

THE LAW COMMISSION'S REPORT ON ELECTRONIC SIGNATURES: PAVING THE WAY FOR DIGITISATION?

The recently published Law Commission's report *Electronic execution of documents* (the **Report**) confirms that the existing English law on execution of documents allows for the use of electronic signatures and no change in law is needed. The publication of the Report is welcome as interest in electronic signatures has grown over recent years, particularly because, as our daily environment becomes increasingly digitised, there is an expectation that putting pen to paper should not be necessary to sign legally binding documents. It remains to be seen whether the Report, which endorses the conclusions of the Law Society 2016 Practice Note on the topic, will encourage more businesses, governments and institutions to use electronic signatures on a widespread basis. This briefing examines the Report and its recommendations, highlights other factors that must be considered when using electronic signatures and looks in more detail at electronic signing (or e-signing) platforms.

THE LAW COMMISSION REPORT

The Law Commission published the Report on 4 September 2019 following a consultation in 2018. The stated objective of the project is to "ensure that the law governing the electronic execution of documents, including electronic signatures, is sufficiently certain and flexible to remain fit for purpose in a global, digital environment". The consultation noted that although many lawyers and law firms, including Clifford Chance, were of the view that electronic signatures were a valid method of execution under existing English law, "[this] is by no means the universal view", and that "the issues around the electronic execution of documents are hindering the use of new technology where legislation requires a document to be 'signed'". These concerns informed the focus and content of the Report.

The Report:

- (1) confirms the Law Commission's view that electronic signatures are valid and that under the current law an electronic signature is capable

Key issues

- Law Commission's report on Electronic execution of documents:
 - Electronic signatures are valid
 - Statement of Law
 - Recommendations
- Considerations other than legal validity
- Electronic signature platforms
- Where next for electronic signatures
- A possible review of the law of deeds

of being used to validly execute documents, including deeds or where there is a statutory requirement for a signature;

- (2) sets out a statement of law regarding the validity of electronic signatures, based on the EU eIDAS Regulation, the Electronic Communications Act 2000, as amended, and case law relating to electronic and non-electronic signatures; and
- (3) makes a number of recommendations and suggested options for reform.

Wills and registered dispositions under the Land Registration Act 2002 were excluded from the scope of the Report.

The Statement of Law

As there is no single source of law setting out the current position on electronic execution of documents, the Law Commission felt it would be beneficial to provide an accessible high-level explanation of the existing law, as determined by the Law Commission, (the **Statement of Law**) to facilitate usage. This provides that:

- (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, for example, 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.

The Statement of Law applies both where there is a statutory requirement for signature and where there is not and it is not restricted to consumer and commercial documents. The Statement of Law is also neutral when it comes to the form or type of electronic signature that can be used.

Recommendations and Options for Reform

The Report recommends:

Industry working group: that a multidisciplinary industry working group, including technology experts, lawyers and insurers, be established to consider the practical and technical issues associated with electronic execution of documents. The group should consider how different technologies can: (a) provide evidence of identity and intention to authenticate; and (b) ensure security and reliability and also prepare best practice guidelines on electronic execution.

An email "automated signature" can be a valid electronic signature

Drawing on the Law Commission's conclusions in the consultation paper and the Report, the High Court has very recently held in *Neocleous v Rees* that an automated signature (including name, occupation and contact details) which appeared on the bottom of a lawyer's email was a valid signature for the purposes of concluding a contract for the sale of land in accordance with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 provides that that the document must be "signed".

This was determined even though the email signature was automatically applied to each email sent by the lawyer. The reasoning was that setting up the auto-signature rule had involved a conscious act of the lawyer, the lawyer was aware that the auto-signature would be applied to the email and the application of the signature was sufficient to associate the lawyer with the contents of the email, particularly because the lawyer had included the words "many thanks" before the auto signature.

Video witnessing: that the industry working group look at the feasibility of video witnessing and attestation of deeds and consequently the Government should consider amending the Electronic Communications Act to allow for video witnessing.

Review of the law of deeds: that the Government ask the Law Commission to undertake a review of the law of deeds to confirm it remains fit for purpose (which should include further consideration of the implications of the Mercury case where obiter comments were made that deeds need to be whole when executed). Helpfully, however, the Law Commission endorsed the conclusions of the 2009 Law Society Practice Note on virtual execution of documents (which addressed the concerns raised by the Mercury case) and reiterated its view that no legislative reform in relation to those concerns was necessary.

The Report also suggests as an option for reform that the Government may wish to codify existing law on electronic signatures to improve its accessibility. It includes a draft provision that could be considered in a future consultation.

OTHER CONSIDERATIONS; NOT JUST A QUESTION OF LEGAL VALIDITY

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 not be used (see box for examples).

In addition, issues other than the legal validity of an electronic signature are important. The type of signature used and its evidential merits could be challenged and tested in court. Not all types of electronic signature will have the same weight or will be sufficiently secure, reliable and resilient to fraud. Further, it is crucial to ensure that the signatory has the authority to apply the electronic signature to the document in question and fundamentally that they intended to be bound by the terms of the document to which it was applied. For example, different considerations in relation to these questions will apply as between a jpeg signature attached to an electronic word or pdf document and generating an electronic signature via an e-signing platform. Although, it is important to recognise that similar issues could be raised in disputes relating to documents signed with handwritten signatures.

