as execution under seal, or requiring the signature of two officers, since there would in practice be no check on the ability of a single director to bind the company to a deed. It would also be inconsistent with the provisions for execution in the articles of most existing companies (although a similar objection could be made about section 36A(4) as it stands).

- 14.11 There is also an argument for permitting execution by the signature of a single director in the limited case of a single member company with a sole director, for example where a small business has been incorporated, and the shares are wholly owned by the sole director.¹³
- 14.12 If there is to be any change, then it would also be necessary to amend the presumption in section 36A(6) accordingly. We have not addressed how many signatures should be needed to attest the affixing of a company's seal, because there is no statutory requirement in this respect. Clearly, however, if it was felt appropriate to allow execution by the signature of a single officer, then section 74(1) of the Law of Property Act 1925 would also need to be amended to apply where execution was under seal attested by a single director or the secretary.

OPTIONS FOR REFORM

- 14.13 (a) **Should there be any change in the method of execution by a company without using its common seal set out in section 36A(4) of the Companies Act 1985?**
- (b) **If so:-**
- (i) **Should the categories of permitted signatories be expanded?**
- (ii) **If your answer to (i) is "yes", should there be additional safeguards, such as a requirement for details of authorised signatories to be lodged in a central registry which is open to inspection (for example Companies House)?**
- (iii) **Should execution by the signature of a single officer be permitted?**

¹³ See the Companies (Single Member Private Limited Companies) Regulations SI 1992 No 1699. Specific provision for execution by such companies (called "proprietary companies") is proposed in Australia: see the draft Second Corporate Law Simplification Bill 1996.

- (iv) **If your answer to (iii) is “yes”, should there be any additional requirement, for example attestation?**
 - (v) **If your answer to (iii) is “yes” should execution by the secretary alone be permitted, or should there be a requirement that where there is a single signatory, it must be a director?**
 - (vi) **Should execution by the signature of a single director be permitted in the limited case of a single member company with a sole director?**
- (c) **Should it be permissible for a person who is a director or secretary of more than one company to sign a deed once only, in their capacity as director or secretary of each relevant company, when more than one such company is a party to the deed?¹⁴**

Our provisional view is against option (b)(i) above. We think that it would be unsafe to extend the categories of permitted signatory without introducing additional requirements, which might in themselves be unduly burdensome. We see arguments both for and against permitting a deed to be executed by the signature of a single director (option (b)(iii)), and for option (c), but have not reached a view at this stage.

The use of facsimile seals and signatures

- 14.14 We invite views on whether the current requirement that the execution of deeds and other documents should be by affixing an engraved seal or the personal signature of its officers is too burdensome for companies and other corporations, or too uncertain in operation.

Signature

- 14.15 We have explained in Part XI that our provisional view is against any relaxation of the requirement for personal signature when a document is executed, whether it is by way of signature or attestation.¹⁵ We can see that there are, however, certain categories of instrument which are required to be executed in large numbers, where it might be convenient and appropriate to relax these rules. Share certificates and deeds of discharge of a registered charge are obvious examples.¹⁶

The common seal

- 14.16 We have suggested that the purpose of the requirement that the name of a company should be engraved on its common seal is so that a physical impression is left on the document when it is used. Our provisional view is that so long as corporations are permitted to execute under seal this requirement serves a useful purpose. A physical

¹⁴ See above, para 14.3(e) for a discussion of execution in this fashion.

¹⁵ See above, para 11.88.

¹⁶ See above, para 9.1.

imprint bearing the company's name will often, though not always, be a clearer and more permanent record than, for example, a print made in ink, which may fade or smudge. Moreover, we suspect that some companies would prefer the degree of control given by having a single engraved seal, as opposed to a rubber stamp. The requirement for an engraved seal also ensures relative certainty as to what suffices for sealing. A provision that execution must be in a form "leaving a physical impression on the document", for example, would be more uncertain. We are, however, sympathetic to companies which have to execute large numbers of documents, and would like the freedom to do so by some means which provides a reasonable degree of authenticity and permanence other than affixing an engraved seal. We have not yet had an opportunity to investigate the range of options which are available to companies - such as laser printers which can print a seal which leaves a physical impression on the document - and would particularly like to receive views on the subject. We would also welcome views on whether companies would find it helpful to have freedom to have any number of duplicate seals.

- 14.17 Overall, our impression is that the difficulties caused by the requirement for an engraved seal can, to a large extent, be overcome by the flexibility given by the ability to determine who should affix and attest the seal, and of course now to execute without using a seal. We think it likely that the main practical difficulty is only where large numbers of instruments of a routine nature have to be executed. We are reluctant to suggest that there might be different rules for different classes of document, but we wonder whether an exception might be justified in certain very limited cases, for example share certificates and deeds of discharge of registered charge. Specific provision might, for example, be made allowing flexibility in the execution of such instruments.¹⁷

OPTIONS FOR REFORM

- 14.18 (a) **Should the requirement in section 350(1) of the Companies Act 1985 that the name of a company must be engraved on its seal be abolished?**
- (b) **If so, should this be replaced by a requirement that any method of sealing used by a company must leave a physical impression?**
- Our provisional view is that the requirement for a seal to be engraved serves a useful purpose, so long as companies are permitted to execute**

¹⁷ Land Registration Rules, SR & O 1925 No 1093, r 151 (as substituted by SI 1990 No 2613) provides for the discharge of a registered charge to be in a prescribed form (Form 53), but that the Registrar "shall be at liberty to accept and act upon any other proof of satisfaction of a charge which he may deem sufficient". The permissible methods of execution of a Form 53 are set out in the Rule, and, in the case of a corporation other than a registered company, include signature by such person as the Registrar is satisfied has authority to bind the corporation to the discharge of the charge under its constitution: see eg, Building Societies Act 1986, Sched 4, para 2. It is understood that the Land Registry are sometimes prepared to accept the execution of Forms 53 by facsimile execution by prior arrangement with the mortgage lender, in reliance on r 151.

under seal, and should remain as a general requirement.

- (c) Is it necessary or appropriate to make statutory provision for a company to have one or more duplicate seals?**

We have not reached a provisional view at this stage, and would welcome hearing further about current practice in this respect.

- (d) Should there be any relaxation in the requirement for personal signature in the case of companies, and if so what? Should any such change be extended to execution by individuals?**

We are provisionally against any such relaxation.

- (e) Should there be a relaxation in the requirements for execution of particular classes of instrument, and if so, which classes of instrument would you suggest?**

Whilst reluctant to see different rules for different types of instrument, we would welcome hearing views, particularly if the present requirements are considered impracticable for certain types of document.

- (f) Should there be some other change in the rules as to what constitutes signature and sealing by companies, and if so what?**

PART XV SPECIFIC PROPOSALS FOR THE REFORM OF SECTION 36A OF THE COMPANIES ACT 1985 AND SECTION 74(1) OF THE LAW OF PROPERTY ACT 1925

Introduction

- 15.1 As we explained in Part XII, there may be no consensus on the options for reform set out in the preceding Parts. Even if that is so, however, there may still be a case for making more detailed changes to section 36A of the Companies Act 1985 (together with the Foreign Companies (Execution of Documents) Regulations which adapt section 36A for foreign companies), and in this Part we invite views on such changes. Given the degree of overlap with section 36A, this may also involve the amendment of section 74(1) of the Law of Property Act 1925, and, to a lesser extent, section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. These detailed options are clearly subject in some respects to views expressed on the more general issues raised in Parts XIII and XIV above. In particular, a number of detailed changes to section 36A(4) have already been considered in Part XIV.¹

The meaning of the term “executed”

- 15.2 We have explained that the term “executed” excludes delivery when used in section 36A, but that the phrase “executed as a deed” includes delivery when used in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.² Our provisional suggestion is that section 36A should be amended, for the sake of consistency, to make it clear that a document is validly executed as provided by the section, but that such a document is *executed as a deed* only if it is:-
- (a) executed in either of the ways permitted by section 36A (namely by affixing the seal in accordance with section 36A(2) or by the signature of two officers in accordance with section 36A(4)); *and*
 - (b) delivered.
- 15.3 The advantage of such wording is that it makes it clear that a document only requires delivery where it is to be a deed. Section 36A presently allows for the “execution” of documents other than deeds, and it would be wrong to leave any suggestion that delivery is required where a document is not a deed.³
- 15.4 **(a) Should section 36A and/or section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 be amended to ensure consistency**

¹ See above, paras 14.7 - 14.12.

² See above, para 11.21.

³ That might be the case if s 36A were to be amended to provide simply that a company *executes a document* by eg, sealing and delivery, as opposed to referring to *execution as a deed*.

in the use of the term “executed”?

- (b) If so, do you agree with our provisional suggestion that section 36A should be amended to provide that execution “as a deed” is by execution and delivery?**

Execution in accordance with the articles

15.5 We have also explained that section 36A(2) might be taken to suggest that a company may execute a document by affixing its seal without complying with any additional requirements in the articles, such as the need for the seal to be attested by two officers, although we do not think that the section has this effect.⁴ There is, of course, a case for saying that section 36A(2) should override the articles in this way, much as appears to be the case with section 36A(4), but that would mean a fundamental departure from the general rule that a corporation must execute in accordance with its constitutional requirements. If there is agreement that this would be undesirable, it could be avoided by amending section 36A(2) to say that execution is by *affixing the common seal in accordance with the articles of association*. A possible disadvantage, however, is that such wording might cast doubt on the ability of a person dealing with a company to rely on sections 35A and 35B of the Companies Act, and create an apparent inconsistency with the provisions of section 74(1) of the Law of Property Act 1925, which, as mentioned above, currently prevails if it is inconsistent with the articles.⁵ This might be avoided by an express saving provision, if it is considered necessary, or possibly by replacing the reference to *affixing the common seal* with *execution under the common seal* where there is probably no implication that merely affixing the seal is sufficient.⁶ An alternative would be to provide in section 36A(2) that it was sufficient if the seal was authenticated by two directors or by a director and the secretary unless the articles otherwise required.

- 15.6 **(a) Should section 36A(2) of the Companies Act 1985 be amended by adding that execution is by affixing the common seal “in accordance with the articles”? If so, should this be made expressly without prejudice to sections 35A and 35B of the Companies Act 1985, and to the presumptions of due execution in section 36A(6) and section 74(1) of the Law of Property Act 1925?**

- (b) Should there be some other change to section 36A(2), and if so what?**

⁴ See above, para 4.9.

⁵ See above, paras 5.24, 5.27 n 75.

⁶ The words “under its common seal” are, of course, found in Companies Act 1985, s 36(a): see above, para 7.3.

We have not reached a provisional view upon the need for such amendment at this stage, and invite comments.

Corporate directors

- 15.7 We have mentioned that section 36A(4) makes no obvious provision for the position where the directors or secretary of a company are themselves other companies or corporations, and that the same is true of section 74(1) of the Law of Property Act 1925.⁷ We would welcome views on whether clarification is appropriate.
- 15.8 (a) **Is there any need to clarify the application of section 36A(4) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 where the directors or secretary of a company are themselves other companies or corporations?**
- (b) **If so, should this be done by making specific provision that such a director or secretary may “sign” or “attest” by the signature of a person authorised to do so on its behalf?**

Due execution - section 36A(6) and section 74 of the Law of Property Act 1925

Is a presumption of due execution still required?

- 15.9 Our provisional conclusion in Part XI was that the presumption (or rather deeming) of due execution in favour of a purchaser in section 36A(6) and in section 74 of the Law of Property Act 1925 continues to serve a useful purpose, and should be retained.⁸ If so, then the question arises whether there is a case for extending the ambit of the presumption so that it is available to any person dealing in good faith with a company or other corporation, as opposed to the present restriction to a purchaser in good faith. We are inclined to think, however, that this might cause too great an overlap with sections 35A and 35B, and would push the balance too far in favour of a person dealing with a company, and against the interests of the company in ensuring that obligations which it undertakes are duly authorised by the company. In that respect it will be remembered that section 74(1) appears to operate despite the lack of any proper authorisation of execution by the board, whilst sections 35A and 35B may apply only to transactions or dealings decided on by the board or with its authority.⁹ There is also, of course, an argument for treating purchasers in good faith as a special case for the sake of ensuring that title in the relevant property passes to them.
- 15.10 **Do consultees agree with our provisional conclusion that the presumption of due execution in favour of a purchaser in good faith contained in section 36A(6) of the 1985 Act and section 74(1) of the 1925 Act should be retained?**

⁷ See above, para 11.46.

⁸ See above, para 11.55.

⁹ See above, para 5.15.

Due execution - consistency between sections 36A(6) and 74(1)

- 15.11 We have explained that there is some doubt whether section 36A(6) is restricted to execution by the signature of two officers under section 36A(4), or whether it also applies when execution is under section 36A(2) and the affixing of the seal is attested by, say, two directors. We consider that the point should be clarified. Since, however, execution under seal will attract the presumption in section 74 of the Law of Property Act 1925, little turns on this - at least so far as due execution is concerned - so long as sections 36A(6) and 74 are brought into line. Leaving to one side the important question of delivery,¹⁰ the points which need to be addressed in order to achieve consistency between sections 36A(6) and 74 are those mentioned in the following paragraphs.

IDENTITY OF THE OFFICERS

- 15.12 Section 74(1) should be amended so that it applies where the seal is attested by two directors as well as by the secretary and a director.¹¹ There may be a case for leaving section 74(1) as it is, on the basis that it applies to all corporations aggregate, and that it might be appropriate to require one of those attesting the affixing of the seal to be the secretary, but we would need to be persuaded of this. We see no case, however, for restricting sections 36A(4) and (6) to execution by a director and the secretary.¹²

SECRETARY OR DEPUTY SECRETARY?

- 15.13 The seal may be attested for the purpose of section 74(1) by the secretary, clerk or other permanent officer *or his deputy*. As explained in Part XI, the references to the secretary in sections 36A(4) and (6) do not appear to include a deputy or assistant secretary.¹³ We invite comments on whether sections 36A(4) and (6) should be extended to include a deputy and assistant secretary. The disadvantage is that there is no requirement to lodge particulars of a deputy or assistant secretary with the Registrar of Companies, and hence no way for a person dealing with a company to check the authority of the person signing by carrying out a “company search”, should they wish to do so.¹⁴

¹⁰ See further below, paras 15.18 - 15.25.

