

CORONAVIRUS: CAN ELECTRONIC SIGNATURES HELP?

The precautions being put in place globally to address the spread of Coronavirus (Covid 19) include recommending or requiring many to work from home. This has raised the question of whether it is possible to legally execute documents by electronic signature. The answer is it depends. Relevant factors include the governing law of the document, the type of document that is to be signed, the form of electronic signature used and whether there are cross-border implications to be considered. This briefing considers the position of electronic signatures under English law and looks briefly at electronic signing (or e-signing) platforms.

E-signatures under English law

Electronic signatures are valid under English law. This is the view of the Law Commission, set out in its 2019 report *Electronic execution of documents* (the Report), which was endorsed by the UK Government in a Ministerial Statement on 3 March 2020.

The Law Commission Report

The Report confirms the Law Commission's view that electronic signatures are valid and that under the current law an electronic signature is capable of being used to validly execute documents, including deeds or where there is a statutory requirement for a signature. Although this is subject to the proviso that any execution formalities are satisfied.

It also sets out an accessible high-level explanation of the existing English law on electronic signatures (the Statement of Law) regarding the validity of electronic signatures. The Statement of Law is based on the EU eIDAS Regulation, the Electronic Communications Act 2000, as amended, and case law relating to electronic and non-electronic signatures. It is neutral on the form or type of electronic signature that can be used.

Key issues

- Law Commission and Government confirm that electronic signatures are valid for English law
- Considerations other than legal validity
- Cross-border implications
- Electronic signature platforms

Practical questions

- Is the list of authorised signatories up to date and readily available?
- If the usual signatories are unavailable do any additional authorisations or approvals need to be put in place, including any approvals for the use of electronic signatures?
- Is it sensible to add extra persons to the list of authorised signatories?
- If the usual signatories are working remotely do they have access to a printer and a scanner in order to print and return signed documents? If a scanner is not available it may be possible to return a jpeg photo of the signed document, depending on the method of signing adopted and the satisfaction of any execution formalities.
- Has the IT department considered if using a cloud-based e-signing platform is appropriate?

The Statement of Law provides:

- (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 signatures¹; 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 Government position

In a ministerial statement by Robert Buckland, the Lord Chancellor, on 3 March 2020 the UK Government confirmed that it agreed with the conclusions of the Report. The ministerial statement said:

I agree with the report’s conclusion that formal primary legislation is not necessary to reinforce the legal validity of electronic signatures. The existing framework makes clear that businesses and individuals can feel confident in using e-signatures in commercial transactions.

I endorse the Commission’s draft legislative provision as set out in the report, as reflecting the Government’s view of the legal position on electronic signatures. They are permissible and can be used in confidence in commercial and consumer documents.

¹ We would note that a SWIFT message is unlikely to satisfy the execution formalities required for a deed.

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 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.

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; and
- if there are any cross-border issues that may impact the document or transaction (see section on cross-border implications).

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 can be used to sign remotely if signatories are physically unavailable, provided they have access to the internet via a mobile phone, tablet or computer. 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: it is not always clear if e-signing platforms have the appropriate 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.

Practicalities: pre-identification (and verification in the case of a QES) of signatories may be required which may not be feasible or desirable and explaining how e-signing platforms work to the various parties involved may be time-consuming. 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.

Will we see broader adoption of electronic signatures in light of the Coronavirus?

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 had already expected that these types of reservations would continue to fall away in light of the Report, and the Government’s endorsement of it, and advances in electronic signing solutions. It is possible that the commercial reality imposed on business and organisations in light of the Coronavirus may override these reservations at a faster rate than initially anticipated. However, broad adoption of e-signature in many cases is likely to continue to be constrained by the cross-border elements and practical concerns we have outlined above.

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