Powers of attorney

Why a power of attorney needs signing as a deed

(These are clickable links…)

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The issue

A frequent requirement of a client is that they need to sign a document labelled a 'power of attorney'.

A power of attorney means the giving of permission to someone else to do something on your behalf.

If you are doing something in another country you will often need to give such permission to someone in the country to work, or do something, on your behalf.

What that work or something is will depend on the nature of transaction or matter in which you are involved. For an individual it is often to do with buying or selling property, and can involve doing things such as signing documents, appear before officials or a court, pay sums, receive payments etc on your behalf).

Giving permission to someone to do things on your behalf in England

In England, if you wish someone to give permission to someone else to do something on your behalf you do not need to do so in writing or if you use a written document you do not need to call it a 'power of attorney'.

(Naturally, there are exceptions to the above sentence but they are not relevant here).

Why a document called a 'power of attorney' in England is different to other 'permission' documents

If you are to give permission to someone else in another country to do something on your behalf the document you will have to sign will almost be invariably called a 'power of attorney'.

In England, documents which are called a 'power of attorney' have to comply with certain formalities, that is:

1. contain certain words; and

2. be signed in a particular way

which makes them different to most other documents.

This is a requirement of, principally, three Acts of Parliament:

1. the Powers of Attorney Act 1971 (link to wording);

2. the Law of Property (Miscellaneous Provisions) Act 1989 (link to wording), and

3. the Companies Act 2006 (link to wording).

(see further below)

What this means in practise is essentially:

1. stating on a power of attorney:

(a) that it is a deed *or*

(b) that it is signed as deed; and

2. for

(a) an *individual*, the individual signs the document in the presence of a witness (who also signs and adds her/his details), *or*

(b) *a company*, a director signs (in the presence of a witness, who adds her/his signature and details) *or* two directors signing *or* a director and the company secretary signing (not all companies have a company secretary).

(There are additional requirements for situations other than described here. They are not listed for the sake of keeping things simple.)

What is the problem with a power of attorney signed in England but is for use in another country?

For most other countries signing a power of attorney does not need to be, called (or signed) as a deed (although it will need signing before a witness or a notary).

Why should you bother with making sure that a document which is called a 'power of attorney' and which is only being used abroad should comply with the requirements of English law?

The assumption is that all you need to do is make sure that is complies with the law of the country to which you are to send the power of attorney. What does it matter if English law requirements are not satisfied?

There are two reasons why I consider it is necessary to sign a document called a 'power of attorney' as a deed:

First reason

The first reasons concerns an international law proposition:

> *To create a binding document you need to comply with the law of the country in which you are signing the document (not the country to which it is going).*

(The proposition is known under its Latin name of '*locus regit actum*'. One translation of the meaning of this is '*the validity of an act depends on the law of the place where it is done...*' from *Osborn's Concise Law Dictionary*, 7th edition, Sweet and Maxwell.)

As I see it, this means if you are signing the document in England, and the document is called a 'power of attorney', then the law of England states that it needs signing as a deed.

The converse of this that a document labelled a 'power of attorney' signed in a country such as Brazil and is validly signed in accordance with the law of Brazil it would be valid here, even if it does not state it is a deed or is signed or dealt with in the same way as if it had been signed in England.

The second reason

The second reason is more practical as far I am concerned. Like any lawyer, there is plenty of laws, guidance and rules that I need to follow, and the standard I should achieve. One of the books that deal with notarial work states as follows (perhaps *the* book for notaries):

> *"In line with the principle enunciated about regarding the formality validity of powers of attorney [ie locus regit actum, the validity of an act depends on the law of the place where it is done], the English or Welsh notary, when called upon to draw up or authenticate an instrument purporting to create a power of attorney, should always ensure that the instrument meets the formal requirements of the law of England and Wales (that is to say it should be executed as a deed whether or not that is a requirement of the country in which the power is to be acted upon), and that it meets any formal requirements of the law of the jurisdiction in which it is to be used—as, for example, the number of witnesses required and whether the power of attorney should take the form of a public instrument.'* (from Brooke's Notary, 13th edition, 2009, Sweet and Maxwell, from section 8- 57)

For me, this passage from the book sets the standard I should achieve when dealing with a power of attorney.

Will I (as a notary) never deal with a document labelled a 'power of attorney' unless it is a deed?

The short answer is "yes".

The common situation is for a client to receive a document to sign. This is usually prepared by a lawyer or someone else in the country to which the document will be used. It will usually not contain the required words to make it a deed. The ideal is to amend the document so that it contains the required wording (such as persuading the lawyer or other person to amend it). This is the ideal.

What will happen if the lawyer or other person or the client refuses to have the document amended? However, I would advise the client:

1. that they are signing a document which is potentially invalid (see the next heading);

2. that the document (and any activity carried out in connection with or under it) is challengeable simply because it was not signed as a deed.