¹¹ See above, para 11.40.

¹² Power to manage a company is given by the articles, and we take it that most companies will be happy to permit two directors to affix the seal: see, eg, Companies Act 1985, Table A, para 101 (above, para 4.6 n 19). In the case of, eg, a non-commercial corporation outside the Companies Acts, where the directors may have less day to day involvement with the running of the corporation, it may be more desirable that the secretary or clerk should be involved when any deed is to be executed. As to local authorities, see below, para 16.10.

¹³ See above, para 11.41.

¹⁴ In the case of a corporation which is not subject to the Companies Act 1985, there may, of course, be no requirement to lodge particulars of any officer in a form available for public inspection.

DEFINITION OF “PURCHASER”

- 15.14 We have explained that the definition of “purchaser” varies slightly between the two sections. The main difference is that the term includes an “intending purchaser” for the purpose of the Law of Property Act 1925 “where the context so requires” whilst there is no mention of an intending purchaser in section 36A.¹⁵ In our view, it is doubtful whether the context does “so require” in section 74(1), so that there may, in fact, be no practical difference between the two definitions. It has been suggested that if section 36A(6) is capable of operating in favour of a person who has exchanged contracts to purchase land (an intending purchaser), then there is a risk that this could result in a transfer or conveyance taking effect despite the failure of the purchaser to complete. We think this unlikely, because it is hard to see that a person who had not paid or was unwilling to pay the purchase price would be a purchaser “in good faith”. Moreover, if there is a difficulty in this respect, it stems from the irrebuttable presumption of delivery in section 36A(4), rather than from the inclusion, or otherwise, of an intending purchaser within the section. Where a person such as a purchaser of the freehold interest, lessee, or mortgagee seeks to rely on section 74(1) or section 36A(6) to establish due execution, they will, as it were by definition, be a purchaser where the relevant deed is effective, whether or not there is a prior contract.¹⁶ It appears to us that the important question is whether the presumption may be relied on in the case of a document which does not itself effect a transfer of the legal estate, for example when a contract to acquire a property has been executed as a deed,¹⁷ or where there is some document which is collateral to the conveyance. In such a case, it is much less certain whether there is a “purchaser”, and whether protection is only obtained if an “intending purchaser” is included.¹⁸

PURPORTED SIGNATORIES

- 15.15 There should be consistency in the references to the “purported” signatories. However, we see little to choose between referring to a document which purports to be signed or attested by two officers on the one hand, and a document which is signed or attested by two persons purporting to be two officers. On balance we prefer the wording used in section 36A(6), if only for the sake of brevity. Probably more important is the relationship between these presumptions and cases of forgery. We do not consider that the presumptions would operate in cases of forgery,¹⁹ but would welcome comments on this point, and on any need for clarification. The term “purports” could, for example, be replaced by a provision that the presumption

¹⁵ See above, para 11.44.

¹⁶ That would appear to be so even if the deed had been executed in escrow ahead of completion.

¹⁷ Such a contract need only, of course, be signed (Law of Property (Miscellaneous Provisions) Act 1989, s 2), but there may be occasions when it is executed as a deed.

¹⁸ As to what constitutes a “purchaser” see also now the decision in *Johnsey Estates* (above, para 5.25).

¹⁹ See above, paras 5.32, 11.55.

operates where a document is signed or the seal attested by such officers notwithstanding any defect in their appointment, or lack of authority, or even (in the case of a *de facto* director) the lack of any appointment at all. A simpler alternative would be a saving provision to the effect that the sections do not apply in the case of forgery or fraud, although we have explained above that there has been a degree of uncertainty as to what constitutes a forgery in the case of the execution of deeds.²⁰

RESTRICTION TO DEEDS

- 15.16 Section 74 is limited to deeds. The presumption of due execution (but not of delivery) in section 36A(6) appears to be applicable to any document executed in accordance with section 36A(4). Most documents executed by a corporation on which a purchaser will need to rely will in fact be deeds, so the point may be of limited practical importance. However, subject to what has been said above about the relationship between contracts under seal and deeds,²¹ we are inclined to favour resolving the inconsistency by extending section 74 to all documents executed under seal. It is difficult to see why two documents executed by the same method should attract differing presumptions of due execution.

OPTIONS FOR REFORM

- 15.17 (a) **Should there be any change in the identity of the officers who may attest the affixing of the seal for the purpose of section 74(1)? In particular, do you agree with our provisional view that due execution should be deemed in favour of a purchaser in good faith when the seal has been attested by two directors or members of the council or governing body as well as by one such person and the secretary, clerk or other permanent officer or his secretary?**
- (b) **Should section 36A(4) be amended so that one of those signing a document by way of execution by the company may be a deputy or assistant secretary? If it should, the presumption in section 36A(6) would have to be amended accordingly.**
- (c) **Should the definition of “purchaser” applicable to sections 36A(6) and 74(1) be amended, and if so how? In particular, should due execution be deemed in favour of a purchaser or intending purchaser in the case of the purchase contract (if executed as a deed) and/or any other document which does not effect the transfer of the relevant property?**
- (d) **Should the references to “purported” officers be amended in sections 36A(6) and/or 74(1), and if so, how? Our provisional view is that both**

²⁰ See above, para 5.31.

²¹ See above, paras 13.6 - 13.9.

sections should follow the wording of section 36A(4) in this respect.

- (e) **Is any amendment required to clarify the relationship between the deeming of due execution in sections 36A(6) and 74(1) and the rules governing forged documents?**
- (f) **Should section 36A(6) be limited to deeds, or alternatively should section 74(1) be extended to include any document executed under seal, whether or not a deed? Our provisional view is to extend section 74(1) to any document executed under seal and attested by the appropriate officers, whether or not a deed.**
- (g) **Should there be any other detailed amendments to sections 74(1) and 36A(6), and if so what should they be?**²²

Delivery

The concept of delivery

- 15.18 We have explained our provisional view that the presumption of delivery continues to serve a useful purpose (namely fixing the date when a deed takes effect), but that we would be interested to learn whether views have changed since our last consultation on the subject.²³ It should be borne in mind that it would be beyond our remit in this project to recommend that the concept of a deed should be abolished, so that any changes would have to be made within a system which still made an important distinction between deeds and other documents.
- 15.19 **Do you agree with our provisional view that the concept of delivery still serves a useful purpose? If not, what do you consider should determine when a deed takes effect?**

Sections 36A(5) and 36A(6), and section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 - presumptions of delivery

- 15.20 The issues arising on the presumptions of delivery in section 36A may be summarised as follows:-
- (a) Whether any statutory presumption of delivery upon execution is necessary at all.
 - (b) Whether there is inconsistency in the application of the statutory presumptions depending on the manner of execution, and also on the type of corporation.²⁴

²² The irrebuttable presumption of delivery in section 36A(6) is dealt with separately below, in para 15.22.

²³ See above, para 11.59.

²⁴ On the assumption that it is now established that Law of Property Act 1925, s 74 does not import any presumption of delivery: see above, para 6.4.

- (c) Whether the statutory presumptions should be rebuttable, or irrebuttable.
- (d) Whether the presumptions need to be amended to make it clear that the deemed delivery may be in escrow, as opposed to delivery with immediate effect.

SECTION 36A(5) OF THE COMPANIES ACT 1985

- 15.21 We have pointed out that it seems somewhat anomalous that there are statutory presumptions of delivery where a deed is executed by a company, but not by an individual, save of course now for the presumption of delivery in a conveyancing transaction by virtue of section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989. We are also aware of views that the statutory presumption in section 36A(5), though rebuttable, causes difficulty where the maker of a deed wishes to execute it on the basis that it will be delivered by their solicitor on their behalf on completion.²⁵ Our provisional view, however, is that the presumption in section 36A(5) is unobjectionable, since it repeats a common law presumption, and may be rebutted by contrary intention. In fact, it is in some respects helpful to have the common law presumption spelt out in this way.²⁶ If so, then there is a case for extending the presumption to other corporations to which section 36A(5) does not apply.

SECTION 36A(6) OF THE COMPANIES ACT 1985

- 15.22 The presumption in section 36A(6), however, causes more difficulty. Most obviously, there is, at best, uncertainty how far it is consistent with section 74(1) of the Law of Property Act 1925, which it was intended to replicate. There is an irrebuttable statutory presumption of delivery where a company executes a document by the signature of two officers in accordance with section 36A(4) but uncertainty whether this is also the case when it executes under seal.²⁷ It seems that there is no such presumption where execution is by a corporation to which section 36A(6) is inapplicable, since section 74(1) of the Law of Property Act 1925 is a presumption of due execution but not of delivery. Moreover, since it is irrebuttable, it is inconsistent with the new regime of “delayed delivery” introduced by the 1989 reforms, and in particular with the presumption of delivery on behalf of the maker on completion in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989. Attempts to prevent the presumption applying - so as to allow execution in advance whilst retaining the ability to withdraw the document before completion - may cause confusion as to whether the document has been executed at all.²⁸ Our provisional view is that the irrebuttable presumption of delivery in section 36A(6) should be repealed.

²⁵ See above, para 11.62, and in particular the recent decision in *Johnsey Estates (1990) Limited v Newport Marketworld Ltd and Others* (see above, para 11.62 n 106).

²⁶ Eg, it makes it easier for bodies such as the Land Registry to accept deeds for registration without asking for evidence of delivery.

²⁷ See above, para 11.31.

²⁸ See above, para 6.22.

It should be noted, however, that doing so may entail inconvenient transitional provisions.²⁹

DELIVERY IN ESCROW

- 15.23 In practice, deeds must often be executed some time before formal completion of a transaction. We have pointed out that there is, perhaps, a tension between the two methods used to achieve this, namely execution in escrow and delivery on the maker's behalf on completion.³⁰ It may be that the use of execution in escrow for this purpose will wither away in many common transactions, but we accept that execution in escrow may remain useful for particular transactions,³¹ and that execution in escrow should remain possible. We have commented above, however, that the concept of delivery in escrow sits a little uneasily with the provision in section 36A(5) that a deed "has effect" upon delivery. Comments are invited on whether this causes any difficulty in practice. If so, it could be simply avoided by redrafting section 35A(5) to avoid the particular phrase.

AUTHORITY TO DELIVER

- 15.24 We think that consideration should also be given to extending the statutory presumption of delivery by a solicitor, certificated public notary or licensed conveyancer in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989. That is particularly so if the statutory presumptions of delivery on execution are modified or repealed, and also if we are correct in our assumption that delivery on behalf of a company, taking advantage of the relaxation made by section 1(1)(c) of that Act, is proving to be the most practical way of having a deed "executed" in advance of completion. We would welcome views on whether the presumption in section 1(5) should be extended to apply to any deed which a solicitor, licensed conveyancer or duly certificated notary public purports to deliver in the course of any transaction, whether or not it involves the creation or disposal of an interest in land. In effect this would give statutory recognition to the implied authority of such a person discussed in Part XI.³²

A NEW PRESUMPTION - DELIVERY UPON DATING?

- 15.25 Finally, we have given some thought to whether the statutory presumptions mentioned above could be replaced with a statutory presumption that a deed which has been dated is deemed to have been delivered unconditionally upon the date inserted in the

²⁹ We consider that it would be wrong to make abolition retrospective. Deeds executed in the period between 1989 and the date of abolition would therefore remain subject to the irrebuttable presumption.

³⁰ See above, paras 11.57 - 11.60.

³¹ Eg, there may be cases where it is important to make use of some of the characteristics of escrows (particularly the doctrine of relation-back) to have a document executed subject to conditions, without having to spell those conditions out in the document.

³² Paras 11.69 - 11.71.

document, unless a contrary intention is proved.³³ Such a presumption, which could apply to all types of corporations and also to execution by individuals, would be consistent with the concept of delivery by an agent upon completion. It would appear to coincide with the normal position - at least in a typical conveyancing transaction - that the parties expect to be able to rely on a deed from completion, when it is dated, and to meet the need to establish delivery in most cases. It would not affect the rule that dating is not essential to a deed.³⁴

OPTIONS FOR REFORM

- 15.26 (a) **Do you agree with our provisional view that the statutory rebuttable presumption of delivery upon execution contained in section 36A(5) of the Companies Act 1985 should be retained?**
- (b) **If so:-**
- (i) **Should such a statutory presumption be extended to all corporations?**
 - (ii) **Is there any need to clarify the relationship between the presumption and the concept of delivery in escrow?**
 - (iii) **If there is such a need, do you agree with our suggestion that the provision in section 36A(5) that a deed “has effect upon delivery” should simply be removed?**
 - (iv) **Is there any need to clarify the relationship between the presumption in section 36A(5) and the concept of “delayed delivery” on behalf of the maker of the deed? If so, how should this be done?**
 - (v) **Should there be some other change in the presumption in section 36A(5), and if so what?**
- (c) **Should there be an irrebuttable presumption (or deeming) of delivery upon execution in favour of a purchaser in good faith, as currently contained in section 36A(6) of the Companies Act 1985? Our provisional view is that there should be no such presumption of delivery, given the apparent inconsistency between a presumption of delivery on execution with the presumption in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 of delivery on behalf of the maker of a deed (for example by the party’s solicitor on completion) and indeed, with the whole concept of “delayed delivery”.**
- (d) **If you think that there should be such a presumption, should section 74(1) of the Law of Property Act 1925 be amended to include a presumption of delivery in the same terms as section 36A(6)? Whilst our**

³³ Effectively codifying but strengthening the common law presumption. See above, para 6.9.

³⁴ See above, para 6.9.

provisional view is against there being such a presumption at all, if consultees disagree, then we would favour there being an identical presumption in both sections 36A(6) and 74(1).

