

NOTE ON THE EXECUTION OF A DOCUMENT USING AN ELECTRONIC SIGNATURE

1. **Introduction**

This note has been prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees (the **JWP**). This note has been developed to help parties (and their legal advisers) who wish to execute commercial contracts using an electronic signature or who wish to enter into a commercial contract with one or more other parties that intend to execute that contract using an electronic signature. The JWP has obtained legal advice from Leading Counsel (Mark Hapgood QC) on the use of electronic signatures as a valid method of executing documents. This note has been approved by Leading Counsel.

This note is limited in scope to commercial contracts entered into (and certain other documents signed) in a business context, rather than those to which consumers or other individuals outside of a business context are a party. However, it is recognised that certain of the principles considered in this note may also be applicable to documents entered into in other contexts. Each transaction should be approached according to its own facts and should take into account the wider implications of the transaction, including any relevant regulatory or tax implications.

This note is limited to the position under English law (the position under the laws of other parts of the United Kingdom may be different). See paragraph 7 of this note for a short discussion of when English law may not be the applicable law for determining whether or not a contract has been properly executed. Paragraph 8 of this note sets out a number of practical considerations which should be taken into account when considering whether to use an electronic signature.

2. **Background**

At present, where the parties to a transaction are not physically at the same meeting to sign the documents, it is common for the lawyers involved to arrange a signing via email, following the procedures set out in an earlier guidance note¹. This typically involves the signatory signing a hard copy document in wet ink, converting the document and signature into electronic form (e.g. by scanning or photocopying it) and sending it by email. However, as market practice and technology evolve, the use of electronic signatures is becoming increasingly common in a range of commercial transactions and that trend is expected to continue. Electronic signatures can take a number of different forms, including:

- (a) a person typing his or her name into a contract or into an email containing the terms of a contract;
- (b) a person electronically pasting his or her signature (e.g. in the form of an image) into an electronic (i.e. soft copy) version of the contract in the appropriate place (e.g. next to the relevant party's signature block);
- (c) a person accessing a contract through a web-based e-signature platform and clicking to have his or her name in a typed or handwriting font automatically inserted into the contract in the appropriate place (e.g. next to the relevant party's signature block); and
- (d) a person using a finger, light pen or stylus and a touchscreen to write his or her name electronically in the appropriate place (e.g. next to the relevant party's signature block) in the contract.

This note does not focus on any one method of electronic signature, but rather on setting out the principles for determining whether a given document signed with an electronic signature has been validly executed.

¹ *Note on Execution of Documents at a Virtual Signing or Closing* prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees in May 2009.

3. **Legislative framework**

Regulation (EU) No 910/2014 (the **eIDAS Regulation**) has direct effect in EU Member States from 1 July 2016.² It establishes an EU-wide legal framework for electronic signatures (as well as for electronic seals, electronic time stamps, electronic registered delivery services and website authentication, all of which are outside the scope of this note).

The eIDAS Regulation defines:

- (a) an “*electronic signature*” as “data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign”;
- (b) an “*advanced electronic signature*” as one which meets the following requirements: (i) it is uniquely linked to the signatory; (ii) it is capable of identifying the signatory; (iii) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and (iv) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable; and
- (c) a “*qualified electronic signature*” as “an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures”.

Articles 25(2) and (3) of the eIDAS Regulation provide that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature and that a qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States. However, Article 25(1) of the eIDAS Regulation also provides that an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures. Furthermore, Recital 49 of the eIDAS Regulation states that (apart from the requirements for qualified electronic signatures) it is for national law to define the legal effect of electronic signatures.

As at the date of this note, qualified electronic signatures are not commonly used in England. Therefore, neither the concept of a qualified electronic signature nor the provisions of Articles 25(2) and (3) of the eIDAS Regulation have been relied on in reaching the conclusions set out in this note.

The Electronic Communications Act 2000 (the **ECA 2000**) provides a statutory framework for the admissibility of electronic signatures in England and Wales. Section 7(1) of the ECA 2000 provides that in any legal proceedings (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and (b) the certification by any person of such a signature, shall each be admissible in evidence in relation to any question as to the authenticity or integrity of the communication or data. Although the ECA 2000 deals with the admissibility of electronic signatures, it does not deal with the validity of electronic signatures. The conclusions about the validity of electronic signatures set out in this note are therefore based on wider principles of English common law.