CROSS-BORDER IMPLICATIONS

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

Examples of when an electronic signature may not be appropriate and further analysis may be required

- if a wet ink signature is required, for example the document needs to be filed with a registry that only accepts wet-ink signatures;
- if there are particular restrictions in legislation or case law that may apply to the relevant document;
- if the place of execution of the document is important, for example if there are tax or stamp duty consequences;
- if the executing party uses 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;
- if the document to be executed is 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 section on cross-border implications).

local law requirement for a document to be apostilled or notarised, this may not be possible for a document signed electronically.

There appears to be a very mixed picture as to how different jurisdictions approach the question of legal validity and evidential sufficiency of electronic signatures. Although in the EU a signature that satisfies the specific and technical requirements of a qualified electronic signature (QES) under the EU eIDAS Regulation will have the same legal effect as a handwritten signature in each member state. To date there has been very limited use of QES in English law governed transactions, although certain e-signing platforms can facilitate a QES.

E-SIGNING PLATFORMS

What can constitute an electronic signature encompasses a wide range of non-wet-ink signatures, and the Report is deliberately technology neutral, but a significant amount of current interest relates to signatures generated by e-signing platforms. Many readers will be familiar with these types of platforms and services which are increasingly prevalent in certain sectors, jurisdictions and circumstances.

Extra Considerations When Using E-Signing Platforms

E-signing platforms have the potential to simplify and speed up execution arrangements and keep a record of who signed when. But transaction parties will need to familiarise themselves with how they work and appreciate the distinctions between this method of execution and others. These may or may not be considered significant depending on the views of the parties involved.

Witnessing: To date e-signing platforms have not had the functionality to completely deal with witnessing requirements but solutions are now available on certain platforms. Bear in mind that 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. Exploring the technical solutions in relation to witnessing, including the possibility of virtual or video witnessing (i.e. where the physical presence of the witness is not required) is part of the Law Commission's recommendations.

Practicalities: Pre-identification (and verification in the case of a QES) 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 method of execution is appropriate for their institution, could be time-consuming and unappealing. These types of concerns will be exacerbated in transactions where there are multiple parties. There are also unsurprisingly costs involved in obtaining a licence to use e-signature platforms, although only the entity arranging and coordinating the signing of documents (and not the signatories themselves) needs to obtain a licence.

Cyber-security: E-signing 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. Not all institutions have complete confidence in the security of cloud based technology and getting broad agreement to use these type of services could therefore hinder the use of e-signing platforms on multi-party transactions.

How e-signing platforms work

- Cloud based.
- A signatory opens a link sent by email and clicks a tab or types their name to sign the document.
- No need to print the document and manually sign it.
- When each signatory has "signed" the platform applies a computer generated signature of each party to the electronic document and creates a fully signed pdf version.
- A digital certificate is produced recording who signed the document, the time and date of signing and the IP address of each signatory's computer.
- The executed pdf document is digitally sealed which will evidence any tampering with the document after signing.

Fraud: It is arguable whether there is a slight risk of fraud inherent in e-signing platforms in that it may be “easier” to click a tab or type a name than replicate a manual handwritten signature. Although additional levels of security, such as PIN numbers sent to mobile phones, will alleviate some of the perceived risk or, in the case of the additional QES requirements, remove such risk altogether.

WHERE NEXT FOR ELECTRONIC SIGNATURES

There has to date been very limited demand for electronic execution on complex multi-party and multi-jurisdictional deals. Initial reservations were typically based on the assumption that manual, rather than electronic, signatures were better able to both: (a) evidence that the person executing the document was who they said they were and that they had the authority to sign the document; and (b) satisfy any formality requirements. We expect these types of reservations to continue to fall away in light of the Report and advances in electronic signing solutions, which are likely to provide more comfort on questions of identification and authentication. We anticipate any conclusions and statements of best practice produced by the industry working group proposed by the Law Commission will also be helpful in this regard. However, given earlier developments, such as the publication of the 2016 Law Society Practice Note on electronic execution and increasing familiarity with e-signing platforms over recent years, have made little impact on the market it will be interesting to see if the Report and its recommendations can herald a significant change in practice. Our view is that for many transactions on which we advise more widespread adoption will continue to be constrained by the cross-border elements and practical concerns we have outlined above.

THE DEMISE OF DEEDS?

Potentially the most significant aspect of the Report is the possibility that the law of deeds be reconsidered as to whether it remains fit for purpose. It is notable that many law firms responded to the Law Commission's consultation confirming that they believed such a review to be desirable. Given that many English and non-English lawyers find the formalities relating to deeds archaic and confusing a review that proposed significant simplification to the law has the ability to reduce execution errors and enhance the attractiveness of English law. However, although this review has been recommended by the Law Commission it still needs to be formally proposed by the Government before it can be undertaken.

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