- (e) Should there be some other change in the presumption of delivery in section 36A(6), and if so, what?**

- (f) Should there be a statutory presumption that a solicitor or other legal adviser who purports to deliver and date a deed on behalf of their client has authority to do so? If so, would it be appropriate to extend the presumption of authority to deliver on behalf of the maker of the deed contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 to transactions other than those involving the creation or disposal of an interest in land? We would be sympathetic to the extension of section 1(5) in this way, but we invite views.**

- (g) Should there be some other presumption of delivery in favour of a person dealing with a company, and if so what? For example, should the presumptions mentioned above be replaced by a rebuttable presumption of delivery with the date which has been inserted in the deed?**

Execution by Foreign Corporations - the Foreign Companies (Execution of Documents) Regulations

Introduction

- 15.27 We have expressed the view that the Foreign Companies (Execution of Documents) Regulations 1994 adapt sections 36 and 36A to execution by foreign companies in a way which is generally flexible and sensible, albeit with the result that foreign companies may execute with a lesser degree of formality than their counterparts incorporated in England and Wales. Views are, however, invited on the Regulations generally, and in particular on the following points.

SHOULD “COMPANY” BE DEFINED?

- 15.28 Should there be a definition of “company” for the purpose of the Regulations? Our preliminary view is that it might be difficult to find a definition which offered sufficient clarity, since it would entail distinguishing between foreign corporations which had characteristics typical of a company (for example a board of directors, members, certain activities, etc) and other corporations and entities. It would also be strange to have such a definition for the purpose of the Regulations but not for certain other provisions of the Companies Act.³⁵ We would, however, be interested to learn whether the lack of any definition of “company” for the purpose of the Regulations causes any difficulty in practice.

³⁵ Eg, s 691, dealing with registration requirements when a company incorporated outside Great Britain establishes a place of business here.

SHOULD THE REGULATIONS APPLY TO ALL FOREIGN CORPORATIONS?

- 15.29 As an alternative to defining “company”, should the Regulations be extended so that they are applicable to all foreign “corporations”? This seems appropriate in many ways given that the Regulations are widely drawn, permitting execution by the signature of any person acting under the authority of the company. There might still be difficult questions as to what was a corporation for this purpose, but at least it would no longer be necessary to ask whether the maker of a deed might be a foreign corporation which was not a foreign company. We provisionally favour extending the Regulations in this way.

WHAT CONSTITUTES SUFFICIENT AUTHORITY FOR THE PURPOSE OF THE REGULATIONS?

- 15.30 We invite comments on two further points mentioned in Part XII. First, would it assist if the Regulations were amended to provide that they are without prejudice to any additional requirements for execution imposed by the law of incorporation of the company?³⁶ We do not ourselves see the need for such amendment at this stage. Secondly, is there any need to confirm that authority to execute a deed for a foreign corporation need not itself be given by deed,³⁷ or to make any other change in the Regulations in order to clarify what constitutes sufficient authority to enable a person to execute a deed under the authority of a foreign corporation in accordance with the Regulations? We are not, as yet, satisfied that there is any need to amend the Regulations on this point, but would welcome views.

OPTIONS FOR REFORM

- 15.31 (a) (i) **Do you agree with our provisional view that the Regulations should be extended so that they are applicable to all corporations incorporated outside Great Britain?**
- (ii) **As an alternative to (i), should “company” be defined for the purpose of the Regulations? If so, how might the definition be framed?**
- (iii) **Should the Regulations be amended to provide that they are without prejudice to any additional requirements for execution imposed by local law? Our provisional view is against making such an amendment.**
- (iv) **Should the Regulations be amended to clarify what constitutes sufficient authority to execute a document under the authority of the foreign company, and if so how?**
- (b) **Should there be some other change in the Regulations, and if so what?**

³⁶ See above, para 11.49.

³⁷ See above, paras 8.3, 11.50.

PART XVI GREATER UNIFORMITY FOR EXECUTION BY DIFFERENT TYPES OF CORPORATION

Corporations aggregate

Introduction

- 16.1 We anticipate that the detailed amendments to section 36A of the Companies Act 1985 and to section 74 of the Law of Property Act 1925 which were considered in Part XV should remove some of the inconsistencies between the rules governing execution by different types of corporation. We also envisage that any changes to section 36A would be reflected in similar statutory provisions which are applicable to other types of corporation, although we return to this point below.¹
- 16.2 We have explained, however, that the way in which a corporation may execute a deed varies depending on the type of corporation,² and changes along the lines considered in Part XV would do little to reduce this lack of uniformity. Having asked what rules should govern the execution of deeds and documents by companies, we now consider how far similar rules can be applied to other types of corporation, to which section 36A of the Companies Act does not currently apply.³ We recognise that the variety of different types of corporation, and particularly in their constitutions, and procedures for execution, may make it difficult to achieve greater uniformity. It would therefore be inappropriate simply to extend section 36A to all corporations aggregate. It would also be beyond the scope of this Paper to suggest that, for example, sections 35, 35A and 35B of the Companies Act 1985 (dealing with corporate capacity and directors' authority) should be extended to corporations to which it does not currently apply.⁴ Another difficulty stems from the variety of separate statutory regimes for execution by different types of corporation.⁵ One option is therefore to make no changes to the rules governing execution by corporations to which section 36A does not apply - other than ensuring that the presumptions in sections 36A and 74(1) are consistent.

Extension of execution without a seal - a common "formula" for all corporations aggregate

- 16.3 Given that both individuals and companies registered under the Companies Acts may now execute deeds without using a seal, we are provisionally in favour of extending

¹ See below, para 16.6. For examples of such statutory provisions see above, para 4.21, and below, para 16.7.

² See above, para 11.16.

³ See above, para 4.20.

⁴ See above, paras 4.18, 4.20, 5.7 - 5.9.

⁵ See above, n 1.

this ability to other types of corporation.⁶ We recognise, of course, that some such corporations will not be managed in the same way as a typical commercial company, and that the formality attached to affixing the seal may be felt to afford a useful means of control for such corporations.⁷ There is also the difficulty of identifying a formula which is appropriate to every form of corporation (or to as many as possible), given that some corporations may not have a management structure comparable to a registered company, and in particular may not have directors and secretaries as such. Local authorities are an obvious example. One option, however, would be to combine the methods of execution set out in section 36A with the more widely worded section 74 of the Law of Property Act 1925, which already seeks to provide a presumption of execution applicable to all types of corporation aggregate. This would permit a document to be executed by any corporation aggregate (including a registered company) either:-

- (a) by the corporation affixing its common or other authorised seal; or
- (b) by being signed by two directors or members of the council or other governing body, or by one such officer and the secretary, clerk or other permanent officer or his deputy, and being expressed to be executed by the corporation.

16.4 It would be necessary to decide whether execution under seal ((a) above) should be qualified by adding that execution was by affixing the seal “in accordance with the memorandum and articles, statute, charter, or other instrument constituting the corporation or regulating its affairs”.⁸ The principal change, however, would be to allow all corporations aggregate to execute without using a seal.

16.5 We envisage that there might be a saving provision, so that this “formula” would be applicable in addition to any other mode of execution authorised by law, practice, statute, or other instruments constituting the corporation or regulating its affairs. A corporation which has traditionally executed in a different manner could therefore continue to do so, although it might be anticipated that it would in time become convenient to execute in one of the ways permitted by the formula. One result of this would be that a corporation to which section 36A does not presently apply, and which has executed in accordance with customary practice, would for the first time be able to execute in a mode authorised by statute. It should also be noted that (a) and (b) above would be alternatives, so that corporations which have always executed under seal could continue to do so. We anticipate that many such corporations would, at least in the short term, be concerned if the ability to execute under seal was abolished. Moreover, many such corporations have no need to file returns of directors and

⁶ As explained above, the general rule is that a corporation must execute a deed under its seal in the absence of specific statutory authority to do otherwise: see above, para 4.11.

⁷ See further below, para 16.5.

⁸ This is discussed further above, at para 15.5 in relation to s 36A(2).

secretaries, in contrast to registered companies,⁹ and it is not suggested that this requirement should be extended, or that details of authorised signatories should be filed. Those dealing with such a corporation may also therefore prefer to see the use of sealing continue.

16.6 It would be necessary to determine the relationship between this formula and existing statutory provisions governing execution by particular types of corporations. In many cases, of course, there is simply a provision in the relevant statute or charter for the corporation to have an official seal or other common seal,¹⁰ and there seems to be no reason why this should not be left in place alongside a general formula of the type suggested above. It is more difficult where there are more complex provisions as to execution. An option would be to leave such provisions in place, so that execution in accordance with a particular statute would be within the saving provision mentioned above. This would, however, have the disadvantage of leaving overlapping statutory modes of execution. Alternatives would be to make the new provision mandatory, or to repeal such provisions, but this could clearly only be done if the formula was found to be applicable to all corporations.¹¹ We recognise that in many cases legislation would only be appropriate after consultation with the body in question. It also needs to be borne in mind that many statutory provisions governing execution by particular corporations apply throughout the United Kingdom, so that amendments which reflect only the English law on the execution of deeds would be inappropriate.

16.7 An example may assist. By virtue of section 60 of the Charities Act 1993, a deed may be executed by a charity which has been incorporated under that Act¹² in the following ways:-

- (a) by the charity affixing its common seal;
- (b) by being signed by a majority of the trustees (defined as the persons having the general control and management of the administration of the charity) and expressed to be executed by the body; or
- (c) by being signed by two or more of the trustees who have, subject to the trusts of the charity, been authorised in the manner set out in section 60(5), to execute for the

⁹ See above, para 5.21.

¹⁰ See above, para 4.21.

¹¹ It will be recognised that not only are there various statutory provisions dealing with execution by particular types of corporation, but there are still many individual corporations where the formalities required for execution are prescribed in the statute of incorporation or other constitutional documents.

¹² The Charity Commissioners may grant a certificate of incorporation to the trustees of a charity under Charities Act 1993, s 50. A company incorporated under the Companies Acts may, of course, also be a registered charity, and charitable corporations may be created in other ways (eg, under the Industrial and Provident Society legislation).

body by the trustees.¹³

- 16.8 The categories of authorised signatories in our suggested formula should be wide enough to include “trustees”, since, although the latter term is very widely defined, all those having general control and management of the administration of the charity should be either directors or members of the governing body or council. If the formula were to be adopted in place of section 60, however, the requirement for a deed to be signed by either a majority of the trustees or by those to whom the power to execute has been expressly delegated would be replaced with a simple requirement for two signatures. On the other hand, adopting a common formula for all charitable corporations would avoid the present position, by which execution by charitable companies incorporated under the Companies Acts is governed by section 36A of the Companies Act 1985, whilst execution by a body incorporated under the Charities Act 1993 is governed by section 60 of that Act. Other types of charitable corporation may be subject to different rules. This conveniently encapsulates the question whether the divergence between the different management structures typically found in registered companies and other corporations justifies retaining different methods of execution.
- 16.9 We would welcome comments on the categories of authorised signatories mentioned above, especially if it is considered that they would be inappropriate for particular types of corporation. One option would be to provide a basic formula, with variations for particular types of corporation.¹⁴ Obvious examples would be local authorities, building societies, and incorporated charities. Taking only the first of these, it appears to us that the terms “member of the council” and “secretary, clerk or other permanent officer or his deputy” would be adequate to cover most local authorities, but a different formulation could be used instead, for example “duly authorised member” and “proper officer”.¹⁵ Even if this produced a basic formula with variations, it appears to us that there would be a considerable advantage in having a single accessible set of provisions, dealing with execution by every type of corporation. It would also end the very restricted number of situations where execution by a corporation aggregate has to be by a number of its members using wafer seals.¹⁶

¹³ There are detailed provisions in s 60(5) as to the form of authority, for example that it may be exercisable by any of the trustees or by named trustees only, and covering any want of formality in the giving of the authority. Sections 60(7) and (8) go on to mirror Companies Act 1985, ss 36A(5) and (6) with appropriate modification. Note also Charities Act 1993, s 82, which authorises the trustees of an unincorporated charity to delegate execution of deeds or other instruments to two or more of their number. In such a case there is a presumption of due execution in Charities Act, s 82(4).

¹⁴ The Requirements of Writing (Scotland) Act 1995 is an example of such an approach: see Appendix B.

¹⁵ The requirement that the member must be “duly authorised” would clearly constitute a restriction. By virtue of Local Government Act 1972, s 270(3), a “proper officer” is an officer appointed for the relevant purpose.

¹⁶ Eg, parish councils where there is no corporate seal: see above, para 4.22.

- 16.10 What we have said so far in this Part assumes that there will be no change in the basic methods of execution available to registered companies. We have, however, asked for views in Part XIV on whether those methods should be revised, particularly by abolishing execution by seal, or by permitting execution to be by the signature of a single officer (with or without some additional safeguard, such as attestation). These questions appear to have equal relevance to other types of corporation, and we would again welcome views, particularly if it is considered that there are special considerations which apply to particular types of corporation. For example, we are aware of views that the present practice by which the sealing of a deed by a local authority is attested by both an elected member and an officer of the authority provides a valuable safeguard which should be retained, even if execution other than under seal is permitted.
- 16.11 It would also be necessary to decide how far the presumptions of due execution and delivery presently found in section 36A of the Companies Act 1985 should be repeated in any such formula. Our general view is that if such presumptions are appropriate for registered companies, then there is no reason why they should not also apply to other corporations. A further advantage of having a common formula for execution by corporations is that there could be a single set of such presumptions, thus avoiding the present overlap between section 36A and section 74 of the Law of Property Act 1925.
- 16.12 We have mentioned that for many bodies incorporated by statute, there are existing statutory presumptions as to instruments executed under the corporation's seal, and authenticated as provided by the relevant statute.¹⁷ These presumptions are often of longstanding, and apply throughout the United Kingdom. It would appear that such presumptions could generally be left undisturbed.

OPTIONS FOR REFORM

- 16.13 (a) **Do you favour changes to achieve greater uniformity between different types of corporation in the rules governing the execution of deeds and other documents, and to make those rules more accessible?**
- (b) **If so, then in particular:-**
- (i) **Do you agree with our provisional view that the ability to execute without using a seal should be extended to corporations to which section 36A(4) of the Companies Act 1985 does not currently apply?**
- (ii) **Would you favour the introduction of a formula for execution such as that suggested above? That would permit a document to be executed by any corporation aggregate (including a registered company) either:-**
- (A) by the corporation affixing its common or other authorised seal;**
- or**

¹⁷ See above, para 4.21.

(B) by being signed by two directors or members of the council or other governing body, or by one such officer and the secretary, clerk or other permanent officer or his deputy, and being expressed to be executed by the corporation.