In addition, Section 8 of the ECA 2000 provides for the UK government to modify by statutory instrument (**SI**) any enactment which requires something to be done or evidenced in writing, to be authorised by a person’s signature or seal or to be delivered as a deed or witnessed. Although more than 50 such SIs have been enacted under the ECA 2000, there are many statutory provisions imposing execution formalities which have not been addressed in this manner. However, in the opinion of Leading Counsel and the JWP, the fact that an SI has not been enacted under the ECA 2000 in respect of a particular statutory provision imposing an execution formality does not mean that a contract subject to such provision cannot be executed using an electronic signature (and this is supported by the eIDAS Regulation).

² The ECA 2000 and the Electronic Signatures Regulations 2002, derived in part from Directive 1999/93/EC, previously applied in England and Wales. The eIDAS Regulation repealed Directive 1999/93/EC with effect from 1 July 2016 and the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 amended the ECA 2000 and repealed the Electronic Signatures Regulations 2002 with effect from 22 July 2016, subject in both cases to certain transitional provisions.

4. Using electronic signatures to execute English law governed documents

4.1 Simple contracts

In the absence of any (usually statutory) requirement, there is no need under English law for contracts to be in any particular form; in fact they can be entered into orally, provided there is offer and acceptance, consideration, certainty of terms and an intention to be legally bound. Therefore, a simple contract may be concluded using an electronic signature.

4.2 Documents subject to a statutory requirement to be in writing and/or signed and/or under hand

A number of types of document are subject to specific formalities imposed by statute, including a requirement for the document to be in writing and/or signed and/or under hand. Examples include:

- (a) Section 4 of the Statute of Frauds 1677 requires a guarantee or a memorandum or note thereof to be in writing and signed by the guarantor or some other person authorised by the guarantor to do so;
- (b) Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (the **LP(MP)A 1989**) requires a contract for the sale or other disposition of an interest in land in England and Wales to be in writing and signed;
- (c) Section 53(1) of the Law of Property Act 1925 (the **LPA 1925**) requires a disposition of an equitable interest to be in writing, signed by the person disposing of it or by his properly authorised agent;
- (d) a statutory assignment within Section 136 of the LPA 1925 must (among other requirements) be in writing and signed by the assignor;
- (e) under Section 83 of the Bills of Exchange Act 1882, a promissory note must (among other requirements) be in writing and signed by the maker;
- (f) under Section 90(3) of the Copyright, Designs and Patents Act 1988, an assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor; and
- (g) under Section 1(1) of the Stock Transfer Act 1963, registered securities may be transferred by means of an instrument under hand in the form set out in Schedule 1 to the Act.

In the opinion of Leading Counsel and the JWP, a contract executed using an electronic signature (and which may exist solely in electronic form) satisfies a statutory requirement to be in writing and/or signed and/or under hand for the following reasons.

- (i) **Writing:** The Interpretation Act 1978 defines “writing” to include “typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form”. Where the contract is represented on a screen (including a desktop, laptop, tablet or smartphone) in a manner which enables a person to read its terms properly, it will be “in writing” at that point. For example, in *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265 (**Golden Ocean**), the Court of Appeal found that the exchange of a number of emails could lead to the conclusion of an agreement in writing for the purposes of the Statute of Frauds 1677.

- (ii) **Signature:** The test for determining whether or not something is a signature is whether the mark which appears in a document was inserted in order to give, and with the intention of giving, authenticity to it. Therefore, provided that the signatory inserts an electronic signature into the appropriate place (e.g. next to the relevant party's signature block) in a document with the intention of authenticating the document, a statutory requirement for that document to be signed will be satisfied. It does not matter how the signatory inserted the electronic signature into the document (e.g. using any of the methods specified in paragraphs 2(a)-(d) above), nor does it matter in what form that signature was inserted (e.g. a handwritten signature, a generic handwriting font, a typed font, etc.). Leading Counsel has advised that *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) is authority that typing a name into an email satisfies a statutory requirement for a document to be signed (and this position was confirmed in *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch)) and *Golden Ocean* is authority that an electronic signature has the same legal status as a wet ink signature, the key question being whether or not the purpose of the signature is to authenticate the document.
- (iii) **Under hand:** A document is generally understood to have been executed under hand if it has been executed otherwise than by deed. The insertion of an electronic signature with the relevant authenticating intention would be sufficient for a document to have been executed under hand.

