

SYNDICATED LOANS: CAN YOU SIGN ELECTRONICALLY?

The Law Commission has confirmed, in its report *Electronic Execution of Documents* (the "**Report**"), published on 4 September 2019, that electronic signatures can, for the most part, be used to sign documents. In the interests of reducing uncertainty and to increase confidence in the use of electronic signatures, the Law Commission has produced a statement of the law in England and Wales.

This will be of interest to participants in the syndicated loan market, where the digitisation of the documentation is considered to be key to making syndication and trading of loans more efficient. In this briefing, we examine whether electronic signatures really can be used as a viable alternative to handwritten ones when executing syndicated loan agreements, security and intercreditor documents and transfer documents in the loan market.

The Law Commission's Statement of Law

The Law Commission's Statement of Law, which is based on current English and EU law (as applied in the United Kingdom) and existing English case law, provides in summary: (1) an electronic signature is capable in law of being used to execute a document (including a deed) provided there is an intention to authenticate and any execution formalities are satisfied; (2) execution formalities may be required under a statute or in contract; (3) an electronic signature is admissible in evidence in legal proceedings; (4) the common law adopts a pragmatic approach and does not prescribe any particular form or type of signature, subject to contrary provisions in legislation, relevant contracts or case law (for example, the courts have held that signing with an "X", printing a name and using a stamp of a handwritten signature constitute a non-electronic "signature"); (5) electronic equivalents of these accepted non-electronic forms of signature are likely to be recognised by a court as legally valid (the courts have held that a name typed at the bottom of an email; clicking an "I accept" tick box on a website; and the header of a SWIFT message amount to valid signatures); and (6) the Law Commission's view is that a requirement that a deed be signed "in the presence of a witness" requires the physical presence of that witness.

To put this into context, the Law Commission's Statement of Law confirms that:

- an English law syndicated loan agreement (which would typically be in the form of an agreement and not a deed), may be executed electronically;

What is electronic execution?

Electronic execution is a broad term. It can mean a person typing his or her name in an email containing the terms of a contract; scanning and attaching signed pages to an email; attaching a pre-saved pdf signature into an electronic version of the document; or signing via an electronic signing platform, which is the method currently generating the most interest. Essentially it means a method of execution that does not involve physically signing a paper document.

What are e-signing platforms?

E-signing platforms are cloud based services which allow a person signing a document to open a link sent by email and to simply click a tab or type their name to sign the document. There is no need to print the document and manually sign it. Once each signatory has "signed", the platform applies a computer generated signature of each party to the electronic document and a fully signed pdf version is created. The system produces a digital certificate which records who signed the document, the time and date of signing and the IP address of the computer used by each signatory. The executed pdf document is also digitally sealed and this seal will evidence if the document is tampered with after signing.

- English law security and intercreditor documents (which are often in deed form) may be executed electronically; and
- English law transfer certificates and assignment agreements used to transfer lender commitments may be signed electronically,

subject in each case to any specific statutory, contractual or other applicable formalities and to local law considerations.

Execution of Deeds

The Law Commission's Statement of Law confirms that the current law requires any document which is executed as a deed to be witnessed and for the witness to be physically present at the time the deed is signed. Such a requirement applies even in circumstances where both the individual executing the deed and the witness attesting the document are using electronic signatures. Practically this means that, irrespective of the method of electronic signature, documents drafted in deed form must allow for the witness to see the electronic signature of the individual executing the deed and provide a mechanism for the witness to apply their electronic signature to the same document.

It should be noted that the Law Commission recommended that an industry working group be established to consider practical and technical issues associated with the electronic execution of documents to provide for further guidance and in particular to consider the practical and technical obstacles to video witnessing of electronic signatures on deeds and attestation, so there may be more on this subject in the future.

Execution of Registrable Documents

Regardless of the current legal position on e-signatures, if any of the credit documents in a syndicated loan transaction are to be registered, it may not be possible to sign them electronically if the relevant registry only accepts wet ink signatures or if it has particular requirements as to execution.