(iii) Do you agree with our provisional view that execution in accordance with such a formula should be available in addition to any existing statutory or other modes of execution? This would permit corporations to continue to execute as they do at present, but give them the option of using a method which might be more commercially convenient for those dealing with them.

(c) Are there any categories of corporation aggregate (for example local authorities, building societies, or charities incorporated under the Charities Act 1993) for which special provision would be appropriate? If so, what modification of the formula would you suggest?

(d) Do you consider that any statutory presumptions of due execution and delivery which are applicable to registered companies should also apply to other types of corporation aggregate?

(e) Should there be any other changes in the rules for the execution of deeds and other documents in order to achieve greater uniformity or consistency for different types of corporation, and if so what?

Corporations sole

16.14 Corporations sole are subject to special considerations. Unlike a corporation aggregate, a corporation sole has a double personality, namely the corporate capacity and the holder of the office in his or her individual capacity. There may from time to time be vacancies in the relevant office.¹⁸ The seal of the corporation may also have a particular ceremonial significance to the corporation. It is also apparent that the formula mentioned in paragraph 16.3 above is largely inapplicable, since a corporation sole is neither obliged to have a seal, nor will there be officers of the corporation in the sense envisaged by the formula.

16.15 It would, however, be possible to make a permissive provision for execution by such corporations, for example that execution was either under the corporation's seal or by the attested signature of the holder of the office for the time being. Such a provision would end the need for a corporation sole without a corporate seal to execute using a wafer seal.¹⁹ It would be largely consistent with the existing statutory provisions for

¹⁸ See above, para 7.7 n 12.

¹⁹ See above, para 4.26.

government ministers to have a corporate seal,²⁰ though the exact relationship with those statutory provisions would have to be determined. Where execution was under seal, then the affixing of the seal could be attested by any person authorised to do so by the corporation in question, for example an authorised deputy, or person to whom the power had been delegated during a vacancy in the office in question. Where execution was by attested signature, it would be possible to limit this to the office holder personally, or to extend this to any person acting with due authority.²¹ We have not reached any provisional conclusion at this stage on execution by corporations sole, and would welcome comments.

- 16.16 (a) **Should there be any statutory provision for execution by all corporations sole?**
- (b) **If so, do you agree with our suggestion that there should be a permissive statutory provision (namely, one which is available in addition to any existing method of execution) allowing execution either under the corporation's seal or by the attested signature of the holder of the office for the time being?**

²⁰ See above, para 4.27.

²¹ It seems best to avoid restricting this to a person duly authorised by the office-holder, to allow for the authorisation to be given by some other person during a vacancy.

PART XVII

CONTRACTS

Introduction

- 17.1 Any changes which we may recommend on the rules governing company contracts are likely to depend on the responses received on the matters discussed in Part XIII above. In the light of those responses, it may be appropriate to suggest amendments to sections 36 and 36A of the Companies Act 1985, to ensure that those sections adequately distinguish between deeds and other documents. Our other suggestions at this stage relate to the Corporate Bodies' Contracts Act 1960.

The Corporate Bodies' Contracts Act 1960

- 17.2 Our provisional view is that section 1 of the 1960 Act should be amended to follow the wording of section 36 of the Companies Act 1985, for the sake of both clarity and consistency.¹ We also provisionally recommend that the overlap should be removed between section 1 of the 1960 Act and the Foreign Companies (Execution of Documents) Regulations 1994, which modify and apply section 36 to contracts made by foreign companies. Our suggestion is that foreign companies should be expressly excluded from the 1960 Act (as is already the case with companies registered under the Companies Acts). If our proposals above for a "common formula" for the execution of documents by all corporations aggregate are supported, then there would, of course, equally be a case for drawing the rules in section 1 of the 1960 Act and section 36 of the 1985 Act together into a single provision.

OPTIONS FOR REFORM

- 17.3 (a) **Do you agree with our provisional view that:-**
- (i) **Section 1 of the Corporate Bodies' Contracts Act 1960 should be re-worded to follow section 36 of the Companies Act 1985? That would mean that for any corporation (other than a company) a contract could be made either:-**
 - (A) **by a corporation, by writing under its seal; or**
 - (B) **on behalf of a corporation, by any person acting under its authority, express or implied.**

In each case, any formalities required by law in the case of a contract made by an individual would also be necessary, unless a contrary intention appears.
 - (ii) **Any company or corporation subject to the Foreign Companies (Execution of Documents) Regulations 1994 should be excluded from section 1?**
- (b) **Should there be some other amendment to the Corporate Bodies' Contracts Act 1960, and if so what?**

¹ See above, para 11.73.

- (c) Should there be a single provision (along the lines of option (a)(i) above) applicable to contracts made by all corporations aggregate, including registered companies? This would be amended to apply to foreign corporations as is done at present in the case of foreign companies by the Foreign Companies (Execution of Documents) Regulations.**

PART XVIII

EXECUTION OF DEEDS ON BEHALF OF CORPORATIONS

Execution by an attorney

- 18.1 Our criticisms of the present law governing the execution of deeds by an attorney on behalf of a corporation are summarised in Part XI.¹ In the following paragraphs we set out a number of possible changes to the law on which comments are invited.

Effect of section 38 of the Companies Act 1985

- 18.2 We are satisfied that section 38 of the Companies Act 1985 does not prevent a company appointing an attorney to execute deeds in the United Kingdom. Whilst we do not, therefore, consider it necessary to do so, the position could nonetheless be clarified by inserting a saving provision, for example to the effect that section 38 is without prejudice to any other power to appoint an attorney to execute deeds, either in the United Kingdom or elsewhere. As we have mentioned, the point continues to be discussed in leading textbooks, and we are not aware of any decision in this jurisdiction which resolves it.²

Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989

- 18.3 Our provisional view is that section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended to make express provision for execution by an attorney. The simplest amendment would be to amend section 1(2)(b) to provide that an instrument which is to be a deed must be executed as a deed by *or on behalf of* that person, or as the case may be, *by or on behalf of* one or more of those parties. To be consistent, it would appear necessary to carry a similar amendment into section 36A(5), so that it provided for execution *by or on behalf of* a company. Section 1(2)(b) would then permit a deed to be executed by or on behalf of the maker, whilst section 36A would govern how a company executes a deed, whether as the maker of the deed or as attorney on their behalf. The amendment suggested above would leave open the question what authority was needed to execute “on behalf of” another person, which might cause uncertainty, but seems preferable to trying to define what constitutes sufficient authority (for example, power of attorney, statutory or contractual power to convey, etc).

Are the formalities governed by the donor or the attorney?

- 18.4 We would welcome views as to whether there is a need to clarify which formalities govern execution by an attorney, so that, for example, it is clear that it is those applicable to the attorney. The amendment suggested in the preceding paragraph may make this unnecessary, but if further clarification is desired, then there might be a

¹ Paras 11.75 - 11.82.

² See above, para 8.9.

provision³ that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985 govern execution by an individual or company respectively, in each case whether as the maker or a party to the deed, or on behalf of any such person. The effect would be to clarify that when an individual attorney executes a deed this is by an attested signature, whilst an attorney which is a company executes in either of the ways permitted by section 36A. It will be recognised that this represents something of a departure from the position originally provided for in the Law of Property Act 1925 where the identity of the donor appears to have governed the appropriate formalities.⁴ However, it appears to us that since 1925, the practice has developed of treating the formalities as governed by the attorney, and our provisional view is that this practice should be put onto a firmer footing. As we have pointed out in Part VIII, unless the formalities are governed by the identity of the attorney, there appears at present to be no valid means of execution where there is a corporate donor but an individual attorney, save in the case of a conveyance of property.⁵

Section 7 of the Powers of Attorney Act 1971

- 18.5 We would also welcome views on whether any amendment is necessary to section 7 of the Powers of Attorney Act 1971, since, as we have explained, the wording of the section seems inappropriate to cover execution where the donor is a corporation, and the section clearly does not apply to a corporate attorney.
- 18.6 Section 7(3) of the 1971 Act causes potential difficulty by making section 7(1) without prejudice to any statutory direction requiring execution in the name of the estate owner. This has led to suggestions that section 7(1), which permits an attorney to execute with his or her own signature, cannot be relied upon to execute a conveyance. Whilst we do not believe that to be correct, we doubt whether section 7(3) still serves any necessary purpose, and invite views as to whether it should be repealed.⁶

Presumptions of execution and delivery

- 18.7 Views are invited on whether clarification is needed as to the applicability of the statutory presumptions of execution and delivery when execution is by an attorney. Our provisional view is that if the suggestions made in paragraphs 18.3 and 18.4 above are adopted, so that a deed may be executed by or on behalf of the maker, and the relevant formalities for execution are governed by the identity of the attorney, then the

³ Either in the Law of Property (Miscellaneous Provisions) Act 1989, s 1, in the Companies Act 1985, s 36A, or both.

⁴ See above, para 8.22 n 48.

⁵ See above, para 8.22.

⁶ It has, however, been suggested to us that in those cases where a chargee grants a lease in the name of the chargor under the provisions of Law of Property Act 1925, s 8(1), the effect of s 7(3) may be to preserve the limitation imposed by the final words of s 8(1) on the covenants on the part of the lessor which may be contained in the lease.

application or otherwise of the various statutory presumptions should follow naturally from section 36A. For example, where the donor is a company, but the attorney an individual there will nonetheless be a rebuttable presumption of delivery on execution by virtue of section 36A(5), since there will be a deed executed by or on behalf of a company. The presumptions in section 36A(6) and section 74(1) of the Law of Property Act 1925 will, however, only apply where the attorney is itself a company.

Codification of execution by attorney

- 18.8 In view of the uncertainties described in Parts VIII and XI, we have given some thought to whether it might be helpful to replace section 7(1) of the Powers of Attorney Act 1971 and sections 74(3) and (4) of the Law of Property Act 1925 with a more comprehensive code setting out how an attorney may execute. This might, for example follow the summary of methods of execution set out in Part VIII above,⁷ and perhaps be accompanied by an illustrative list of sample attestation clauses for execution by an attorney. Our provisional view is that such codification would be helpful.

OPTIONS FOR REFORM

- 18.9 (a) **Should section 38 of the Companies Act 1985 be amended to clarify that it does not preclude a company from appointing an attorney to execute deeds in the United Kingdom, or in some other way? Our view is that no such amendment is necessary, but that it might be helpful in any general review of execution by an attorney.**
- (b) **Does section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 need to be amended to make specific provision for execution by an attorney? If so:-**
- (i) **Would it be appropriate to provide that a deed is executed “by or on behalf of” the maker of a deed?**
- (ii) **Is a similar amendment needed to section 36A(5) of the Companies Act 1985?**
- (c) **Should there be statutory clarification that the formalities governing execution are governed by the identity of the attorney (or alternatively of the donor - so long as appropriate methods of execution are available in all cases)? Our provisional view is that the formalities should be governed by the identity of the attorney.**
- (d) **Does section 7 of the Powers of Attorney Act need to be amended to make more appropriate provision for execution by an individual attorney in the name of a corporate donor?**
- (e) **Does section 7(3) of the Powers of Attorney Act 1971 cause any difficulty**

⁷ See above, paras 8.11 - 8.18.

in practice? If so, is there any reason why it should not be repealed?

- (f) Is further clarification required on the application of the statutory presumptions of due execution and delivery where a deed is executed on behalf of a corporate party by its attorney?**
- (g) Do you agree with our provisional view that the present rules for execution by attorney should be codified, setting out a non-exhaustive list of methods of execution which are available? If so, should this be accompanied by an illustrative list of examples?**
- (h) Should there be any other change in the rules which govern the execution of documents by an attorney, whether on behalf of a corporate or an individual donor, and if so what?⁸**

Execution by liquidators

18.10 We have explained that there are doubts concerning the way in which a liquidator should execute a deed on behalf of a company which has no common seal.⁹ We provisionally recommend that these should be removed by amending Schedule 4 to the Insolvency Act 1986 to provide that the powers of a liquidator exercisable without sanction in any winding up include:-

- (i) the power to do all acts and to execute in the name and on behalf of the company any deed, receipt or document; and
- (ii) as a separate power, the power to use the company's seal.

That would make it clear that the same methods of execution (namely with or without a seal) are clearly available to a company both before and after the commencement of liquidation. We should, however, emphasize that Schedule 4 to the Insolvency Act applies equally to Scotland. The amendment mentioned above may be neither appropriate nor necessary under Scots law, and this needs to be borne in mind.¹⁰

- 18.11 **(a) Do you agree with our provisional view that the ability of a liquidator to execute deeds and other documents on behalf of the company either by affixing its seal, or (whether it has a seal or not) by signing the deed in the name of the company should be confirmed and clarified?**
- (b) If so, should there be a requirement for such signature to be attested?**

⁸ Although our main concern is with execution by an attorney on behalf of a corporate donor, we would be pleased to receive comments which would also cover execution on behalf of an individual.

⁹ See above, para 8.30.

¹⁰ In particular, we understand from the Scottish Law Commission that under Scots law there is no need to retain any reference to the seal, and that attestation should not be necessary for formal validity.

- (c) Are there any other problems arising from the execution of deeds and other documents by liquidators?**

Execution by administrators and administrative receivers

18.12 The only change which seems to require consideration here is whether it is necessary or desirable to amend the Insolvency Act 1986 in order to clarify that the powers of administrative receivers are statutory powers (subject to exclusion in the debenture), and hence survive the winding-up of the company, and exercisable despite any inconsistency with the articles of the company, as opposed to powers given purely as a matter of contract in the relevant debenture.

- 18.13 **(a) Is it necessary or appropriate to clarify that the powers of an administrative receiver are statutory powers, although subject to modification in the debenture or the appointment?**

- (b) Are there any other problems arising from the execution of deeds and other documents by administrators or administrative receivers?**

Execution by non-administrative receivers

18.14 The main difficulty which we have identified concerns the position where the receiver needs to execute a document in the company's name after it has gone into liquidation.¹¹ Whilst in practice receivers in this position are able to execute documents, our provisional view is that the basis on which this is done should be clarified. Where the receiver executes by virtue of a power of attorney, this might be done by extending section 4 of the Powers of Attorney Act 1971,¹² so that it applies to make a power of attorney irrevocable where the relevant proprietary interest or obligation is owned by or owed to the person appointing the attorney, and not just by the attorney. Alternatively, provision might be made either that:-

(a) without prejudice to the other powers of a receiver, any power of attorney or other power to convey in the name of the chargor is not terminated by the liquidation of the chargee, notwithstanding the termination at that point of the agency of the receiver for the chargor; or

(b) that any such power of attorney or other power is a power coupled with an interest within the common law rule.¹³

- 18.15 **(a) Do you agree with our provisional view that it would be helpful to confirm and clarify the power of a non-administrative receiver to execute deeds in the company's name following the commencement of liquidation of the chargor company?**

¹¹ See above, para 8.38.

