Powers of attorney

Why a power of attorney needs signing as a deed

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 is no more than giving 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 another country to work or do something on your behalf.

What that work or something will depend on the nature of transaction or matter you are involved in. For an individual it is often to do with buying or selling property, but 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 be given to sign will almost be invariably called a 'power of attorney'.

In England, documents which are called a 'power of attorney' have to contain words and be signed in a particular way which is different to most other documents. This is a requirement of the Powers of Attorney Act 1971 and the Law of Property (Miscellaneous Provisions) Act 1989 (see below) .

What this means in practise is essentially:

1. stating on the document called 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 signing 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, but are not listed for the sake of keeping things simple.)

What is the problem with a power of attorney signed in England but which 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).

The real issue is 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 where 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 that to create a binding document you need to comply with the law of the country where you are signing the document.

(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 to be signed 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 would be valid here, even its was not described as a deed or signed or dealt with in the same way as if the document is 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?

I will deal with a document which is not a deed subject to the following two things occurring:

1. a lawyer in the country where the power of attorney is going to provides to me in writing that the wording necessary to make a document a deed is against the law of that country; and

2. the client provides to me in writing confirmation that s/he has received this note and is aware that they may have signed a document which may not be binding on them or legally not (or potentially is not binding) and therefore potentially ineffective.

An example,

For example, a document labelled a power of attorney is signed a client but it is not a deed. The power of attorney gives permission to a person (attorney) in another country to buy a property in that country on behalf of the client. The attorney signs various papers so that property is bought. However a dispute arises. The client and the seller are required to take part in a trial in that other country. If it is discovered that the power of attorney is not signed in accordance with the rules of England and Wales to create a binding power of attorney then in that country it may be held that the power of attorney was ineffective to appoint the attorney, and that the attorney was not able legally to sign the papers to buy the property and accordingly the client is not the owner of the property.

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

any problem (ie adding 'signed as a deed').

Sometimes a client (or a non-lawyer in another country) states that such wording is not needed or cannot be used. Unfortunately given my understanding of the law and the view given of the standard I should achieve I will not normally be prepared to accept such a statement.

In over 8 years working a notary, I have had only a few lawyers in other countries having a problem with adding the wording necessary to make the power of attorney a deed. However, I have had problems with estate agents and other non-lawyers in other countries, with reasons ranging from: (a) I did not know the law, (b) I was only a notary and not qualified to know about the law, (c) I am only a notary and only there to witness the signature of the client, (d) that it never been asked for before, (e) that I was only trying to bump the amount I charge, (f) that adding the words need to create a deed was against the law but without specifying what law it was against and so on.

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

Mostly a client will be receive the wording of the power of attorney (eg if they are buying property overseas, then they will receive the document 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 requires a few words adding (such as a 'signed as a deed'), 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', a golden rule I have found in over 8 years working as a notary is 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.

Why is it important the document called a power of attorney *itself* indicates that it is a deed or is signed as a deed

What the Powers of Attorney Act 1971 says

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.)

What the Law of Property (Miscellaneous Provisions) Act 1989 says

Section 1(2) states "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--

[(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--

(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 . . ..