

**NOTE ON THE EXECUTION OF A DOCUMENT
USING AN ELECTRONIC SIGNATURE**

prepared by the joint working party of The Law Society Company Law Committee & The City of London Law Society Company Law & Financial Law Committees and approved by Mark Hapgood QC in July 2016

updated in October 2022 by the Company and Financial Law Committees with input from The Law Society Company Law Committee

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NOTE ON THE EXECUTION OF A DOCUMENT USING AN ELECTRONIC SIGNATURE

1. Introduction

- 1.1 **Original note:** this note was originally prepared in 2016 by the 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**).

It was 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 obtained legal advice from Leading Counsel (Mark Hapgood QC) on the use of electronic signatures as a valid method of executing documents. The original 2016 version of this note was approved by Leading Counsel.

- 1.2 **Update:** this note has been updated to reflect developments since 2016. These developments include:

- the publication by the Law Commission in September 2019 of its report on '*Electronic execution of documents*' (the **2019 Law Com Report**);¹
- changes in practice adopted by HM Land Registry, HMRC and others; and
- the more widespread use of e-signing platforms.

A summary of the conclusions reached by the Law Commission is extracted in Appendix 1 to this note.

The modifications to the original note are shown in a blacklined version of this note which is available separately. Given the changes are largely of a mechanical nature or provide additional support for the views expressed back in 2016, wider consultation on the modifications has not been undertaken.

- 1.3 **Scope:** this note is limited in scope to documents (including contracts) entered into in a business context, rather than those to which consumers or other individuals outside of a business context are a party.

However, certain 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 the parties 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 the laws of England and Wales. The position under the laws of other parts of the United Kingdom may be different. For convenience references to English law in this note should be read as shorthand for references to the law of England and Wales.

See paragraph 7 (Conflict of law issues) 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 (Certain other considerations) sets out a number of practical considerations which should be taken into account when considering whether to use an electronic signature.

¹ <https://www.lawcom.gov.uk/project/electronic-execution-of-documents>

2. Background and types of electronic signatures

2.1 **Remote signings:** 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 (the **Mercury Procedures**) set out in an earlier guidance note.² This 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. A table summarising the earlier guidance on Mercury Procedures³ appears as Appendix 2 to this paper.

The use of electronic signatures (including those affixed via web-based e-signing platforms) has accelerated as a result of remote working imposed by the COVID-19 pandemic and is now routinely adopted in a wide range of commercial transactions.

Where an e-signing platform is used to obtain signatures the principles enshrined in the Mercury Procedures must still be observed. It therefore remains important in relation to deeds that:

- any signature and any attestation of that signature by a witness "*must form part of the same physical document when it (the deed) is signed*";
- the signed document should exist as a "*discrete physical entity*"; and
- a party should sign "*an actual existing authoritative version of the contractual document*".⁴

Using an e-signing platform where the entire final version of the relevant document is uploaded makes it more straight-forward to comply with the requirement applicable to deeds that the relevant signatures (and any witness attestation) "*form part of the same physical document when it is signed*".

Those organising the signing process should still take appropriate authorisations from the signatories to implement the dating and delivery of the relevant document(s) (and as relevant the affixing of signature pages to the final agreed form of document) as envisaged by the Mercury Procedures.

2.2 **Forms of e-signatures:** electronic signatures can take a number of different forms, including:

- **typed in name:** a person typing their name into a contract or into an email containing the terms of a contract;
- **inserting a signature image:** a person electronically inserting their 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);
- **e-signing platform signature:** a person accessing a contract through a web-based e-signing platform and clicking to have their name in a typed or handwriting font (or

² 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 as amended in February 2010.

³ Which predated the widespread adoption of e-signing platforms.

⁴ All three quotes mentioned here are from *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721.

an electronic copy of their wet-ink signature) automatically inserted into the contract in the appropriate place (e.g. next to the relevant party's signature block); and

- **touchscreen signature:** a person using a finger, light pen or stylus and a touchscreen to write their signature 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.