¹² See above, para 8.38 n 88.

¹³ See above, para 8.38.

(b) If so, should this be done:-

- (i) By extending section 4 of the Powers of Attorney Act 1971 to powers of attorney granted to a receiver?**
- (ii) By provision that a power of attorney or other power to convey in the name of the chargor is not terminated by the liquidation of the chargor?**
- (iii) By provision that any such power of attorney or other power is a power coupled with an interest within the common law rule?**
- (iv) By a combination of (i), (ii) and (iii) above, or in some other way?**

Our provisional view is that option (b)(i) alone would be insufficient, as it would not clarify the use of a power to convey which is not expressed to be a power of attorney. Such a power is commonly found in security documents, and, whilst there may be doubts as to its exact status, we would not favour any option which cast doubt on the ability to use such a power. We provisionally favour option (ii), perhaps included as part of a general codification of execution by attorneys.

(c) Are there any other problems arising from the execution of deeds and other documents by non-administrative receivers?¹⁴

¹⁴ We have, however, explained that we consider it to be beyond the scope of this Paper to address the question of how far such a receiver may create fresh obligations on the part of the company after liquidation. See above, para 8.39 n 92.

PART XIX SUMMARY OF ISSUES

19.1 We end with a summary of the main issues and questions raised in this Paper on which we would welcome comments. We should be particularly grateful if commentators would let us know of any factors or arguments which we may have overlooked, and would also welcome hearing of any difficulties occurring in practice which we have not mentioned. Those wishing to respond to some only of the points set out below should feel free to do so.

The distinction between deeds and other documents

- 19.2 (a) Should the “face-value” requirement in section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 be made more specific? If so, would you favour a requirement that an instrument is not a deed unless:-
- (i) it expressly describes itself as a deed; or
 - (ii) it contains a prescribed form of attestation clause?¹ (paras 13.3 - 13.4)
- (b) Do you agree with our provisional view that the “face-value” requirement as expressed in sections 36A(5) and (6) of the Companies Act 1985 needs to be harmonised with section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989? If so:-
- (i) Assuming there to be no other changes in the face-value requirement, should this be done by adding after the words “which makes it clear on its face that it is intended by the person or persons making it to be a deed” the words “(whether by describing itself as a deed or expressing it to be executed as a deed or otherwise)”?²
 - (ii) Alternatively, should the words “(whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)” be omitted from section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989? (para 13.5)
- (c) Do you agree with our provisional view that the term “specialty” needs to be clarified in the context of deeds and other documents? If so, would you favour:-
- (i) a provision that no instrument (or obligation created or confirmed in an instrument) is a specialty unless it is a deed;³ or

¹ This approach would necessitate consequential amendments to section 57 of the Law of Property Act 1925.

² We have omitted the words “or signed”, which appear in s 1(2)(a) because they seem inappropriate given that a deed executed under s 36A is expressed to be executed “by the company”, even when s 36A(4) is used.

³ If this is favoured in principle, considerable care would be needed to preserve specialty obligations which did not derive their status by virtue of being contained in a deed, for example where an obligation is expressly made a specialty by statute.

(ii) a provision that a specialty should include all deeds and any contract made by a corporation under seal (or in accordance with section 36A(4)), whether or not a deed; or

(iii) some other method of clarification, and if so what? (paras 13.6 - 13.8)

We are provisionally in favour of option (i) above.

(d) Do you agree with our provisional view that the relationship between contracts under seal and deeds also needs to be clarified? If so, would you favour:-

(i) making all contracts executed under seal by a corporation deeds (for example by amending section 1 of the Law of Property (Miscellaneous Provisions) Act 1989) so that intention to create a deed is sufficiently shown in the case of a company or other corporation by execution under seal (and also by execution without a seal but in accordance with section 36A(4) by a company, and any other type of corporation to which this method of execution might be extended); or

(ii) making it clear that the “face-value” requirement is not satisfied merely because an instrument is executed under seal; or

(iii) some other form of clarification, and if so what? (paras 13.6 - 13.9)

We are provisionally in favour of option (ii) above, although we see some disadvantages to this.

(e) Should there be any other change in the present rules governing what is required to make an instrument a deed?

Defective deeds

19.3 Our provisional view is against recommending that there should be a rule of law that an instrument which fails to take effect as a deed may nonetheless still have effect as a contract or other instrument under hand, but comments are invited. (paras 13.12 - 13.13)

The method of execution of deeds and documents by companies

19.4 Do you agree with our provisional view that, despite its shortcomings, the present “dual regime” should be retained, so that companies may continue to execute deeds either under the common seal or by the signature of two officers? (paras 14.1 - 14.5)

Execution without a seal

19.5 (a) Should there be any change in the method of execution by a company without using its common seal set out in section 36A(4) of the Companies Act 1985?

(b) If so:-

(i) Should the categories of permitted signatories be expanded?

(ii) If your answer to (i) is “yes”, should there be additional safeguards, such as a requirement for details of authorised signatories to be lodged in a central registry which is open to inspection (for example Companies House)?

- (iii) Should execution by the signature of a single officer be permitted?
 - (iv) If your answer to (iii) is “yes”, should there be any additional requirement, for example attestation?
 - (v) If your answer to (iii) is “yes”, should execution by the secretary alone be permitted, or should there be a requirement that where there is a single signatory, it must be a director?
 - (vi) Should execution by the signature of a single director be permitted in the limited case of a single member company with a sole director?
- (c) Should it be permissible for a person who is a director or secretary of more than one company to sign a deed once only, in their capacity as director or secretary of each relevant company, when more than one such company is a party to the deed?

Our provisional view is against option (b)(i) above. We think that it would be unsafe to extend the categories of permitted signatory without introducing additional requirements, which might in themselves be unduly burdensome. We see arguments both for and against permitting a deed to be executed by the signature of a single director (option (b)(iii)) and for option (c), but have not reached a view at this stage. (paras 14.7 - 14.11)

Facsimile seals and signatures

- 19.6 (a) Should the requirement in section 350(1) of the Companies Act 1985 that the name of a company must be engraved on its seal be abolished?
- (b) If so, should this be replaced by a requirement that any method of sealing used by a company must leave a physical impression?
- Our provisional view is that the requirement for a seal to be engraved serves a useful purpose, so long as companies are permitted to execute under seal, and should remain as a general requirement.
- (c) Is it necessary or appropriate to make statutory provision for a company to have one or more duplicate seals?
- We have not reached a provisional view at this stage, and would welcome hearing further about current practice in this respect.
- (d) Should there be any relaxation in the requirement for personal signature in the case of companies, and if so what? Should any such change be extended to execution by individuals?
- We are provisionally against any such relaxation.
- (e) Should there be a relaxation in the requirements for execution of particular classes of instrument, and if so, which classes of instrument would you suggest? Whilst reluctant to see different rules for different types of instrument, we would

welcome hearing views, particularly if the present requirements are considered impracticable for certain types of document.

- (f) Should there be some other change in the rules as to what constitutes signature and sealing by companies, and if so what?
(paras 14.14 - 14.17)

Specific proposals for the reform of section 36A of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925

The meaning of the term “executed”

- 19.7 (a) Should section 36A of the Companies Act 1985 and/or section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 be amended to ensure consistency in the use of the term “executed”?
- (b) If so, do you agree with our provisional suggestion that section 36A should be amended to provide that execution “as a deed” is by execution and delivery?
(paras 15.2 - 15.3)

Execution under seal

- 19.8 (a) Should section 36A(2) of the Companies Act 1985 be amended by adding that execution is by affixing the common seal “in accordance with the articles”? If so, should this be made expressly without prejudice to sections 35A and 35B of the Companies Act 1985, and to the presumptions of due execution in section 36A(6) and section 74(1) of the Law of Property Act 1925?
- (b) Should there be some other change to section 36A(2), and if so what?
(para 15.5)
We have not reached a provisional view upon the need for such amendment at this stage, and invite comments.

Corporate directors

- 19.9 (a) Is there any need to clarify the application of section 36A(4) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 where the directors or secretary of a company are themselves other companies or corporations?
- (b) If so, should this be done by making specific provision that such a director or secretary may “sign” or “attest” by the signature of a person authorised to do so on its behalf?
(para 15.7)

Presumptions of due execution

- 19.10 Do consultees agree with our provisional conclusion that the presumption of due execution in favour of a purchaser in good faith contained in section 36A(6) of the 1985 Act and section 74(1) of the 1925 Act should be retained? (para 15.9)

Inconsistencies between section 36A(6) and section 74(1)

- 19.11 (a) Should there be any change in the identity of the officers who may attest the affixing of the seal for the purpose of section 74(1)? In particular, do you agree with our provisional view that due execution should be deemed in favour of a purchaser in good faith when the seal has been attested by two directors or members of the council or governing body as well as by one such person and the secretary, clerk or other permanent officer or his secretary?
- (b) Should section 36A(4) be amended so that one of those signing a document by way of execution by the company may be a deputy or assistant secretary? If it should, the presumption in section 36A(6) would have to be amended accordingly.
- (c) Should the definition of “purchaser” applicable to sections 36A(6) and 74(1) be amended, and if so how? In particular, should due execution be deemed in favour of a purchaser or intending purchaser in the case of the purchase contract (if executed as a deed) and/or any other document which does not effect the transfer of the relevant property?
- (d) Should the references to “purported” officers be amended in sections 36A(6) and/or 74(1), and if so, how? Our provisional view is that both sections should follow the wording of section 36A(4) in this respect.
- (e) Is any amendment required to clarify the relationship between the deeming of due execution in sections 36A(6) and 74(1) and the rules governing forged documents?
- (f) Should section 36A(6) be limited to deeds, or alternatively should section 74(1) be extended to include any document executed under seal, whether or not a deed? Our provisional view is to extend section 74(1) to any document executed under seal and attested by the appropriate officers, whether or not a deed.
- (g) Should there be any other detailed amendments to sections 74(1) and 36A(6), and if so what should they be? ⁴
(paras 15.11 - 15.16)

Delivery

- 19.12 Do you agree with our provisional view that the concept of delivery still serves a useful purpose? If not, what do you consider should determine when a deed takes effect? (para 15.18)

⁴ The irrebuttable presumption of delivery in section 36A(6) is dealt with separately below, see para 19.13(c).

Statutory presumptions of delivery

- 19.13 (a) Do you agree with our provisional view that the statutory rebuttable presumption of delivery upon execution contained in section 36A(5) of the Companies Act 1985 should be retained?
- (b) If so:-
- (i) Should such a statutory presumption be extended to all corporations?
 - (ii) Is there any need to clarify the relationship between the presumption and the concept of delivery in escrow?
 - (iii) If there is such a need, do you agree with our suggestion that the provision in section 36A(5) that a deed “has effect upon delivery” should simply be removed?
 - (iv) Is there any need to clarify the relationship between the presumption in section 36A(5) and the concept of “delayed delivery” on behalf of the maker of the deed? If so, how should this be done?
 - (v) Should there be some other change in the presumption in section 36A(5), and if so what?
- (c) Should there be an irrebuttable presumption (or deeming) of delivery upon execution in favour of a purchaser in good faith, as currently contained in section 36A(6) of the Companies Act 1985? Our provisional view is that there should be no such presumption of delivery, given the apparent inconsistency between a presumption of delivery on execution with the presumption in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 of delivery on behalf of the maker of a deed (for example by the party’s solicitor on completion), and indeed, with the whole concept of “delayed delivery”.
- (d) If you think that there should be such a presumption, should section 74(1) of the Law of Property Act 1925 be amended to include a presumption of delivery in the same terms as section 36A(6)? Whilst our provisional view is against there being such a presumption at all, if consultees disagree, then we would favour there being an identical presumption in both sections 36A(6) and 74(1).
- (e) Should there be some other change in the presumption of delivery in section 36A(6), and if so, what?
- (f) Should there be a statutory presumption that a solicitor or other legal adviser who purports to deliver and date a deed on behalf of their client has authority to do so? If so, would it be appropriate to extend the presumption of authority to deliver on behalf of the maker of the deed contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 to transactions other than those involving the creation or disposal of an interest in land? We would be sympathetic to the extension of section 1(5) in this way, but we invite views.

- (g) Should there be some other presumption of delivery in favour of a person dealing with a company, and if so what? For example, should the presumptions mentioned above be replaced by a rebuttable presumption of delivery with the date which has been inserted in the deed?
(paras 15.20 - 25)

Foreign corporations

- 19.14 (a) (i) Do you agree with our provisional view that the Foreign Companies (Execution of Documents) Regulations should be extended so that they are applicable to all corporations incorporated outside Great Britain?
(ii) As an alternative to (i), should “company” be defined for the purpose of the Regulations? If so, how might the definition be framed?
(iii) Should the Regulations be amended to provide that they are without prejudice to any additional requirements for execution imposed by local law? Our provisional view is against making such an amendment.
(iv) Should the Regulations be amended to clarify what constitutes sufficient authority to execute a document under the authority of the foreign company, and if so how?
- (b) Should there be some other change in the Regulations, and if so what?
(paras 15.27 - 15.30)

Greater uniformity for execution by different types of corporation

- 19.15 (a) Do you favour changes to achieve greater uniformity between different types of corporation in the rules governing the execution of deeds and other documents, and to make those rules more accessible? (para 16.2)
- (b) If so, then in particular:-
(i) Do you agree with our provisional view that the ability to execute without using a seal should be extended to corporations to which section 36A(4) of the Companies Act 1985 does not currently apply? (para 16.3)
(ii) Would you favour the introduction of a formula for execution by all corporations aggregate? Such a formula might, for example, permit a document to be executed by any corporation aggregate (including a registered company) either:-
(A) by the corporation affixing its common or other authorised seal; or
(B) by being signed by two directors or members of the council or other governing body, or by one such officer and the secretary, clerk or other permanent officer or his deputy, and being expressed to be executed by the corporation.
(iii) Do you agree with our provisional view that execution in accordance with such a formula should be available in addition to any existing statutory or other modes of execution? This would permit corporations to continue to execute as they do at present, but give them the option of using a method which might be

more commercially convenient for those dealing with them.