4.3 **Deeds**

At common law, a deed must be in writing. Given the willingness of the courts to interpret various statutory requirements for writing to include the situation where a document is represented on a screen and executed with an electronic signature, in the opinion of Leading Counsel and the JWP, the approach outlined above would apply in respect of deeds. For the execution of deeds:

- (a) Section 46 of the Companies Act 2006 (the **CA 2006**) provides that a document is validly executed as a deed by a company incorporated under the CA 2006 if it is duly executed and is delivered as a deed.
- (i) Section 44 of the CA 2006 provides that one of the ways in which a document can be validly executed by a company incorporated under the CA 2006 is by signature by two directors or by one director and the company secretary (**authorised signatories**). In the opinion of Leading Counsel and the JWP, this can be achieved by each of two authorised signatories signing the deed (using an electronic signature or another acceptable method) either in counterpart or by one authorised signatory signing, followed by the other adding his or her signature to the same version (electronic or hard copy) of the deed.
- (ii) In the opinion of Leading Counsel and the JWP, delivery can be achieved through electronic signing, but the parties will have to take steps to ensure the signing arrangements adequately address when delivery takes place, particularly if the parties propose that their lawyers hold their signed documents to the order of the relevant party prior to the deed coming into effect.
- (b) Section 1(3) of the LP(MP)A 1989 provides that an instrument is validly executed as a deed by an individual (including an individual acting under a power of attorney) if it is signed by him in the presence of a witness who attests the signature (and, by Section 1(4), "sign" includes making one's mark on the instrument). Section 44 of the CA 2006 provides that another of the ways in which a document can be validly executed by a company incorporated under the CA 2006 is if it is signed on behalf of the company by a director of the company in the presence of a witness who attests the signature. In the opinion of Leading Counsel and the JWP, where a suitable signatory signs a deed using an electronic signature and another individual genuinely observes the signing (i.e. he or she has sight of the act of signing and is aware that the signature to which he or she is attesting is the one that he or she witnessed), he or she will be a witness for these purposes. If that witness subsequently signs the adjacent attestation clause (using an electronic signature or otherwise), that deed will have been validly executed. The practical means of witnessing different forms of electronic signature will need to be settled on a case-by-case basis, with consideration given to the evidential weight of the form agreed (see paragraph 5 below). However, in the opinion of Leading Counsel and the JWP, it is best practice for the witness to be physically present when the signatory signs, rather than witnessing through a live televisual medium (such as a video conferencing facility), in order to minimise any evidentiary risk as to whether the person genuinely witnessed the signing.

4.4 Companies incorporated under the CA 2006: minutes and resolutions

Leading Counsel has advised that:

- (a) a document (including minutes of a directors' meeting under Section 249 of the CA 2006 and a members' written resolution under Section 296 of the CA 2006) signed with an electronic signature by a person and sent or supplied to a company will have been sufficiently authenticated for the purposes of Section 1146 of the CA 2006 if:
 - (i) it is sent or supplied in hard copy form by or on behalf of the person who signed it; or
 - (ii) it is sent or supplied in electronic form, provided that the identity of the sender is confirmed in a manner specified by the company or (where no such manner has been specified by the company) if the communication contains or is accompanied by a statement of the identity of the sender and the company has no reason to doubt the truth of that statement;
- (b) minutes of the proceedings of a general meeting that are signed by the chairman using an electronic signature constitute evidence of the proceedings of that meeting in accordance with Section 356(4) of the CA 2006 and a record of a resolution passed otherwise than at a general meeting that is signed by a director or the company secretary using an electronic signature constitutes evidence of the passing of that resolution in accordance with Section 356(2) of the CA 2006; and
- (c) the directors of a company that has adopted the CA 2006 Model Articles for private companies limited by shares, the CA 2006 Model Articles for public companies limited by shares or the Companies Act 1985 Table A articles may take a decision or pass a directors' written resolution (as applicable) under those articles by the relevant directors signing a resolution using an electronic signature.

4.5 Using a combination of execution methods

If one (or some) parties to a document (including any witnesses) wish to sign using an electronic signature, while another (or others) would prefer to use another acceptable method (e.g. a wet-ink signature), there is no reason why the document cannot be signed using a combination of different methods, so long as each party uses a valid signature method, although there may be practical advantages (e.g. electronic storage) if a document is created only in an electronic process.

5. Evidential weight

Section 7 of the ECA 2000 provides that in any legal proceedings, an electronic signature incorporated into a particular electronic communication shall be admissible in evidence in relation to any question as to the authenticity of that communication or as to the integrity of that communication. Leading Counsel has advised that, if the authenticity of a document signed using an electronic signature were to be challenged, an English court would accept the document bearing the electronic signature as *prima facie* evidence that the document was authentic and, unless the opponent adduced some evidence to the contrary, that would be sufficient to deal with the challenge. These are the same principles that an English court would apply in relation to wet-ink signatures.