3. **Legislative framework**

3.1 **eIDAS Regulation**

Regulation (EU) No 910/2014 (the **eIDAS Regulation**) has direct effect in EU Member States from 1 July 2016. With the exception of Chapter II it continues as part of English law post Brexit.⁵

It establishes a 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:

- 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";
- 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 their 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
- 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".

Article 25(1) of the eIDAS Regulation 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.

⁵ Pursuant to the European Union (Withdrawal) Act 2018 (as amended), s 3(1) of the eIDAS Regulation forms part of UK domestic law and is amended by the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019. Chapter II of the eIDAS Regulation provides for the mutual recognition and interoperability between EU Member States pertaining to the use of electronic identity schemes. It requires that public sector digital services using electronic identities above a described assurance level must accept electronic identities from 'notified' schemes in other EU Member States. Notification is a process whereby Member States choose to have their electronic identity scheme recognised and accepted by the other Member States. These provisions have been revoked in the case of the UK because Chapter II of the eIDAS Regulation establishes reciprocal arrangements between public bodies in the UK and EU Member States that are no longer appropriate now the UK has withdrawn from the EU. Chapter IV of eIDAS provides that electronic documents are not denied legal effect or admissibility as evidence in legal proceedings solely on the basis that they are in electronic form. Chapter IV forms part of retained EU law.

Article 25(2) of the eIDAS Regulation provides that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

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 Article 25(2) of the eIDAS Regulation has been relied on in reaching the conclusions set out in this note.

3.2 **Electronic Communications Act 2000**

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:

- an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data; and
- 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.⁶

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).⁷

3.3 **E-commerce Directive and the Brexit related Trade and Co-operation Agreement**

Article 9(1) of the EU's e-commerce directive 2000/31 (the **E-commerce Directive**), regulating matters within the EU, states:

"Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic

⁶ The Law Commission's conclusion is that most transactions are not required to be executed in a particular manner. Electronic signatures are validly used instead of handwritten signatures in transactions every day (see the 2019 Law Com Report).

⁷ 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.

contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means."

There are various exceptions to these general obligations. First, the E-commerce Directive does not apply to certain activities, including gambling, taxation and telecommunications (Article 1(5)). Secondly, Article 9(2) permits member states to lay down that the general obligations in Article 9(1) do not apply to all or certain types of contracts falling into the following categories:

- contracts that create or transfer rights in real estate, except for rental rights;
- contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
- contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;
- contracts governed by family law or by the law of succession.

The Brexit related Trade and Co-operation Agreement regulating matters between the EU and the UK and signed on 31 December 2020 (the **TCA**)⁸ also contains provisions related to electronic execution of contracts. Broadly, it provides that each of the UK and the EU must ensure that contracts can be electronically executed and that its law does not create any obstacles to the use of electronic contracts, subject to certain possible exemptions. The list of exemptions is similar to, but not exactly the same as, the provisions relating to electronic signatures in the E-commerce Directive.⁹

The potential practical consequence of these provisions is considered in paragraph 7.5 (Implications of the E-commerce Directive and the TCA) below.

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:

- **guarantees:** 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;

⁸ Treaty Series No. 8 (2021) CP 426.

⁹ See Part Two Title III (Digital Trade) and in particular Articles 200 (Definitions), 205 (Conclusion of Contracts by electronic means) and 206 (Electronic authentication and electronic trust services). These provisions overlay English law (including the elements of the eIDAS Regulation which are retained EU law) by virtue of s29 of the European Union (Future Relationship) Act 2020.

- **interests in land:** 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;
- **equitable interests:** 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 their properly authorised agent;
- **choses in action:** a statutory assignment within section 136 of the LPA 1925 must (among other requirements) be in writing and signed by the assignor;
- **promissory notes:** 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;
- **copyright:** 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
- **stock transfers:** a transfer of registered securities as envisaged by section 1(1) of the Stock Transfer Act 1963 must 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:¹⁰

- (a) **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 amount to an agreement in "writing" for the purposes of the Statute of Frauds 1677.