- (c) Are there any categories of corporation aggregate (for example local authorities, building societies, or charities incorporated under the Charities Act 1993) for which special provision would be appropriate? If so, what modification of the formula would you suggest?
- (d) Do you consider that any statutory presumptions of due execution and delivery which are applicable to registered companies should also apply to other types of corporation aggregate?
- (e) Should there be any other changes in the rules for the execution of deeds and other documents in order to achieve greater uniformity or consistency for different types of corporation, and if so what?
(paras 16.3 - 16.12)

Corporations sole

- 19.16 (a) Should there be any statutory provision for execution by all corporations sole?
- (b) If so, do you agree with our suggestion that there should be a permissive statutory provision (namely, one which is available in addition to any existing method of execution) allowing execution either under the corporation's seal or by the attested signature of the holder of the office for the time being?
(paras 16.14 - 16.15)

Contracts

- 19.17 (a) Do you agree with our provisional view that:-
- (i) Section 1 of the Corporate Bodies' Contracts Act 1960 should be re-worded to follow section 36 of the Companies Act 1985? That would mean that for any corporation (other than a company) a contract could be made either:-
 - (A) by a corporation, by writing under its seal; or
 - (B) on behalf of a corporation, by any person acting under its authority, express or implied.In each case, any formalities required by law in the case of a contract made by an individual would also be necessary, unless a contrary intention appears.
 - (ii) Any company or corporation subject to the Foreign Companies (Execution of Documents) Regulations 1994 should be excluded from section 1? (para 17.2)
- (b) Should there be some other amendment to the Corporate Bodies' Contracts Act 1960, and if so what?
- (c) Should there be a single provision (along the lines of option (a)(i) above) applicable to contracts made by all corporations aggregate, including registered companies? This would be amended to apply to foreign corporations as is done

at present in the case of foreign companies by the Foreign Companies (Execution of Documents) Regulations. (para 17.2)

Execution of deeds on behalf of corporations

Execution by attorneys

- 19.18 (a) Should section 38 of the Companies Act 1985 be amended to clarify that it does not preclude a company from appointing an attorney to execute deeds in the United Kingdom, or in some other way? Our view is that no such amendment is necessary, but that it might be helpful in any general review of execution by an attorney. (para 18.2)
- (b) Does section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 need to be amended to make specific provision for execution by an attorney? If so:-
- (i) Would it be appropriate to provide that a deed is executed “by or on behalf of” the maker of a deed?
 - (ii) Is a similar amendment needed to section 36A(5) of the Companies Act 1985? (para 18.3)
- (c) Should there be statutory clarification that the formalities governing execution are governed by the identity of the attorney (or alternatively of the donor - so long as appropriate methods of execution are available in all cases)? Our provisional view is that the formalities should be governed by the identity of the attorney. (para 18.4)
- (d) Does section 7 of the Powers of Attorney Act 1971 need to be amended to make more appropriate provision for execution by an individual attorney in the name of a corporate donor? (para 18.5)
- (e) Does section 7(3) of the Powers of Attorney Act 1971 cause any difficulty in practice? If so, is there any reason why it should not be repealed? (para 18.6)
- (f) Is further clarification required on the application of the statutory presumptions of due execution and delivery where a deed is executed on behalf of a corporate party by its attorney? (para 18.7)
- (g) Do you agree with our provisional view that the present rules for execution by attorney should be codified, setting out a non-exhaustive list of methods of execution which are available? If so, should this be accompanied by an illustrative list of examples? (para 18.8)
- (h) Should there be any other change in the rules which govern the execution of documents by an attorney, whether on behalf of a corporate or an individual

donor, and if so what?⁵

Execution by liquidators

- 19.19 (a) Do you agree with our provisional view that the ability of a liquidator to execute deeds and other documents on behalf of the company either by affixing its seal, or (whether it has a seal or not) by signing the deed in the name of the company should be confirmed and clarified?
- (b) If so, should there be a requirement (under English law) for such signature to be attested?
- (c) Are there any other problems arising from the execution of deeds and other documents by liquidators?
(para 18.10)

Execution by administrators and administrative receivers

- 19.20 (a) Is it necessary or appropriate to clarify that the powers of an administrative receiver are statutory powers, although subject to modification in the debenture or the appointment?
- (b) Are there any other problems arising from the execution of deeds and other documents by administrators or administrative receivers?
(para 18.12)

Execution by non-administrative receivers

- 19.21 (a) Do you agree with our provisional view that it would be helpful to confirm and clarify the power of a non-administrative receiver to execute deeds in the company's name following the commencement of liquidation of the chargor company?
- (b) If so, should this be done:-
- (i) By extending section 4 of the Powers of Attorney Act 1971 to powers of attorney granted to a receiver?
 - (ii) By provision that a power of attorney or other power to convey in the name of the chargor is not terminated by the liquidation of the chargor?
 - (iii) By provision that any such power of attorney or other power is a power coupled with an interest within the common law rule?
 - (iv) By a combination of (i), (ii) and (iii) above, or in some other way?

Our provisional view is that option (b)(i) alone would be insufficient, as it would

⁵ Although our main concern is with execution by an attorney on behalf of a corporate donor, we would be pleased to receive comments which would also cover execution on behalf of an individual.

not clarify the use of a power to convey which is not expressed to be a power of attorney. Such a power is commonly found in security documents, and, whilst there may be doubts as to its exact status, we would not favour any option which cast doubt on the ability to use such a power. We provisionally favour option (ii), perhaps included as part of a general codification of execution by attorneys.

- (c) Are there any other problems arising from the execution of deeds and other documents by non-administrative receivers? ⁶
(para 18.14)

⁶ We have, however, explained that we consider it to be beyond the scope of this Paper to address the question of how far such a receiver may create fresh obligations on the part of the company after liquidation. See above, para 8.39 n 92.

APPENDIX A

EXTRACTS FROM THE PRINCIPAL STATUTES AND INSTRUMENTS REFERRED TO IN THE PAPER

Relevant extracts from the following statutory provisions:

Law of Property Act 1925, sections 74, 205

Corporate Bodies' Contracts Act 1960, section 1

Powers of Attorney Act 1971, sections 1, 7

European Communities Act 1972, section 9

Limitation Act 1980, sections 5, 7, 8, 9

Companies Act 1985, sections 35, 35A, 35B, 36, 36A, 37, 38, 39, 40, 711A

Insolvency Act 1986, sections 14, 42, 165, 167; Schedule 1, paras 8, 9, 23;
Schedule 4, Part II, paras 7, 13

Law of Property (Miscellaneous Provisions Act) 1989, section 1

Charities Act 1993, section 60

Foreign Companies (Execution of Documents) Regulations 1994,
regulations 2, 3, 4, 5

LAW OF PROPERTY ACT 1925

Execution of instruments by or on behalf of corporations

74.—(1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument which is not a deed in relation to any matter within the powers of the corporation.

(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.

(4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an

officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.

(6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

....

General definitions

205.—(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

....

(ii) “Conveyance” includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; “convey” has a corresponding meaning; and “disposition” includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and “dispose of” has a corresponding meaning;

....

(xx) “Property” includes any thing in action, and any interest in real or personal property;

(xxi) “Purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Act and elsewhere where so expressly provided “purchaser” only means a person who acquires an interest in or charge on property for money or money’s worth; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires “purchaser” includes an intending purchaser; “purchase” has a meaning corresponding with that of “purchaser”; and “valuable consideration” includes marriage but does not include a nominal consideration in money;

CORPORATE BODIES’ CONTRACTS ACT 1960

Cases where contracts need not be under seal

1.—(1) Contracts may be made on behalf of any body corporate, wherever incorporated, as follows:—

(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the body corporate in writing signed by any person acting under its authority, express or implied, and

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the body corporate by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the body corporate and its successors and all other parties thereto.

(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made.

(4) Nothing in this section shall be taken as preventing a contract under seal from being made by or on behalf of a body corporate.

(5) This section shall not apply to the making, variation or discharge of a contract before the commencement of this Act but shall apply whether the body corporate gave its authority before or after the commencement of this Act.

POWERS OF ATTORNEY ACT 1971

Execution of powers of attorney

1.—(1) An instrument creating a power of attorney shall be executed as a deed by the donor of the power.

....

(3) This section is without prejudice to any requirement in, or having effect under, any other Act as to the witnessing of instruments creating powers of attorney and does not affect the rules relating to the execution of instruments by bodies corporate.

....

Execution of instruments, etc. by donee of power of attorney

7.—(1) If the donee of a power of attorney is an individual, he may, if he thinks fit—

- (a) execute any instrument with his own signature, and
- (b) do any other thing in his own name,

by the authority of the donor of the power; and any document executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature or, as the case may be, in the name, of the donor of the power.

(2) For the avoidance of doubt it is hereby declared that an instrument to which subsection (3) of section 74 of the Law of Property Act 1925 applies may be executed either as provided in that subsection or as provided in this section.

(3) This section is without prejudice to any statutory direction requiring an instrument to be executed in the name of an estate owner within the meaning of the said Act of 1925.

(4) This section applies whenever the power of attorney was created.

EUROPEAN COMMUNITIES ACT 1972 (repealed¹)

9.—(1) In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed to be free of any limitation under the memorandum or articles of association; and a party to a transaction so decided on shall not be bound to enquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and shall be presumed to have acted in good faith unless the contrary is proved.

¹ Repealed by the Companies Consolidation (Consequential) Provisions Act 1985, s 29, Sched 1.

LIMITATION ACT 1980

Actions founded on simple contract

Time limit for actions founded on simple contract

5.— An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

....

Time limit for actions to enforce certain awards

7.— An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

....

General rule for actions on a specialty

Time limit for actions on a specialty

8.—(1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

....

Actions for sums recoverable by statute

Time limit for actions for sums recoverable by statute

9.—(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

COMPANIES ACT 1985

A company's capacity not limited by its memorandum

35.—(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.

(2) A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceedings shall lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(3) It remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum; and action by the directors which but for subsection (1) would be beyond the company's capacity may only be ratified by the company by special resolution. A resolution ratifying such action shall not affect any liability incurred by the directors or any other person; relief from any such liability must be agreed to separately by special resolution.

(4) The operation of this section is restricted by section 65(1) of the Charities Act 1993 and section 112(3) of the Companies Act 1989 in relation to companies which are charities; and section 322A below (invalidity of certain transactions to which directors or their associates are parties) has effect notwithstanding this section.

Power of directors to bind the company

35A.—(1) In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution.

(2) For this purpose—

- (a) a person “deals with” a company if he is a party to any transaction or other act to which the company is a party;
- (b) a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution; and
- (c) a person shall be presumed to have acted in good faith unless the contrary is proved.

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving—

- (a) from a resolution of the company in general meeting or a meeting of any class of shareholders, or
- (b) from any agreement between the members of the company or of any class of shareholders.

(4) Subsection (1) does not affect any right of a member of the company to bring proceedings to restrain the doing of an act which is beyond the powers of the directors; but no such proceedings shall lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(5) Nor does that subsection affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.

(6) The operation of this section is restricted by section 65(1) of the Charities Act 1993 and section 112(3) of the Companies Act 1989 in relation to companies which are charities; and section 322A below (invalidity of certain transactions to which directors or their associates are parties) has effect notwithstanding this section.

No duty to enquire as to capacity of company or authority of directors

35B.— A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so.

Company contracts: England and Wales

36.— Under the law of England and Wales a contract may be made—

- (a) by a company, by writing under its common seal, or
- (b) on behalf of a company, by any person acting under its authority, express or implied;

and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.

Execution of documents: England and Wales

36A.—(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed.

A “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

....

Bills of exchange and promissory notes

37.— A bill of exchange or promissory note is deemed to have been made, accepted or endorsed on behalf of a company if made, accepted or endorsed in the name of, or by or on behalf or on account of, the company by a person acting under its authority.

Execution of deeds abroad

38.—(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom.

(2) A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company’s common seal.

(3) This section does not extend to Scotland.

Power of company to have official seal for use abroad

39.—(1) A company which has a common seal whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have for use in any territory, district, or place elsewhere than in the United Kingdom, an official seal, which shall be a facsimile of its common seal, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) The official seal when duly affixed to a document has the same effect as the company’s common seal.

(2A) Subsection (2) does not extend to Scotland.

(3) A company having an official seal for use in any such territory, district or place may, by writing under its common seal or as respects Scotland by writing subscribed in accordance with the Requirements of Writing (Scotland) Act 1995, authorise any person appointed for the purpose in that territory, district or place to affix the official seal to any deed or other document to which the company is party in that territory, district or place.

(4) As between the company and a person dealing with such an agent, the agent's authority continues during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(5) The person affixing the official seal shall certify in writing on the deed or other instrument to which the seal is affixed the date on which and the place at which it is affixed.

Official seal for share certificates, etc.

40.—(1) A company which has a common seal may have, for use for sealing securities issued by the company and for sealing documents creating or evidencing securities so issued, an official seal which is a facsimile of its common seal with the addition on its face of the word "Securities".

The official seal when duly affixed to a document has the same effect as the company's common seal.

(2) Nothing in this section shall affect the right of a company registered in Scotland to subscribe such securities and documents in accordance with the Requirements of Writing (Scotland) Act 1995.

....

Exclusion of deemed notice²

711A.— (1) A person shall not be taken to have notice of any matter merely because of its being disclosed in any document kept by the registrar of companies (and thus available for inspection) or made available by the company for inspection.

(2) This does not affect the question whether a person is affected by notice of any matter by reason of a failure to make such inquiries as ought reasonably to be made.

INSOLVENCY ACT 1986

Administrators

General powers

14.—(1) The administrator of a company—

(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and

(b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act;

and in the application of that Schedule to the administrator of a company the words "he" and "him" refer to the administrator.