The person alleging that the document was not authentic (e.g. produced fraudulently, not signed by the person who had purportedly done so or not properly witnessed) would need to prove, on a balance of probabilities, that this was the case. The Code of Conduct of the Solicitors Regulation Authority provides that a solicitor should not allege fraud without material which he or she reasonably believes shows, on the face of it, a case of fraud. Under the Bar Standards Board Code of Conduct it is necessary to have reasonably credible material which establishes an arguable case of fraud before a barrister can plead fraud. Although it would not (in the absence of handwriting) be possible to adduce evidence of a handwriting expert, there is a spectrum of evidence that might be used to prove the authenticity of a particular signature. It may be possible, for example, to show (i) that the purported signatory or witness accessed the electronic document via his or her email account or computer, (ii) the location in which it was accessed, (iii) that he or she used a password and/or PIN or encryption key in order to access the document (if that was the case), (iv) the time at which he or she applied his or her signature; and/or (v) that the document had not been amended between when it was uploaded to the electronic signature platform and when the final signatory executed it.

On certain transactions solicitors may be involved in checking the identity of a signatory, the authenticity of a signature and/or the question of whether or not a document has been properly approved. On other transactions the identity, authenticity and approval may be assumed. The use of electronic signatures will not change this.

6 Originals and counterparts

Leading Counsel has advised that:

- (a) it is possible, depending on the facts, to have multiple originals of a document in both electronic and hard-copy form (including, for example, where the parties intend for multiple originals to be produced in electronic and/or hard-copy form), but it would not be appropriate if it would conflict with other legal requirements (as would be the case with, for example, promissory notes);
- (b) where a document has been executed electronically with each signatory applying his or her signature to the same file uploaded to the relevant electronic signature platform, the signatories will be deemed to have signed the same counterpart;
- (c) where a document has been executed electronically, there is no need as a matter of English law for an additional wet-ink version to be executed, although there may be practical reasons for doing so (see paragraphs 7(b) and 8(d));
- (d) where a document has been executed using a combination of electronic and wet-ink signatures, the parties or their legal advisers may wish to create a composite document (either by using a hard-copy print out of the electronically-signed document and the wet-ink signed pages or by scanning the wet-ink signed pages and creating a composite electronic document) and to the extent that the document is required to be produced in evidence, an English court would accept this composite document;
- (e) to the extent that an original of a document executed electronically is required to be produced in evidence, an English court would accept an electronic version of that executed document or a hard-copy print out;
- (f) where an undated document is executed electronically, it may be validly dated with the authority of the parties (i) by inserting the date electronically or (ii) by printing it out and inserting the date by hand; and
- (g) after a document has been executed electronically, amendments may be made to it (electronically or in manuscript) to the same extent as amendments may be made in manuscript to a document executed in wet ink.

7. Conflicts of Law issues

In certain circumstances, the parties to a document to be signed using an electronic signature may wish to seek advice from counsel in another jurisdiction. For example:

- (a) **Where a document governed by English law is to be executed by an overseas company³:**
 - (i) In any litigation in the English courts, the courts will be obliged to apply Article 11 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the **Rome I Regulation**) to determine questions as to which law should be applied to ascertain whether or not a contract is formally valid (assuming it is a civil and commercial matter and its subject matter is not excluded from the Rome I Regulation). Article 11 of the Rome I Regulation provides that one of the ways in which a contract is formally valid is if it satisfies the formal requirements of the law which governs it (although this rule does not apply to consumer contracts and there are specific provisions to be considered for contracts concerning rights in rem in immovable property and for tenancies of immovable property). Therefore, for matters within the scope of the Rome I Regulation in any action brought in the English courts, a contract governed by English law will be upheld as validly executed so long as it has been validly executed as a matter of English law.

³ i.e. a company which is not incorporated under the CA 2006.

(ii) Section 44(1) of the CA 2006, as modified by the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, provides that, as a matter of English law, a document (including a deed) can be validly executed by an overseas company (x) by the affixing of the company's common seal; (y) if it is executed in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company; or (z) if it is signed by a person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of the company and it is expressed (in whatever form of words) to be executed by the company.