- (b) **Signature:**¹¹ 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 in the appropriate place (e.g. next to the relevant party's signature block) in a document

¹⁰ The 2019 Law Com Report notes at paragraph 3.25 that "*The underlying principle that an electronic signature is capable in law of being used to execute a document, including where there is a statutory requirement for a signature, is established in the relevant case law*". It cites as authority *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [28]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21], *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95]; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1205 (Ch) at [44]; *WS Tankship II BV v Kwangju Bank Ltd and another*; *WS Tankship III BV v Seoul Guarantee Insurance Co*; *WS Tankship IV BV v Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) at [153] and [155]; and *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [42] and [43].

¹¹ The 2019 Law Com Report notes at paragraph 3.30 that a "*signature may perform different functions including, for example, the making manifest of an intention to be legally bound or confirming the signatory has notice of the contents of a document. It is such a function which "distinguishes a "signature" from the mere writing of a name"*. L Brazell, *Electronic Signatures and Identities: Law and Regulation* (3rd ed 2018) para 2-002; per Slade LJ in *Central Motors (Birmingham) Ltd v PA Wadsworth (trading as Pensagain)* (1982) 133 N.L.J. 555 and *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [26].

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 paragraph 2.2 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.¹²

Further, as noted at paragraphs 3.42 and 3.43 of the 2019 Law Com Report:

"The law does not generally prescribe a particular type of signature, save where this is set out in legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion¹³. There is no statutory definition of "signed" or "signature" which applies generally.¹⁴

The common law adopts a pragmatic approach to what will satisfy a signature requirement¹⁵. In determining whether the method of signature adopted demonstrates an authenticating intention the courts adopt an objective approach, considering all of the surrounding circumstances. Indeed, provided that the "signatory" intends to authenticate the document, it need not be the "signatory" who actually signs¹⁶.

- (c) **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.
- (d) **Document:** The 2019 Law Com Report refers back to the Law Commission's 2001 advice which noted a general consensus that information stored in electronic form is a "document" satisfying a statutory requirement for a document. It also notes at paragraph 2.18 of its report that "document" may include some computer files,¹⁷ including text messages and that case law dealing with disclosure of documents in

¹² Also see *Neocleous v Rees* [2019] EWHC 2462 which is authority for the proposition that an email footer recording the sender's details can constitute a signature even if it is automatically applied to all the sender's emails. In this case the use of the words "Many thanks" above the email footer was considered enough to show the sender's intent to authenticate.

¹³ The Law Commission has concluded this is most likely the case in respect of wills. *Making a Will* (2017) Law Commission Consultation Paper No 231, para 6.15. Also, for example, *National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349*, reg 2.

¹⁴ In the context of deeds, the *Law of Property (Miscellaneous Provisions) Act 1989*, s 1(4) provides that "sign" includes "making one's mark on the instrument" ("LPMPA 1989").

¹⁵ *Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission* (2001), <https://www.lawcom.gov.uk/project/electroniccommerce-formal-requirements-in-commercial-transactions/>.

¹⁶ *In re Whitley Partners Limited* (1886) 32 Ch D 337 (the signature by an agent to a memorandum of association of a company was sufficient to render the agent's principal an original member of the company under the *Companies Act 1862*).

¹⁷ *H Malek QC* (ed), *Phipson on Evidence* (19th ed 2017) para 41-01 and *R v Taylor (George Charles)* [2011] EWCA Crim 728, [2011] 1 WLR 1809.

litigation has held that "documents" extend to electronic documents including emails and databases.¹⁸

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) **Companies – execution mechanic without witnessing:** 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 their 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) **Individuals & companies – execution mechanic with witnessing:** section 1(3)(a)(i) 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 signature¹⁹ (and, by section 1(4), "sign" includes making ones mark on the instrument).²⁰

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

¹⁸ Marilton v Tectronix [2003] EWHC 383 (Ch), [2003] 2 WLUK 269 at [13] to [14]. Also, White Book 2018 vol 1, para 31.4.1 and Atkin's Court Forms (2014) vol 15 Disclosure and information requests para 213.

