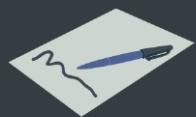


Coronavirus (COVID-19) & Bird & Bird



Using electronic signatures to avoid meetings and in-person signings

This article briefly considers how electronic signatures may be used for contracts governed by English law, at a time when signatories may be forced to sign documents remotely.

Is a signature necessary?

Generally speaking, in English law a contract can be concluded by offer and acceptance. That does not require a signature, although of course in most formal commercial contracts the parties choose to sign the documents in order to evidence their authentication of the contractual document and assent to its terms. In this situation, an electronic signature of any kind will be legally effective to conclude the contract, so long as:

- it is applied with the requisite intent and appropriate authority;
- for a legal entity, there are no restrictions on the use of electronic signatures in its constitutional documents;
- for an overseas (non-UK) legal entity, the law of the place of its incorporation permits electronic signatures; and
- there is nothing in the contractual terms themselves that stipulates something else.

However, as we discuss below, the law occasionally requires a signature for a particular kind of contract or clause within a contract. That situation would require further evaluation.

Admissibility as evidence

The EU eIDAS Regulation¹, which currently remains part of English law, and The Electronic Communications Act 2000 provide that all kinds of electronic signature are *admissible* in evidence. This means that they can be adduced in court as evidence of intent to authenticate the document. Since it is open to the opposing party to submit contrary evidence, from a practical perspective it is sensible to use a formalised signing platform that logs the fact of the signature, how it took place and what was signed.

¹ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market

Electronic signatures are commonly used in England for the execution of documents. For most types of contract, in the absence of a mandatory signature requirement, they are likely to be valid and enforceable, subject to usual contractual requirements such as the intention of the signer to authenticate the document and (for a legal entity), the authority of the signatory.

Mandatory signature requirements

For some kinds of contract (and indeed for some kinds of clause that may be found within a contract) the law lays down a mandatory requirement for a signature. That poses a different question: does an electronic signature comply with such a requirement? That is a question of *validity*. Non-compliance is likely to affect the validity of the transaction.

Where there is a statutory or similar requirement for a signature, but the statute does not stipulate a particular kind of signature, English law has generally recognised the validity of a wide variety of electronic signatures. There are many different forms of electronic signature, including an electronically pasted image of a signature and a signature applied by an electronic signature platform, such as DocuSign. In rare instances, a statute may stipulate a particular kind of signature, in which case the proposed kind of electronic signature would have to be considered with that in mind.

The Law Commission of England and Wales has recently summarised its view of these issues:



STATEMENT OF THE LAW: EXECUTION WITH AN ELECTRONIC SIGNATURE

- 1 An electronic signature is capable in law of being used to execute a document (including a deed) provided that (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied.
- 2 Such formalities may be required under a statute or statutory instrument, or may be laid down in a contract or other private law instrument under which a document is to be executed. The following are examples of formalities that might be required: (i) that the signature be witnessed; or (ii) that the signature be in a specified form (such as being handwritten).
- 3 An electronic signature is admissible in evidence in legal proceedings. It is admissible, for example, to prove or disprove the identity of a signatory and/or the signatory's intention to authenticate the document.
- 4 Save where the contrary is provided for in relevant legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion, the common law adopts a pragmatic approach and does not prescribe any particular form or type of signature. In determining whether the method of signature adopted demonstrates an authenticating intention the courts adopt an objective approach considering all of the surrounding circumstances.
- 5 The Courts have, for example, held that the following non-electronic forms amount to valid signatures:
 - a signing with an 'X';
 - b signing with initials only;
 - c using a stamp of a handwritten signature;
 - d printing of a name;
 - e signing with a mark, even where the party executing the mark can write; and a description of the signatory if sufficiently unambiguous, such as "Your loving mother" or "Servant to Mr Sperling".