(iii) Therefore, if an overseas company executes an English law governed contract using an electronic signature, provided that the relevant signatory is (as a matter of the laws of the territory in which the company is incorporated) acting under the authority (express or implied) of the company, that contract will have been validly executed as a matter of English law. The question of the authority of a signatory, including any limitations on the scope of that authority and the manner in which the company binds itself (i.e. whether signature by electronic means is excluded), is a matter of the laws of the territory in which the company is incorporated (as is the question of that company's capacity).

(b) Where any litigation, or other action, in relation to a document governed by English law may take place, or be required, outside England: Examples include where (i) there is a foreign jurisdiction clause in an English law contract, (ii) an English judgment needs to be enforced in another jurisdiction, (iii) a claim needs to be made in a non-English insolvency proceeding, (iv) a document needs to be notarised or apostilled and (v) a registration needs to be made at a non-English registry. In such circumstances, parties may wish to seek local law advice in advance of signing by electronic signature. Where such action may take place elsewhere in the European Union, parties may wish to consider the feasibility of using a qualified electronic signature (see paragraph 3 of this note).

(c) Where a document is governed by a law other than English law: Whether or not such a document can be validly executed using an electronic signature and the steps required in order for such an execution to be valid are matters of the governing law and, in some jurisdictions, the impact of the law of the forum where the document is relied upon and are beyond the scope of this note.

8. Certain other considerations

This note is limited to the question of whether or not an electronic signature can be used to validly execute a commercial contract as a matter of English law. However, where one or more parties to a contract are contemplating using an electronic signature, there are a number of other legal and practical matters which they or their legal advisers might need to consider, including the following.

(a) Does an entity intending to execute the contract using an electronic signature have the corporate capacity and authority to do so? This will depend on the facts, but should not differ from the position where the party is executing the contract with a pen, unless there is something in its constitutional documents or board resolutions restricting it from using an electronic signature. In the absence of any specific restriction, it is not necessary to include a reference to electronic signature in any board resolution or for the constitutional documents to specifically reference the fact that the entity can enter into agreements or transactions which are signed electronically.

(b) Is there sufficient certainty that the person purporting to sign using an electronic signature is in fact that person or acting under the authority of that person? Factors that might assist in this respect include (in particular, where the contract has been executed through an e-signing platform) whether the signatory had accessed the document using a particular email address or by inputting a unique access code and whether or not this can be confirmed (via a certificate or otherwise) by the platform provider.

(c) Is the document to be distributed, signed and held electronically in a manner which is sufficiently secure? This will depend on the method used and on the degree of importance placed on IT security by the parties in question (for example, how valuable is the contract; how important is it to keep it confidential?), so it is something that each party should consider on a case-by-case basis and draw its own conclusions.

- (d) Where the document needs to be filed with an authority or registry, will that authority or registry accept electronic signatures? For example, as at the date of this note:
- (i) the Land Registry and the Land Charges Registry require a wet-ink signature on a paper version of any document submitted to them for registration (although the Land Registry has announced plans to launch an electronic mortgage service);
 - (ii) Companies House will accept a certified copy of a charging document executed using an electronic signature in satisfaction of the registration requirements under Section 859A of the CA 2006 (although, outside of its web-filing service, it still requires a wet-ink certification of the copy); and
 - (iii) where stamp duty is payable on a document, H.M. Revenue & Customs would normally expect to stamp a version of the document with a wet-ink signature.
- (e) If the place of signature or the location of the document has particular legal consequences (e.g. in relation to the payment of stamp duty), where will a document executed using an electronic signature be treated as having been executed or located? The answer may depend upon a number of factors, including where the signatory is physically located when signing and where the server on which the document is stored is located. In such circumstances, it may be better to have a physical signing.
- (f) Where a party wishes to execute a deed by the physical affixing of its common seal, it is unlikely to be possible to do this electronically (although the eIDAS Regulation and the ECA 2000 provide for the creation and use of electronic seals, these are not, so far as the JWP is aware, currently in use in England).
- (g) It is not necessary to include any specific reference to electronic signatures in the document itself in order for it to be validly executed using an electronic signature.

This note refers to certain EU regulations, the status of which under English law may be affected by the United Kingdom ceasing to be a member of the European Union.

The Joint Working Party

13 July 2016

DISCLAIMER:

This note was developed by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees and has been approved by Leading Counsel. The aim of this note is to make suggestions only and not to give advice. No duty of care or liability whatsoever is accepted by those involved in the preparation or approval of this note, or the firms or organisations that they represent, to any company or individual who relies on material in it.