(2) The administrator also has power—

(a) to remove any director of the company and to appoint any person to

² Prospectively inserted by Companies Act 1989, s 142.

be a director of it, whether to fill a vacancy or otherwise, and
(b) to call any meeting of the members or creditors of the company.

(3) The administrator may apply to the court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

(4) Any power conferred on the company or its officers whether by this Act or the Companies Act or by the memorandum or articles of association, which could be exercised in such a way as to interfere with the exercise by the administrator of his powers is not exercisable except with the consent of the administrator, which may be given either generally or in relation to particular cases.

(5) In exercising his powers the administrator is deemed to act as the company's agent.

(6) A person dealing with the administrator in good faith and for value is not concerned to inquire whether the administrator is acting within his powers.

....

Administrative Receivers: General

General powers

42.—(1) The powers conferred on the administrative receiver of a company by the debentures by virtue of which he was appointed are deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in Schedule 1 to this Act.

(2) In the application of Schedule 1 to the administrative receiver of a company—

- (a) the words “he” and “him” refer to the administrative receiver, and
- (b) references to the property of the company are to the property of which he is or, but for the appointment of some other person as the receiver of part of the company's property, would be the receiver or manager.

(3) A person dealing with the administrative receiver in good faith and for value is not concerned to inquire whether the receiver is acting within his powers.

....

Liquidator's Powers and Duties

Voluntary winding up

165.—(2) The liquidator may—

- (a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and
- (b) in the case of a creditors' voluntary winding up, with the sanction of the court or the liquidation committee (or, if there is no such committee, a meeting of the company's creditors),

exercise any of the powers specified in Part I of Schedule 4 to this Act (payment of debts, compromise of claims, etc.).

....

Winding up by the court

167.— (1) Where a company is being wound up by the court, the liquidator may—

- (a) with the sanction of the court or the liquidation committee, exercise any of the powers specified in Parts I and II of Schedule 4 to this Act (payment of debts; compromise of claims etc.; institution and defence of proceedings; carrying on of the business of the company), and
- (b) with or without that sanction, exercise any of the general powers specified in Part III of that Schedule.

....

Schedule 1 - Powers of Administrator or Administrative Receiver

8. Power to use the company's seal.

9. Power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document.

....

23. Power to do all other things incidental to the exercise of the foregoing powers.

....

Schedule 4 — Powers of Liquidator in A Winding up

Part III—Powers Exercisable Without Sanction in any Winding Up

7. Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal.

....

13. Power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets.

LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989

Deeds and their execution

1.—(1) Any rule of law which—

- (a) restricts the substances on which a deed may be written;
- (b) requires a seal for the valid execution of an instrument as a deed by an individual; or
- (c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished.

(2) An instrument shall not be a deed unless—

- (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
- (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.

(3) 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.

(4) In subsections (2) and (3) above “sign”, in relation to an instrument, includes making one’s mark on the instrument and “signature” is to be construed accordingly.

(5) Where a solicitor, duly certificated notary public or licensed conveyancer, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

(6) In subsection (5) above—
“disposition” and “purchaser” have the same meanings as in the Law of Property Act 1925; and
“duly certificated notary public” has the same meaning as it has in the Solicitors Act 1974 by virtue of section 87(1) of that Act;
“interest in land” means any estate interest or charge in or over land or in or over the proceeds of sale of land.

(7) Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before this section comes into force, this section shall have effect as to signing, sealing or delivery of an instrument by an individual in place of any provision of that Act as to signing, sealing or delivery.

(8) The enactments mentioned in Schedule 1 to this Act (which in consequence of this section require amendments other than those provided by subsection (7) above) shall have effect with the amendments specified in that Schedule.

(9) Nothing in subsection (1)(b), (2), (3), (7) or (8) above applies in relation to deeds required or authorised to be made under—

- (a) the seal of the county palatine of Lancaster;
- (b) the seal of the Duchy of Lancaster; or
- (c) the seal of the Duchy of Cornwall.

(10) The references in this section to the execution of a deed by an individual do not include execution by a corporation sole and the reference in subsection (7) above to signing, sealing or delivery by an individual does not include signing, sealing or delivery by such a corporation.

CHARITIES ACT 1993

Execution of documents by incorporated body

60.—(1) This section has effect as respects the execution of documents by an incorporated body.

(2) If an incorporated body has a common seal, a document may be executed by the body by the affixing of its common seal.

(3) Whether or not it has a common seal, a document may be executed by an incorporated body either—

(a) by being signed by a majority of the trustees of the relevant charity and expressed (in whatever form of words) to be executed by the body; or

(b) by being executed in pursuance of an authority given under subsection (4) below.

(4) For the purposes of subsection (3)(b) above the trustees of the relevant charity in the case of an incorporated body may, subject to the trusts of the charity, confer on any two or more of their number—

(a) a general authority, or

(b) an authority limited in such manner as the trustees think fit, to execute in the name and on behalf of the body documents for giving effect to transactions to which the body is a party.

(5) An authority under subsection (4) above—

(a) shall suffice for any document if it is given in writing or by resolution of a meeting of the trustees of the relevant charity, notwithstanding the want of any formality that would be required in giving an authority apart from that subsection;

(b) may be given so as to make the powers conferred exercisable by any of the trustees, or may be restricted to named persons or in any other way;

(c) subject to any such restriction, and until it is revoked, you shall, notwithstanding any change in the trustees of the relevant charity, have effect as a continuing authority given by the trustees from time to time of the charity and exercisable by such trustees.

(6) In any authority under subsection (4) above to execute a document in the name and on behalf of an incorporated body there shall, unless the contrary intention appears, be implied authority also to execute it for the body in the name and on behalf of the official custodian or of any other person, in any case in which the trustees could do so.

(7) A document duly executed by an incorporated body which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(8) In favour of a purchaser a document shall be deemed to have been duly executed by such a body if it purports to be signed—

(a) by a majority of the trustees of the relevant charity, or

(b) by such of the trustees of the relevant charity as are authorised by the trustees of that charity to execute it in the name and on behalf of the body,

and, where the document makes it clear on its face that it is intended by the person or persons making it to be a deed, it shall be deemed to have been delivered upon its being executed. For this purpose “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

THE FOREIGN COMPANIES (EXECUTION OF DOCUMENTS) REGULATIONS 1994 (SI 1994 No 950)

Application of sections 36 to 36C Companies Act 1985

2. Sections 36, 36A, 36B and 36C of the Companies Act 1985 shall apply to companies incorporated outside Great Britain with the adaptations and modifications set out in regulations 3 to 5 below.

3. References in the said sections 36, 36A, 36B and 36C to a company shall be construed as references to a company incorporated outside Great Britain.

Adaptation of section 36

4. Section 36 shall apply as if—

(a) after the words “common seal,” in paragraph (a) there were inserted— “or in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company,”, and

(b) for paragraph (b) there were substituted—

“(b) on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company;”.

Adaptation of section 36A

5. Section 36A shall apply as if—

(a) at the end of subsection (2) there were inserted—

“, or if it is executed in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company.”,

(b) for subsection (4) there were substituted—

“(4) A document which—

(a) is signed by a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company, and

(b) is expressed (in whatever form of words) to be executed by the company, has the same effect in relation to that company as it would have in relation to a company incorporated in England and Wales if executed under the common seal of a company so incorporated.”, and

(c) in subsection (6) for the words from a “director” to “directors of the company” there were substituted “a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company”.

APPENDIX B

THE APPROACH IN OTHER COUNTRIES

Scotland

- B.1 The Requirements of Writing (Scotland) Act 1995 has significantly changed Scots law as regards the need for writing to effect or evidence legal acts, and the manner in which legal documents are executed or authenticated.¹ This is reflected in section 36B of the Companies Act 1985 (as substituted by the 1995 Act²), which provides that, notwithstanding the provisions of any enactment, a company need not have a common seal. For the purposes of any enactment providing for a document to be executed by a company by affixing its common seal, a document signed or subscribed by or on behalf of a company in accordance with the 1995 Act has effect as if executed under the common seal.
- B.2 Under the 1995 Act, certain documents must be in writing, subscribed by the grantor (the maker).³ Subscription requires the grantor to sign the document at the end of the last page.⁴ Except where an enactment otherwise provides, a document is signed by a company if it is signed on its behalf by a single director, by its secretary, or by a person authorised to sign the document on its behalf.⁵ There is a presumption that the company has subscribed the document where it bears to have been subscribed on behalf of the company either by two directors, a director and the secretary, or by two authorised persons without a witness, or alternatively by one such person and witnessed.⁶ However, even though authenticated in either of these ways, there is no presumption that the relevant officer or person actually held that office or had been duly authorised.⁷ This is understood to make it incumbent upon any person dealing with the company to take such steps as they consider appropriate to verify the authority of the person purportedly signing on its behalf.⁸ We note in particular that the signature of a single director is sufficient, if witnessed.

¹ The 1995 Act is based on recommendations of the Scottish Law Commission: Report on Requirements of Writing (1988) Scots Law Com No 112.

² Sched 4, para 51. For an account of the “convoluted history” of recent reforms to s 36 of the Companies Act 1985 in relation to Scots law see *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.8.1. The current version of s 36B is the third since its enactment by Companies Act 1989, s 130(3).

³ Requirements of Writing (Scotland) Act 1995, ss 2 and 3.

⁴ *Ibid*, s 7.

⁵ *Ibid*, Sched 2, para 3(1).

⁶ Requirements of Writing (Scotland) Act 1995, s 3, as amended by Sched 2, para 3.

⁷ *Ibid*, s 3(1C), as inserted by Sched 2, para 3(5).

⁸ *Gore-Browne on Companies* (44th ed 1986) Vol 1 para 5.9.2.

B.3 There is separate provision for execution by local authorities,⁹ other types of corporation,¹⁰ and for Ministers of the Crown and office-holders¹¹. In part that is because, since the basic rule is that execution is by signature, there has to be provision explaining how every type of corporation signs a document. This does, however, mean that the rules which govern execution by companies, local authorities, and other bodies corporate, are found in a single statute. They are in similar form - the task of defining the form made very much easier by the basic requirement for a single signature - although there is no attempt to find a single formula which is applicable to each. It is also interesting that the use of the common seal retains significance in the case of a local authority or other type of corporation, but not for a company registered under the Companies Acts.

B.4 Although the term “deed” has appeared in legislation applying to Scotland,¹² it is understood that it is not, in fact, a technical term of art in Scots law.¹³ Although, therefore, there is a presumption that a document has been subscribed where there is the attested signature of a single director, the requirement for attestation (or indeed for a second signatory) serves a somewhat different purpose to any additional formality requirement under the law of England and Wales for execution in solemn form as a deed.¹⁴ It is also notable, however, that the category of those who may sign is explicitly made wider than applicable under the law of England and Wales, since it is not restricted to the secretary and directors, but includes any person authorised to sign the document on behalf of the company, without any requirement for such authority to be in the form of a power of attorney.

⁹ Requirements of Writing (Scotland) Act 1995, Sched 2, para 4, providing for signature by the “proper officer” of the authority. A person purporting to sign on behalf of a local authority as an officer of the authority is presumed to be the proper officer. Authentication is by the attested signature of the proper officer, or by execution under the common seal.

¹⁰ *Ibid*, Sched 2, para 5, providing for signature by a member of the governing board (or if there is no such board by a member of the corporation), the secretary (by whatever name he or she is called), or an authorised person. Authentication is by the attested signature of such person, or by execution under the common seal. There is no presumption that any such person holds the relevant office or position, or has been duly authorised.

¹¹ *Ibid*, Sched 2, para 6, providing for signature by the Minister or office-holder personally, by another Minister or officer (where this is permitted by any enactment or rule of law), or by any other person authorised to sign on his behalf. Where the signature is not by the relevant Minister or office-holder personally, a person purporting to sign as mentioned above is presumed to be the relevant officer, “other Minister”, or authorised person. Authentication is by the attested signature of such person. We understand that these provisions were, in part, necessary because the concept of a corporation sole is unfamiliar under Scots law: Report on Requirements of Writing (1988) Scots Law Com No 112, para 6.72.

¹² Eg, Companies Act 1985, s 36(3), in its original form.

¹³ Report on Requirements of Writing (1988) Scots Law Com No 112, para 6.46.

¹⁴ The purpose of the additional formality is to establish the authenticity of a document, rather than being necessary for its formal validity. It appears to derive from the old concept under Scots law of “probativity”, in the sense of a document which is accepted in legal proceedings and for other purposes as genuine unless the contrary is proved.

Civil law jurisdictions

- B.5 More generally, the formalities required by countries for certain types of document differ greatly. The approach to execution by a corporation also varies substantially.
- B.6 In civil law systems such as France there is frequently no concept of the execution of a deed under seal, but instead a distinction between a private and a public instrument. A private instrument is one whose author is the party executing the instrument. A public instrument is a narrative document of which the author is a public authenticating officer, usually a notary, before whom the executing party appears for the purpose of having his transaction recorded. It is for the authenticating officer to satisfy himself that a person or persons entering into a document have authority to do so for the corporation. Such a document is widely required for certain important transactions, including the transfer or creation of an interest in land.
- B.7 The structure of a company in a civil law jurisdiction may also differ substantially from that of a company incorporated in England and Wales. There may be two boards, one having a supervisory and the other a managerial role. The officers of the company equating roughly to the secretary and directors may not have similar titles. A third party dealing with a company may need to satisfy itself that those purporting to execute a contract for a company correspond with the particulars listed for the company in a public register, as in France, Italy and Germany, or in Holland (where the appropriate registers include specimen signatures of those able to bind the company). In particular, companies in most European countries have no seal.

New Zealand

- B.8 In the more easily comparable common law jurisdictions, there is also considerable variation in practice. In New Zealand, sealing is still required for corporations generally, unless execution is by a duly appointed attorney.¹⁵ In the case of companies, however, a contract required to be made by deed by an individual may be made on behalf of the company in writing, signed under the name of the company, by:-
- (a) two or more directors;
 - (b) a director and the secretary, whose signatures must be witnessed;
 - (c) if the articles permit, a director, or other person or class of persons whose signature(s) must be witnessed;
 - (d) one or more attorneys appointed by the company in accordance with the relevant statutory power to appoint an attorney.¹⁶

¹⁵ Property Law Act 1952, ss 4(2) and 5(1)(b).