¹⁹ Paragraph 5.9 of the 2019 Law Com report specifically confirms in relation to deeds the view of the Law Commission that an electronic signature can satisfy any statutory requirement for a signature.

²⁰ Note section 1(3)(b) of the LP(MP)A 1989 also requires the document be delivered as a deed in order for it to be validly executed as a deed.

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 (Evidential weight) below).

However, in the opinion of Leading Counsel and the JWP, a witness should be physically present when the signatory signs, rather than witnessing through a live televisual medium (such as a video conferencing facility).

This view is endorsed by the Law Commission who state in the 2019 Law Com Report:²¹

"... we are not persuaded that parties can be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform, without being physically present. This conclusion is based on the restrictive wording of the statutory provisions and the serious policy questions underlying any extension to accommodate technological developments".

"Our view is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. This is the case even where both the person executing the deed and the witness are executing / attesting the document using an electronic signature."

4.4 **Companies incorporated under the CA 2006: minutes and resolutions**

Leading Counsel has advised that:

- (a) **authentication of documents sent to a company:** 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 general meetings:** minutes of the proceedings of a general meeting that are signed by the chairperson 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) **directors written resolutions:** 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)

²¹ At paragraph 5.35 and in the Executive Summary.

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 more parties to a document (including any witnesses) wish to sign using an electronic signature, while others would prefer to use another acceptable method (e.g. a wet-ink signature), there is no reason why the document cannot be signed in counterparts 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**

5.1 **Admissibility:** 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.

5.2 **Evidence:** 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 their email account or computer; (ii) the location in which it was accessed; (iii) that they 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 they applied their 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.

5.3 **Identity checking:** 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.

5.4 **Professional Codes of Conduct:** The Code of Conduct of the Solicitors Regulation Authority provides that a solicitor should only make assertions or put forward statements, representations or submissions to court or others which are properly arguable. 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.

6. **Originals and counterparts**

Leading Counsel has advised that:

- **multiple originals:** 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);

- **same counterpart:** where a document has been executed electronically with each signatory applying their signature to the same file uploaded to the relevant e-signing platform, the signatories will be deemed to have signed the same counterpart;
- **extra wet ink version:** 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 paragraph 7.2 or if specialist registries require it);
- **composite documents:** 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;
- **evidence in court:** 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;
- **dating mechanics:** 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
- **post execution amendments:** 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

7.1 Other jurisdictions

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. Examples are considered below.

7.2 English law document executed by overseas company

Where a document governed by English law is to be executed by an overseas company²²

- (a) **Rome I and applicable law:** 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**)²³ 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

²² i.e. a company which is not incorporated under the CA 2006.

²³ Rome I Regulation has been converted into English law as retained EU Law pursuant to The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020.

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.

- (b) **Execution by overseas companies:** 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: (i) by the affixing of the company's common seal; (ii) 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 (iii) 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.

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).

7.3 **Litigation commenced or action required outside England**

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.

7.4 **Document governed by a law other than English law**

A document may be 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.

7.5 **Implications of the E-commerce Directive and the TCA**

As mentioned in paragraph 3.3 above, both Article 9(2) of the E-commerce Directive 2000/31 and Article 205 of the TCA identify various types of contract which may not benefit from the protective provisions in Article 9(1) and Article 205 respectively supporting the use and validity of electronic signatures. There is therefore a risk that an English law governed agreement of one of these types that has been electronically executed may not be enforced by the courts of a member state if that member state has taken advantage of any of the exceptions to these general obligations (in relation to the E-commerce Directive, member states are required to notify the Commission where this is the case). Parties entering into such types of contract may therefore wish to take local law advice to check whether or not local law supports the signature of such contracts by electronic means.

8. Certain other considerations

8.1 Other matters

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. They include the following.

8.2 Capacity and authority

Does an entity intending to execute the contract using an electronic signature have the 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 relevant authorising 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 such resolution or for the constitutional documents to specifically reference the fact that the entity can enter into agreements or transactions which are signed electronically.

