

Legal Update

Law Commission report on electronic execution: does it change anything?

Introduction

As part of its most recent Programme of Law Reform, the Law Commission of England and Wales recently published a [report](#) on electronic signatures for deeds and documents. The report confirms what was already the consensus amongst the London legal community: it is possible to use an electronic signature to execute a document (including a deed) under English law. However, the Law Commission has also recognised that there remain practical and technological obstacles with their use in some areas. In this Legal Update, we consider some of the key findings of the Law Commission report and developments we are seeing in connection with electronic signatures.

Background

The Law Commission's most recent programme has focused on reforms designed to enhance the UK's competitiveness internationally by supporting technological innovation: people want convenient modern solutions by which they can conduct business and enter into binding contracts. The report concentrates on two aspects of the electronic execution of documents: (i) the use of electronic signatures to execute documents where there is a statutory requirement that a document must be "signed"; and (ii) the electronic execution of deeds.

Legal validity of electronic signatures

Electronic means of accepting agreements or entry into contracts are being used all the time – most commonly in relation to e-commerce transactions that many of us conduct daily. In such cases, transactions are not required to be executed in a particular manner – examples include when we click to accept terms and conditions online or a name is included at the bottom of an email.

The use of electronic means to bind people into contractual arrangements has been reaffirmed by the Law Commission; their report states that an electronic signature is capable of being used to execute a document and it is admissible in evidence. This includes the execution of deeds, as long as the person signing intends to authenticate the document and any specific contractual or statutory requirements are followed. This, however, should be considered alongside the words of warning contained in the remainder of this Legal Update.

Are electronic signatures being used on transactions?

In the context of more complex commercial transactions, we are starting to see electronic signatures being used in some relatively straightforward situations – where there is a simple contract (as opposed to a deed) and there is no cross-border element. Progress is likely to be slower in more complicated transactions, particularly where there are deeds and where there are cross-border aspects, as there may be jurisdictions where the legal position is not clear-cut or there are doubts about whether electronic signatures will be accepted by transaction parties, for necessary filings or by the local courts. Furthermore, for deals involving numerous parties and documents, consideration should be given to the fact that the process of tagging possibly hundreds of signature blocks will be time-consuming and require careful checking. Until a settled practice emerges, different clients and law firms may argue for different approaches to be adopted in connection with the electronic signature process. Couple these issues with the fact we have an existing widely-used virtual closing process¹ that, whilst at times ungainly, is well rehearsed and is set out in the [Law Society's virtual signing practice note](#), has meant that the use of electronic signatures has been rather limited on material commercial transactions on which the parties instruct external counsel up to now.

Codification of the law around e-signatures?

Whilst the report confirms that electronic signatures are capable in law of being used to execute a document (including a deed), the Law Commission acknowledges there has been uncertainty around their use to date caused, in part, by the fact the law is not set out in a single place. The law has developed over time (consequently being scattered amongst various sources) which has made it less accessible and parties have lacked the confidence to use electronic signatures in some situations.

The Law Commission has included in their report a useful statement of the law relating to the validity of electronic signatures. They have also suggested the government may want to codify the law in this area to make it more accessible. In the meantime, the Law Commission's report is helpful in terms of stating the law in a single place and confirming the legal status of electronic signatures and this alone should encourage their use.

Can you witness an electronic signature remotely?

One of the main points of practical concern about the use of electronic signatures relates to the mechanics for execution of deeds and, in particular, concerns over the witnessing of deeds. In a system where a document can be signed and witnessed electronically, including using a mobile phone, the signatory and witness could realistically do that when they are in two different locations. The Law Commission has confirmed that English law currently requires a deed to be signed in the physical presence of a witness who attests the signature, i.e. the witness cannot witness a signature over video conference, or similar, even where both the signatory and the witness are signing electronically. Whilst concerns also arise in this respect in relation to physical signature processes, the use of electronic means of signature arguably makes it easier for signatories and witnesses to sign while not in each other's presence than when there is a physical piece of paper that needs to be signed.

It is worth noting, there is already a non-technological solution for English companies, avoiding the need for a witness in the first place which is, where practical, to have deeds signed by two directors or a director and company secretary. When this route is followed, there is no need for the two people to be in the same place.

¹ Briefly, this virtual closing procedure usually involves circulating final form documents and signature pages by email and asking parties to sign and return them, in the case of deeds with the final form documents themselves.

The report does recognise, however, that although the law does not currently permit for witnessing a signature over a video link or similar, realistically those applying electronic signatures are likely to want to have that ability in future. To allow for this kind of remote witnessing, the Law Commission has suggested an industry working group be established to consider potential solutions to the practical and technical obstacles to video witnessing of electronic signatures on deeds. The suggestion is that the Government should use this work as the basis for legislative reform to allow for video witnessing.

If the law in this area is modernising, is it time to scrap deeds?

The Law Commission's consultation paper asked whether a review of the law of deeds should be a future Law Commission project. It is interesting to see how varied the responses to this question were. Respondents appear to have had very mixed feelings about whether there should be a review of the English law requirement that certain transactions be documented in a deed, if the concept of deeds should be abolished (in some or all cases) or whether the current system works perfectly well. On balance, the Law Commission have recommended that there should be a review of the law of deeds in the context of both wet ink and electronic execution; considering broad issues about their efficacy and whether they are fit for purpose.

Unless legislation or the relevant contract specifies otherwise, the common law takes a pragmatic approach and does not prescribe a particular form or type of signature of a document. It is worth bearing in mind that one of the benefits of the formalities around the execution of a deed can be the protection those requirements afford, for example where the signatory is vulnerable or there is any possibility of coercion. In those cases, the use of e-signatures may not be appropriate even if the law allows it. So, there is a balancing act needed if a review of the law of deeds is initiated.

What's next?

The Law Commission's report is broadly supportive of the position that documents which can be signed in wet ink can equally be signed using an electronic signature. There are, however, some practical issues that limit the suitability of electronic signatures for signing certain types of document and it is with a view to reducing these that the report includes recommendations and options for reform in the area. One of the main recommendations is for the formation of an industry working group to consider the practicalities of using electronic execution for documents and coming up with solutions to the practical and technical hurdles to witnessing electronic signatures remotely (for example via a video link). It is suggested that the working group should also put together best practice guidance for the use of electronic signatures in different commercial scenarios and, in particular, where it is intended that vulnerable individuals execute documents electronically. Finally, we will wait and see whether the UK Government is persuaded that a review of the law of deeds and possible codification of the law around electronic signatures is needed.

In the meantime, it seems likely we may see a steady increase in uptake of the use of electronic signatures, particularly on transactions with no cross-border aspect where documents are not required by the law of England and Wales to be in writing and "signed" or to be executed as a deed. As lawyers and clients become more familiar with the technology and the e-signature platform providers respond to their suggestions, no doubt this trend will continue and expand, without waiting for the further work recommended by the Law Commission.

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