I would ask from the client that they wish to proceed despite the above points and either:

- ask the client confirm in writing that the wish to proceed without making the power of attorney a deed; or

- sending the client an email confirming that they wished to proceed without making the power of attorney a deed.

Is a power of attorney valid if not signed as a deed?

The likely answer is "yes", but with a large "but" attached to it. What is meant by this is that

the document is “voidable”. That is it is valid and binding until a person challenges its validity. And the challenge could concern solely that the formalities to create a valid power of attorney were not followed.

Another of putting this is that a power of attorney may be declared invalid simply because:

- it was not signed as a deed; or
- it did not state it was a deed; or
- it was not witnessed;

Even though the power of attorney correctly states the intention of the person (donor) who signs it, and the person appointed as the attorney correctly carries out the wishes of the donor.

It is best to illustrate it with an example:

1. I wish to sell my property in Spain.
2. My lawyer in Spain requires me to sign a power of attorney authorising the lawyer to act on my behalf.
3. I sign it, but not as a deed.
4. The lawyer carries out my instructions exactly.
5. The purchaser signs a contract with me (by my lawyer who has the power of attorney, signing on my behalf).
6. After the contract is signed but before completion, the purchaser decides s/he does not want to buy my property. The purchaser wishes to pull out.
7. The purchaser has no valid reason to pull out, but the purchaser spots that the power of attorney is not signed as a deed and argues my lawyer was not validly appointed as my attorney as there is no valid power of attorney appointing my lawyer. Accordingly, there is no valid contract.
8. The argument of the purchaser would be solely based on whether the technicalities of complying with creating a binding power of attorney were complied with.

Naturally this is a worst case scenario and most probably unlikely to occur (or the chances of it occurring are small) but from a practical point the addition of 4 words would have avoided.

How I deal with a power of attorney which does not include the necessary words to make it a deed?

As noted above, most clients will be receive the wording of the power of attorney from their lawyer, notary, agent overseas. It will usually not contain the wording to make it a deed.

Although to create a power of attorney as a deed only normally:

1. requires a few words adding (such as a ‘signed as a deed’); and

2. stating that the client’s signature is signed in the presence of a witness

such wording will normally need to be in the language of the power of attorney (if it is not in English).

Although I am familiar with the expressions used in some other languages to add such words as ‘signed as a deed’, etc., I have found that the provider of the power of attorney should always be given the opportunity to make the change themselves. Primarily the document is theirs and it is being used in their country and also as a matter of courtesy.

What about companies wishing to grant a power of attorney?

All of the above equally apply to companies.

What the law says

The Powers of Attorney Act 1971

Section 1(1) states:

> *"An instrument of a power of attorney shall be executed as a deed by the donor of the power."*

('Instrument' means virtually any type of document. The 'donor' is the person giving the power of attorney, that is permitting someone else to acting on that person's behalf.)

The Law of Property (Miscellaneous Provisions) Act 1989

Section 1(2) states:

> *"An instrument shall not be a deed unless--*
>
> *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*
>
> *it is validly executed as a deed--*
>
> *[(i) by that person or a person authorised to execute it in the name or on behalf of that person, or*
>
> *(ii) by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties]."*

Section 1(3) states:

> *"An instrument is validly executed as a deed by an individual if, and only if-*
>
> *it is signed--*
>
> *by him in the presence of a witness who attests the signature; or*
>
> *at his direction and in his presence and the presence of two witnesses who each attest the signature; and*
>
> *it is delivered as a deed…"*

The Companies Act 2006

Section 43 states:

> *"Execution of documents*
>
> *(1) Under the law of England and Wales or Northern Ireland a document is executed by a company—*
>
> *(a) by the affixing of its common seal, or*

(b) by signature in accordance with the following provisions.

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) The following are "authorised signatories" for the purposes of subsection (2) —

(a) every director of the company, and

(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.

(4) A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company.

(5) In favour of a purchaser a document is deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2).

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.

(6) Where a document is to be signed by a person on behalf of more than one company, it is not duly signed by that person for the purposes of this section unless he signs it separately in each capacity.

(7) References in this section to a document being (or purporting to be) signed by a director or secretary are to be read, in a case where that office is held by a firm, as references to its being (or purporting to be) signed by an individual authorised by the firm to sign on its behalf.

(8) This section applies to a document that is (or purports to be) executed by a company in the name of or on behalf of another person whether or not that person is also a company."

Section 46 states:

"Execution of deeds

(1) A document is validly executed by a company as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34) and for the purposes of the law of Northern Ireland if, and only if—

(a) it is duly executed by the company, and

(b) it is delivered as a deed.

(2) For the purposes of subsection (1)(b) a document is presumed to be delivered upon its being executed, unless a contrary intention is proved."