8.3 Verification of identity

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 the party? 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.²⁴

8.4 Secure safekeeping

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 their own conclusions.

8.5 Registry and HMRC requirements

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:

- (a) the Land Registry now accepts certain documents that have been signed electronically provided certain requirements are met.²⁵ Those requirements may include dual factor authentication via the texting of one-time passwords and/or the making of certain certifications;²⁶
- (b) Companies House will accept a certified copy of a charging document executed using an electronic signature in satisfaction of the registration requirements under section

²⁴ Dual factor authentication is a feature of a number of e-signing platforms.

²⁵ See HM Land Registry Practice guide 82: electronic signatures accepted by HM Land Registry. The types of document that HM Land Registry will accept, along with the types of acceptable signature, are set out in Appendix 1 to that Practice Guide.

²⁶ These are known as a "conveyancer-certified electronic signature". The certification reads "I certify that, to the best of my knowledge and belief, the requirements set out in practice guide 8 for the execution of deeds using electronic signatures have been satisfied."

859A of the CA 2006 (although, outside of its web-filing service, it still requires a wet-ink certification of the copy²⁷); and

- (c) where stamp duty is payable on a document, HMRC used to expect to stamp a version of the document with a wet-ink signature. However, in March 2020 HMRC indicated it would accept e-signatures while COVID-19 measures were in place. Then on 18 June 2021 HMRC "announced the removal of the requirement to physically stamp documents due to the permanent adoption of the COVID-19 temporary processes which give the option of electronic notification and under which HMRC issues a confirmation letter rather than physically stamping the document."²⁸

8.6 Place of signature

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 on 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.

8.7 Use of common seal

Where a party wishes to execute a deed by physically affixing its common seal, it is, as the law stands, not recommended for Companies Act companies or limited liability partnerships to do this electronically (although the eIDAS Regulation (in so far as it is retained EU law applicable in England) and the ECA 2000 provide for the creation and use of electronic seals).

For companies registered under the Companies Acts, section 45(2) of the CA 2006 provides, in relation to a company seal, that its name must be "engraved" on it in legible characters. The Act also only allows a single seal (except for limited purposes in which event the relevant additional seal must have certain distinguishing features). Similar provisions apply to limited liability partnerships²⁹.

The Law Commission considered that the requirement of an engraved seal performed a useful function (see paragraphs 3.50-3.53 of the Law Commission's 1998 Report on the Execution of Deeds and Documents by or on behalf of Bodies Corporate and the discussion at paragraph 4.13 et seq. and paragraphs 9.4 and 9.5 in its Consultation Paper 143³⁰). The 2019 Law Com Report decided against any change to the form of seal required and also considered and rejected any change to allow additional official seals. That said it noted that the use of electronic seals could be part of a future review of the law of deeds.

An electronic seal would by its nature not be engraved and would also (except where a company had chosen not to have a seal at all) be additional to the common seal of the company that complies with section 45 CA 2006. Use of anything less than a company seal as described in section 45 is a criminal offence on the part of the company, responsible officers and any other person who authorises use of a seal which is not engraved.

²⁷ Though we understand such wet ink certification may not be required when filing through a third party platform providing registration services.

²⁸ See HMRC Consultation outcome: Modernisation of the Stamp Taxes on Shares Framework: summary of responses: updated 20 July 2021.

²⁹ See regulation 45 of The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

³⁰ "The requirement for the name to be engraved on the seal might be seen to serve a number of purposes. For example, an engraved metal seal is difficult to alter. But it seems more likely that the purpose of the requirement is that affixing an engraved seal leaves a physical impression on a deed, either on a wax or paper seal, or on the paper itself" (paragraph 9.5 Consultation Paper 143).

An electronic seal is meant to be a symbol of authenticity and therefore some of its uses would risk overlap with use of a company seal as described in section 45. Also the common terminology makes confusion about the purpose of an electronic seal likely.³¹

In the circumstances, the safest course for a company formed under the Companies Acts is not to use an e-seal on electronic documents, and certainly not to substitute an e-seal for a corporate seal (e.g. in relation to the execution of a document required to be under seal).