¹⁶ Companies Act 1955, s 42, as substituted by Companies Amendment Act 1993, s 19. The statutory power for a company to appoint an attorney, subject to its articles, is found in s 44 of the 1955 Act, as substituted by s 21 of the 1993 Act.

B.9 Delivery is still required, which may be in escrow,¹⁷ and the instrument must be intended to take effect as a deed.¹⁸ A person dealing with a corporation in good faith without notice of any irregularity may assume regular and proper execution by the corporation.¹⁹ There is a presumption of due execution where a corporation has sealed a document, and this extends to execution on behalf of the company by an attorney,²⁰ but is of narrow application, as most companies and building societies are excluded from it.²¹

Australia

B.10 In Australia, as in England and Wales, execution by a corporation should comply with the formalities required by its constitution. There is a presumption of due execution in favour of a purchaser similar to section 74(1) of the Law of Property Act 1925 in most states,²² and an express statutory ability for a company to appoint an attorney under its common seal to execute deeds on its behalf.²³

B.11 Companies are still required to have a common seal, on which the name and registered number of the company must be set out. Matters such as corporate capacity and authority are comprehensively dealt with by sections 159 - 166 of the Corporations Law. A person dealing with a company is entitled to make certain assumptions in this respect.²⁴ In particular, there is a presumption that a document is duly sealed if it bears what appears to be an impression of the company seal and appears to have been attested by a director and secretary or two directors.²⁵ These presumptions cannot be relied upon where there is actual knowledge to the contrary, or where the person's connection or relationship with the company is such that they ought to know the true

¹⁷ *Poole v Neely* [1976] 1 NZLR 529, but "formal" or "literal" delivery is not required: Property Law Act 1952, s 4(3).

¹⁸ *Morley v Spencer* [1994] 1 NZLR 27, 29.

¹⁹ Property Law Act 1952, s 5(1), and the doctrine of constructive notice has been abolished so far as registration of company documents is concerned: Companies Act 1955, ss 18B and 18(c).

²⁰ Property Law Act 1952, s 5(1).

²¹ Property Law Act 1952, ss 5(3) and 5(4).

²² Eg, Western Australia, Property Law Act 1969, s 10. In Queensland "purchaser" is defined to include the Registrar (ie, the equivalent of the Chief Land Registrar): Property Law Act 1974, s 46(8).

²³ "A company may, by writing under its common seal, empower a person, either generally or in respect of a specified matter or specified matters, as its agent or attorney to execute deeds on its behalf, and a deed signed by such an agent or attorney on behalf of the company and under his her or its seal ... binds the company and has the same effect as if it were under the common seal of the company": Corporations Law, s 182(8).

²⁴ Eg, compliance with the memorandum and articles; the proper appointment and authority of the officers whose details appear in filed returns; and that the officers have properly performed their duties to the company (Corporations Law, ss 164(3)(a), (b), and (f) respectively).

²⁵ *Ibid*, s 164(3)(e).

position.²⁶ However, the presumptions are not rebutted by fraud or forgery by any officer of the company, unless the person dealing with it had actual knowledge of the fact.²⁷ The same presumptions may be made by a person who has dealings with a person who has acquired title to a property from a company.²⁸ It should be noted, however, that the whole area of corporate capacity and authority is under review, including the execution of deeds. In particular, it is likely that companies will be given the option whether or not to have a common seal.²⁹

B.12 Delivery is still required.³⁰ A corporation sealing a deed imports delivery, but this is a rebuttable presumption. In a conveyancing transaction, the handing of an executed deed to the party's solicitor prior to exchange does not in itself import delivery.³¹ There must again be an intention to create a deed, and compliance with all necessary formalities (such as description as a deed), so that an agreement will not necessarily be a deed merely because a corporation has sealed it.³²

²⁶ *Ibid*, s 164(4).

²⁷ *Ibid*, s 166. See *Advance Bank of Australia Ltd v Fleetwood Star Pty Ltd* (1992) 7 ACSR 387.

²⁸ *Ibid*, s 164(2).

²⁹ See the Second Corporate Law Simplification Bill 1996, cl 123(1).

³⁰ Legislation apparently directed at removing the need for delivery in Western Australia has not had this effect in practice: see *Monarch Petroleum NL v Citco Petroleum Ltd* [1986] WAR 310. The doctrine of escrow has been abolished in South Australia: Law of Property Act 1936, s 41aa(7).

³¹ *Hooker Industrial Developments Pty Ltd v Trustees of the Christian Bros* [1977] 2 NSWLR 109 (abrogated in Victoria by the operation of (Vic) Property Law Act 1958, s 73B(1)).

³² See above, Part XI, para 11.7 n 7.

APPENDIX C

FORMALITIES AND THE CONFLICT OF LAWS

- C.1 A detailed consideration of the conflict of laws issues relating to the execution of documents would be beyond the scope of this Paper,¹ and we do not propose any reform to the rules which govern such issues. However, we give a brief summary of the relevant law below. Companies registered in England and Wales execute documents which will be used abroad. Conversely, foreign companies of course execute deeds for use in this country. This needs to be borne in mind in considering any change to the formalities required for the execution of deeds and documents in England and Wales.
- C.2 The common law rules determining which country's laws govern a contract with a connection with more than one country have been largely replaced by the Contracts (Applicable Law) Act 1990. This gives effect to substantially the whole² of the Rome Convention on the law applicable to contractual obligations (referred to below as "the Convention").³
- C.3 The rules of the Convention (referred to below as "the articles") apply in any situation involving a choice between the laws of different countries,⁴ but only to "contractual obligations".⁵ There are a number of important exceptions, of which the following are the most relevant for present purposes:-
- (a) obligations arising out of bills of exchange, cheques and promissory notes and other negotiable instruments;⁶
 - (b) questions governed by the law of companies and other bodies corporate or unincorporate;⁷

¹ For a full account see *Dicey & Morris, The Conflict of Laws* (12th ed 1993) Caps 22, 23, 24, 30, 32, and 33.

² Articles 7(1) and 10(1)(e) do not have effect in the UK: Contracts (Applicable Law) Act 1990, s 2(2).

³ The Convention was signed by the UK on 7 December 1991 and came into force on 1 April 1991, although it had been relied on by an English court in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, 747.

⁴ This includes conflicts between the laws of different parts of the UK: Contracts (Applicable Law) Act 1990, s 2(3).

⁵ By implication this excludes property rights and intellectual property rights: *Dicey & Morris, op cit*, pp 1200 and 1386. Any unilateral undertaking, unconnected with a contract, will be excluded.

⁶ Article 1.2(c), but in the case of such "other negotiable instruments" only to the extent that the obligations arise out of their negotiable character.

⁷ "such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies ... and the personal liability of officers and members as such for the obligations of the company ...": article 1.2(e). This exclusion does not, however, prevent the Convention applying to contracts entered into by companies and the manner of their

- (c) the question whether an agent is able to bind a principal, or an organ to bind a company or other corporate body to a third party;⁸
- (d) evidence and procedure.⁹

C.4 Moreover, given that the Convention only applies to contractual obligations, there will be many deeds to which it does not apply. For example, it seems that property rights are not “contractual obligations” for the purpose of the Convention.¹⁰ Hence the governing law of a contract for the sale of land will be determined by the Convention, but it appears that the transfer by which that contract is completed (and a transfer not preceded by a contract) will instead be governed by the common law rules. Under those rules, the transfer will be governed by the law applicable where the land is situated,¹¹ and the formality requirements of that law will also apply.

C.5 Under article 3.1 of the Convention a contract is governed by the law chosen by the parties.¹² The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. In the absence of such choice, the contract is governed by the law of the country with which it is most closely connected.¹³

C.6 Where the laws of the forum¹⁴ are mandatory irrespective of the law otherwise applicable to the contract, nothing in the Convention will prevent the application of those mandatory laws.¹⁵

execution by companies. These matters were excluded in view of the continuing work on harmonisation of company law in the EU.

⁸ Article 1.2(f).

⁹ Article 1.2(h), but this is without prejudice to article 14 (burden of proof). Matters of procedure are generally outside the Convention. However, by article 14(1) the law governing a contract applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof. By article 14(2) a contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

¹⁰ See above, n 5.

¹¹ See above, Part IV, para 4.28.

¹² There are special rules for consumer contracts: see articles 5 and 9.5.

¹³ Article 4.1. As to the governing law of the contract see also *ibid*, articles 4.2 (presumption as to country of closest connection), 4.3 and 4.5 (presumptions in the case of immovable property), and 3.3 (application of “mandatory rules”).

¹⁴ Ie, the law of the court hearing a case.

¹⁵ Article 7(2), and see also article 3.3. An example is the Employment Protection (Consolidation) Act 1978, which cannot be evaded in the UK by a choice of foreign law for the contract of employment (s 153(5)).

- C.7 So far as formal validity is concerned the Convention provides that a contract between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs the contract or of the law of the country in which it was concluded.¹⁶ If the parties are in different countries, the contract is formally valid if it satisfies the formal requirements of the law which governs it under the Convention, or of the law of one of those countries.¹⁷ For this purpose, where a contract is concluded through an agent, the relevant country is the one where the agent acts.¹⁸ There is, however, no guidance on which country a corporation is regarded as “being in” for this purpose.
- C.8 “Formal requirements” is not defined¹⁹ but will include such matters as the method of execution of a document, the affixing of a seal, the presence of witnesses or certification by a notary.²⁰
- C.9 Similarly, an act which is intended to have legal effect in relation to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which, under the Convention, governs or would govern the contract, or of the law of the country where the act was done.²¹
- C.10 However, if the subject matter of the contract is a right in, or to use immovable property, the contract will be subject to the mandatory requirements of form of the law of the country where the property is situated if, by that law, those requirements are imposed irrespective of the country where the contract is concluded and of the law

¹⁶ Article 9.1. This is the same as English law prior to the 1990 Act: *Dicey & Morris, op cit*, p 1255. Material validity (eg, matters such as formation, absence of consideration, fraud, mistake and the legality of the contract) are governed by article 8.

¹⁷ Article 9.2.

¹⁸ Article 9.3.

¹⁹ In interpreting the Convention reference may be made to the Guiliano-Lagarde report, which is reproduced in the Official Journal of the Communities of 31 October 1980 C 282, Vol 23 (Contracts (Applicable Law) Act 1990, s 3(3)). The report indicates that for the purpose of article 9 “form” includes “every external manifestation required on the part of a person expressing the will to be legally bound and in the absence of which such expression of will would not be regarded as fully effective”: p 29. For a discussion of whether this extends to matters which the English courts have tended to characterise as procedural (eg, the requirements for writing under the Statute of Frauds 1677) see *Dicey & Morris, op cit*, pp 1256-1257.

²⁰ *Dicey & Morris, op cit*, p 1256.

²¹ Article 9.4.

governing the contract.²² There is no guidance on which rules of law are mandatory for this purpose.²³

- C.11 As mentioned above²⁴ questions governed by the law of companies or other bodies corporate or unincorporate are excluded from the Convention. It remains the position therefore that under English law the capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation, and by the law of the country which governs the transaction in question.²⁵ All matters concerning the constitution of the corporation are governed by the law of the place of incorporation.²⁶
- C.12 The application of the Convention to powers of attorney is uncertain. Although the question of whether an agent is able to bind a principal is excluded,²⁷ the Convention will determine the laws applicable to the contract between the principal and the agent. It is not, however, clear whether it will govern the relationship between principal and agent unless it arises from a contract between them, and whether a power of attorney is a contract for this purpose.²⁸ It is therefore likely that the formal validity of a power of attorney remains governed by the common law rules. As such, it will be formally valid if it satisfies the formalities required by the law of the place of its execution, or those of the place where it is intended to take effect.²⁹ If a power of attorney is a contract within the scope of the Convention then its formal validity will be governed by article 9.³⁰
- C.13 The execution of deeds and other contracts by foreign companies for use in this country has already been considered.³¹ We have also mentioned that, clearly, bodies incorporated in England and Wales may need to execute deeds which are intended for

²² Article 9.6: see further the discussion of this article in the light of the Giuliano-Lagarde report in *Dicey & Morris, op cit*, pp 1392-1393.

²³ The editor of *Dicey & Morris, op cit*, p 1393 considers that the requirements of Law of Property (Miscellaneous Provisions) Act 1989, s 2 for the sale of an interest in land will be mandatory for this purpose.

²⁴ Para C.3.

²⁵ *Dicey & Morris, op cit*, Rule 156(1), p 1111. For the status of a foreign corporation under English law see above, Part IV, para 4.33.

²⁶ *Ibid*, Rule 156(2) p 1111.

²⁷ See above, para C.3.

²⁸ It has been judicially described as “a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but it is not in any sense a contract”: *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 QB 79 CA, *per* Lindley LJ at p 85. See further *Dicey & Morris, op cit*, p 1454.

²⁹ *Brooke's Notary* (11th ed 1992) p 151. For a more cautious view see T M Aldridge, *Powers of Attorney* (8th ed 1991) p 50.

³⁰ See above, para C.7.

³¹ Above, Part IV, paras 4.28 - 4.35.

use in other jurisdictions. The complications of preparing a deed, such as a power of attorney for use in a number of jurisdictions are well known.³² In the case of a power of attorney, it is understood that most jurisdictions accept execution of the power as valid if done in accordance with the law of the place of execution, but this is not invariably the case, and the need to establish that execution was valid under English law may cause expense and delay. It has been suggested that the safest practical course is for such a power to be executed in accordance with English law, but also, so far as possible, in a form commonly employed in the country in which the power is to be used.³³ This consideration favours retaining flexibility for execution formalities under English law, for example so that a power of attorney can be executed under seal if it is to be used in a place which requires a power of attorney to be under seal.

³² See T M Aldridge, *op cit*, p 18. For suggested forms of “international powers of attorney” see *Encyclopaedia of Forms and Precedents* (5th ed 1991) Vol 31, Part 3, para 2501 (service).

³³ *Brooke’s Notary* (11th ed 1992) p 129, n 19 and p 195.