



WING TIPS

Technology Contracts and The Companies Act

The Companies Act 2006 (the “**2006 Act**”), which is coming into force in stages, is re-shaping company law in the United Kingdom. Parts of the 2006 Act which came into force on 6 April 2008 impact the drafting and execution of technology (and commercial) contracts generally.

Defined Terms

Technology contracts frequently refer to sections of the Companies Act 1985 (as amended) (“**1985 Act**”) to define what constitutes a “group” (e.g. for the purposes of scoping the licence granted or setting out who the benefit of the agreement can be assigned to). For contracts executed from 6 April 2008, these references may need to be updated to refer to the relevant sections of the 2006 Act. The table below details sections of the 1985 Act frequently referred to in defining a “group” and the corresponding section reference in the 2006 Act (the relevant sections having come into force on 6 April 2008). The definitions in these sections are effectively the same under the 1985 Act and the 2006 Act.

Term	1985 Act Definition	2006 Act Definition
“group” (note – defined by reference to a parent undertaking and its subsidiary undertakings)	Section 262(1)	Section 474(1)
“parent undertaking” and “subsidiary undertaking”	Section 258	Section 1162
“holding company”, “subsidiary” and “wholly-owned subsidiary”	Section 736	Section 1159

In updating these references, it is important to remember that the terms “parent undertaking” and “subsidiary undertaking” are used in the Companies Acts to define an ‘accounting’ group whereas the terms “holding company” and “subsidiary” are used to define a ‘legal’ group. This means that the constituent members of an accounting and legal group may well be different. In particular, an ‘accounting group’ may be larger and include noncorporate entities such as partnerships and unincorporated associations.

If a technology contract makes general reference to the 1985 Act (e.g. in the interpretation clause), it is important to remember that it should also make reference to the 2006 Act (as parts of both of these Acts are currently in force).

Execution of documents by a company formed under the Companies Acts Ordinary Contracts.

Section 43 of the 2006 Act restates the position in the 1985 Act on executing a ‘simple’ contract (i.e. a contract which is not a deed). Specifically, a single signatory can sign on behalf of a company if that signatory has the necessary express or implied authority.

Deeds.

One of the key changes made by the 2006 Act is to introduce a new method for the execution of a deed. Briefly and by way of background, the key differences between a deed and a simple contract are that some additional execution formality is required (beyond a simple signature) for a deed to be enforceable. Also, deeds are generally enforceable despite a lack of consideration and the limitation period for actions brought under a deed is generally 12 years from the date on which the cause of action accrued (the period is 6 years under a simple contract).

The reasons commonly encountered for executing a technology contract as a deed include (i) the existence of concerns as to the consideration (e.g. because the agreement includes a parent company guarantee), (ii) that a longer limitation period is sought and (iii) that there is a power of attorney in the contract to support the transfer of an asset such as intellectual property rights (under English law a power of attorney must be executed as a deed).

Execution of a Deed.

The 2006 Act does not change the traditional method for execution of a deed i.e. by the company affixing a common seal which is attested to. However, Section 44(2) of the

Act provides that if the company does not have a seal (or prefers not to use it) a document can be signed by a company as a deed if it is signed on behalf of the company by:

- two “authorised signatories” (every director of a company is an authorised signatory as is the secretary or joint secretary of a public company or a private company with a secretary (it being no longer compulsory for a private company to have a secretary). This reflects the position that existed under the 1985 Act in relation to the execution of deeds by a company; or
- by one director, in the presence of a witness, who attests to the director’s signature. This is a new method of executing a deed. The witness who may attest the director’s signature need not be connected to the company in any way.

The new method will be required where a company does not have a secretary and will be useful in situations where it is difficult for two corporate officers to be available to execute a deed. It is also a useful alternative to having a power of attorney where only one signatory is available. At the back of this corporate clips is suggested wording for execution of a deed.

The general requirements imposed by common law and the Law of Property (Miscellaneous Provisions) Act 1989 for the making of a contract as a deed are not affected by the 2006 Act, i.e. the contract must be in writing; it must state on its face that it is a deed; and it must be validly executed as a deed and delivered.

Multiple signatures.

Section 44(6) of the 2006 Act expands on the earlier rule that a person who is an officer of several companies and who signs a document on behalf of more than one of them must sign separately in each capacity for each of them. Specifically, this Section provides that where a document is to be signed by a person (including a person who is not an officer, such as an attorney) on behalf of more than one company, that person must sign separately in each capacity.

Attorney.

Section 47 of the 2006 Act provides that a company which appoints an attorney to execute a document must, like an individual, do so by an instrument executed as deed. The 1985 Act did not specify that such an appointment must be by way of a deed (although this was always best practice based on case law in relation to the execution of deeds).

We have set out below some suggested execution wording:

Execution using a company's common seal

The common seal of [NAME OF COMPANY] was affixed in the presence of:

Director:

Director/Secretary:

Execution by two authorised signatories

Executed as a deed by [NAME OF COMPANY] acting by [a director and its secretary/two directors]

Director:

Director/Secretary:

Execution by one director

Executed as a deed by [NAME OF COMPANY] acting by [NAME OF DIRECTOR] in the presence of:

Signature of witness:

Name of witness:

Address of Witness:

Occupation of Witness:

[For more information contact the Kemp Little, Corporate Practice: Charles Claisse charles.claisse@kemplittle.com or Anne Dolan anne.dolan@kemplittle.com](#)