The position may be different in relation to corporations not formed under the Companies Acts (e.g. local authorities, public bodies, charities and educational establishments), but this will depend upon the wording of the Act of Parliament/Royal Charter creating it and the corporation's constitutional documents.

8.8 Reference to electronic signature

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.

The Joint Working Party

13 July 2016

Updated by the Company and Financial Law Committee with input from The Law Society Company Law Committee.

2 October 2022

DISCLAIMER:

The original version of 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 was approved by Leading Counsel. It has since been updated by the Financial Law Committee. 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.

³¹ The issue of electronic authentication in place of a seal has been considered (see the 2014 amendment to section 48, but the only change to the law relates to execution under the Requirements of Writing (Scotland) Act 1995" which is not part of English law.

Appendix 1

Extract from the Law Commission's 2019 report on 'Electronic execution of documents'

"Statement of the law: execution with an electronic signature³²

- (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:
 - signing with an 'X';
 - signing with initials only;
 - using a stamp of a handwritten signature;
 - printing of a name;
 - 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 name typed at the bottom of an email;
 - clicking an "I accept" tick box on a website; and

³²

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- the header of a SWIFT message.
- (8) Our view is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. This is the case even where both the person executing the deed and the witness are executing / attesting the document using an electronic signature."

Appendix 2

Summary of options for a virtual signing³³ (not using an e-signing platform)³⁴

All three options below assume that before the virtual signing of document X the signing arrangements are pre-agreed and the signatory(ies) confer(s) authority on the relevant law firm(s) to date and deliver document X.

In relation to deeds the individual's "signature and any attestation [by a witness] must form part of the same physical document when it (the deed) is signed" – R (on the application of Mercury Tax Group Ltd) v HMRC [2008] EWHC 2721. Also (i) the signed document should exist as a "discrete physical entity" and (ii) a party should sign "an actual existing authoritative version of the contractual document".

Option	Procedure for executing document X remotely
<p>Option 1</p> <p>Deeds & Real Estate Contracts</p> <p>Guarantees & Simple Contracts</p>	<p>Return PDF/Word document with signature page</p> <p>step 1: email final execution version of document X (PDF or Word) to signatory;</p> <p>step 2: signatory prints out signature page only and signs it;</p> <p>step 3: signatory sends back (in a single email) a PDF copy of their signed signature page <u>plus</u> the execution version of document X.</p>
<p>Option 2</p> <p>Guarantees* & Simple Contracts</p> <p><i>* others than those executed as deeds</i></p>	<p>Return signature page only</p> <p>step 1: email final execution version of document X (PDF or Word) to signatory;</p> <p>step 2: signatory prints out signature page only and signs it;</p> <p>step 3: signatory emails back a PDF copy of just their signed signature page (with authority to attach it to the final approved version of document X).</p>
<p>Option 3</p> <p>Guarantees* & Simple Contracts</p> <p><i>* others than those executed as deeds</i></p>	<p>Advance pre-signed signature page</p> <p>step 1: email signature page³⁵ of yet to be agreed document X (PDF or Word) to signatory;</p> <p>step 2: signatory prints out signature page only and signs it;</p> <p>step 3: signatory emails back a PDF copy of their signed signature page to be held to their order;</p> <p>step 4: (when agreed) final execution version of document X sent to signatory;</p> <p>step 5: signatory confirms document X is approved and their signature page can be attached to document X which may be dated and delivered.</p>

References above to PDF can also include a digital image of the relevant page(s) (e.g. a jpeg photo taken on a smart phone).

³³ Summarised from the JWP's 2009 note on 'Execution of Documents at a Virtual Signing or Closing' (which pre-dated the widespread use of e-signing platforms). Please refer to the note itself for the full guidelines.

³⁴ If an e-signing platform is used – see commentary at paragraph 2.1 of this paper.

³⁵ It may be helpful (to avoid later queries or confusion) if the document number footer is removed from each signature page with each such page instead being labelled as (say) 'Signature page to Document X'