- 6 Electronic equivalents of these non-electronic forms of signature are likely to be recognised by a court as legally valid. There is no reason in principle to think otherwise.
- 7 The courts have, for example, held that the following electronic forms amount to valid signatures in the case of statutory obligations to provide a signature where the statute is silent as to whether an electronic signature is acceptable:
 - a a name typed at the bottom of an email;
 - b clicking an "I accept" tick box on a website; and
 - c the header of a SWIFT message.
- 8 [Deeds – see below]"

Board and shareholder resolutions should be valid if signed using electronic signatures and it will be possible to sign most resolutions remotely (using board and shareholder written resolutions) and separately (if directors are in different places).

Certain types of document present greater risks or require 'wet-ink' signature

The validity of electronic signatures under English law for each type of contract needs to be considered. That includes other formalities and considerations beyond signatures themselves. This would include:

- *Formalities* – is there a statutory formality to comply with, which if it is not satisfied may affect the validity of the contract? Does it need to be in a certain form, such as certain consumer contracts? Is there a process requirement, such as a requirement to sign in a particular order? There may be a requirement that the contract be in writing. However it is generally accepted that in English law a visible electronic document satisfies a generally expressed writing requirement.
- *Evidential requirements* – what evidence is there that the contract was validly signed, where it was signed (which may be relevant for tax purposes) and that the requirements as to formality were satisfied? How good is that evidence?

Under English law, there are statutory formalities for the execution of deeds, including required formalities for a UK company², overseas company³ and individuals⁴.

Importantly, these require deeds (a formal UK document commonly used, amongst other reasons, for land and bank security arrangements) to be signed in the presence of a witness if signed by a sole director or by an individual.

The England and Wales Law Commission Statement referenced above separately concluded that under the current law, the requirement that a deed must be signed in the presence of a witness requires the physical presence of that witness. It is not clear whether a deed can be validly signed in the physical presence of a witness where the parties are using electronic signatures and/or an electronic signature platform, and 'wet-ink' signatures may still be required.

² Sections 43-48 Companies Act 2006

³ Section 4 Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009

⁴ Law of Property (Miscellaneous Provisions) Act 1989

If the intention is to avoid contact with others when signing documents, this requirement for physical presence of a witness may be problematic. If families are isolated, it may be that an adult family member could act as witness, but for certain types of deeds, such as wills, there is also a requirement of independence.

English law also requires that deeds are delivered, the timing and method for which may be more difficult to determine where the parties are using an electronic signature platform.

Finally, for certain documents, there remains a requirement to have original 'wet-ink' signatures, such as for documents required to be filed with the UK tax authorities or Land Registry. For these documents, electronic signature will not be an option.

When you are contracting with other legal entities, it matters in which jurisdiction they are based

Under English law and for contracts governed by English law, contracts entered into by overseas (non-UK) legal entities generally need to be executed by those entities in accordance with the law of the place of their incorporation and/or by a person authorised under that law⁵.

If you are entering into a contract with a company incorporated outside the UK, you should take legal advice in that company's jurisdiction of incorporation to confirm that the use of electronic signatures will not impact on the validity of the contract.

Be extra careful when dealing with legal entities

The constitutional documents of a legal entity should be checked for applicable signature requirements, including any restrictions on the use of electronic signatures.

Where a director or secretary (for a company) or member (for a limited liability partnership) is signing a document on behalf of the legal entity, it can also be important who *applies* that signature. For example, if a director asks their assistant to apply his or her signature to the contract, that signature may then not be effective as only the company and not the director can delegate signing authority.



⁵ Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009

Practical guidance

Companies may want to consider whether to authorise additional individuals to sign contracts on their behalf, in case regular signatories are unable to sign. Board resolutions and powers of attorney can be used to authorise additional signatories.

Companies that want to start using a digital signature platform will need to agree a licence for the product and arrange training for their signatories to use the platform.

Where signatories are home working, companies will want to ensure that they are able to access signature documents remotely, print signature pages as necessary and (where copy signatures are sufficient) scan back or provide a *jpeg* of signature pages.

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