In preparing their Report the Law Commission contacted the four commonly used registries in the UK on their position in relation to the electronic execution of registrable transaction documents. Companies House, the Civil Aviation Authority, the UK Ship Register, the Intellectual Property Office and HM Land Registry appear to take different approaches and accept electronically executed documents to varying degrees depending on the document being filed and the form of electronic execution. We note that in the case of HM Land Registry, best practice remains the original of any certified copy of a document filed with the registry should be manually signed with wet ink.

In the context of a syndicated loan transaction, it is worth noting that while most security documents will need to be filed with Companies House (where the obligor is an English company), and depending on the nature of collateral taken, with other registries at the time the security is first granted, subsequent transfers by lenders of their commitments under a facility agreement will not generally trigger further registration requirements as the security will usually be granted in favour of a security agent or trustee. Therefore, depending on the collateral provided for a loan (and subject to any cross border considerations), it remains the case that registrable security documents may in certain circumstances (and in particular where security over land in the UK is taken) still have to be executed in wet ink when the security is first granted. On the other hand, where security is granted in favour of a security

agent or trustee, subsequent assignments and transfers of the loan may be executed electronically where there is no additional registration requirement.

Other points to consider

Notwithstanding the conclusion that as a matter of English law electronic signatures are valid and are admissible in evidence there will be circumstances in which they cannot or should be used. These include:

- if a wet ink signature is required for any reason, for example filing at a registry or due to client requirements;
- if the place of execution of the document is important, for example if there are tax or stamp duty consequences;
- if the executing party wishes, or is obliged, to use its corporate seal;
- if the executing party does not have the corporate capacity or authority to execute by electronic signature, for example there may be restrictions in the party's constitutive documents;
- a negotiable instrument such as a promissory note or negotiable bond; and
- if there are any cross border issues that may impact the document or transaction (see below).

In addition, the Law Commission highlighted the distinction between the legal validity of an electronic signature and the other practical issues that need to be considered. Primarily these relate to the evidential weight, reliability and security of the type of electronic signature used and to what extent it demonstrates the intention of the signatory to be bound by the terms of the document it is applied to.

Cross border considerations

The position set out above relates only to English law. Where a document is governed by the law of another jurisdiction or where non-English parties are involved confirmation from local counsel that an electronic signature will be a valid method of execution will be needed. This should include confirmation that the non-English party has the authority to execute the document by electronic signature.

Similarly, if litigation or other action in relation to the document, such as enforcement, may take place outside of England the form of the original executed document may be important and an electronic signature may not satisfy the relevant formalities involved in taking such action. Also if it is a local law requirement for a document to be apostilled or notarised this may not be possible for a document signed electronically. This is particularly pertinent to the grant of security and transfer of loans in some European jurisdictions where notarisation of security documents, and transfer certificates/assignment agreements provides lenders with greater protection in the event of an obligor's insolvency.

Use of e-signature platforms – additional considerations

E-signature platforms have the potential to simplify execution arrangements and keep a record of who signed when but there are distinctions between this method of execution and others. These may or may not be considered significant depending on the views of the parties involved. The additional points to consider include:

- *Witnessing*: to date e-signing platforms have not had the functionality to completely deal with witness requirements but solutions are now available on certain platforms. The person attesting the execution of the document must actually see the signatory sign the document and be physically present, as confirmed in the Report.
- *Practicalities*: pre-identification of signatories may be required which may not be feasible or desirable. This, in addition to the need to explain and convince many institutions that this methods of execution is appropriate for their institution, could be time-consuming. These factors will be exacerbated in transactions where there are multiple parties.
- *Cyber-security*: e-signature platforms are cloud based and any party wishing to use them will need to satisfy themselves that the platforms are sufficiently secure for their purposes.
- *Fraud*: it is arguable whether there is a slight risk of fraud inherent in e-signing systems in that it may be “easier” to click a tab/ type a name than replicate a manual handwritten signature. Although additional levels of security, such as one time passcodes sent to mobile phones, that can alleviate some of the perceived risk.

Conclusion

The Law Commission's Report gives those interested in digitising syndicated loans comfort that credit documentation can be signed electronically in so far as English law is concerned. Notwithstanding this, it remains the case that caution should be exercised where the credit documents are required to be registered and where there is a cross border element to a transaction.

For further details please refer to the linked Clifford Chance briefing on the [Law Commission's Report on electronic signatures](#).

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