

The world has responded to the coronavirus (COVID-19) pandemic by requiring that many people work from home.

This raises questions across a number of areas, not least completing corporate transactions with the often-large volume of documentation to be executed by the parties to implement the deal. Logistical and legal issues must be considered ahead of time in order to deliver completion, making use of the available technology and legal framework to deliver a smooth, and legally binding, corporate transaction.

We believe that the pandemic has driven, and will continue to drive, innovation around remote signing protocols and the use of electronic signatures. Here, we take a look at what English law dictates is capable of signature electronically and the key practical and logistical considerations to think about ahead of time. Ultimately, there is no currently available shortcut to working through the documentation and issues systematically to understand the relevant legislation, filing requirements at registries, or if the place of execution is important, for example, where there are tax or stamp duty consequences.

## Key Considerations

### Simple Contracts

The current view, as set out in more detail in the Law Commission Electronic execution of documents report 2019 (which was endorsed by the government earlier this year), is that (unless explicitly set out that electronic signatures are not acceptable) electronic signatures are valid, subject to the parties to such documents attending to the required execution formalities set out in the Companies Act.

For simple contracts in England and Wales, that leaves us with a fairly simple outcome – signing electronically will satisfy the statutory requirement for a document to be signed, provided that the signatory inserts the electronic signature in the appropriate place in the document with the intention of authenticating it. The electronic version of the document will have the same effect as any “wet ink” copy.

### Deeds

Where remote signings become more complex, and where prior planning ahead of completion is needed, is where the parties are required to execute deeds (which under English law are required to be signed in the presence of a witness) or where documents/parties are cross border.

It is legally accepted for a deed to be made in electronic form and signed by an individual using an electronic signature. Where the complexity arises in a “socially distanced” world, is the witnessing of said signature. English law provides that the witness may add their own electronic signature and witness details to the deed to attest that they have witnessed the party sign; however, that witness must be physically present in the same location as the party signing.

Whilst there are views of the Joint Working Party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees stating that the witnessing of documents by a form of video call may be acceptable, the position of the Law Commission, the government and our view on current best practice, is that the witness needs to be physically present in the same location as the party signing. We strongly suspect that practice will develop in this area as precautions against COVID-19 continue, but right now, the advice has to be that where a document needs to be witnessed, the witness must be in the same physical location.

### Cross-Border Issues

Where the governing law of a document is not English law, or where there are non-English parties involved, local requirements should be considered as to the legal validity (including capacity and authority considerations) and evidential value of any electronic signatures.

In the EU, a signature that satisfies all requirements of a qualified electronic signature (QES) under the EU eIDAS Regulation, shall have the same legal effect as a wet ink signature.

To date, there has been limited use of QES in English law governed transactions, although certain e-signing platforms can facilitate a QES. For example, DocuSign is able to verify identities of signatories and is independently certified against European Commission-recommended technology standards.

Hurdles may also arise at the stage of enforcement of any judgment or arbitral award outside of England, e.g. where the electronic signature on an underlying contractual document falls short of local formalities for enforcement.

Certain jurisdictions can require documents to be executed using a corporate seal, or to be notarised or apostilled and further analysis of those situations will be needed to design a completion process meeting all legal requirements.

## Our View on Electronic Signatures Going Forward

Our team has completed a large number of multijurisdiction transactions during the lockdown by means of remote completion. Whilst the use of electronic signatures has, prior to COVID-19, been left to those moments where all other viable options for wet ink have been exhausted, we are seeing that the commercial reality during the pandemic has driven a more pragmatic approach to the electronic signing of documents.

With the government's endorsement of the Law Commissions 2019 report, and businesses and advisers becoming more comfortable with the practicalities of remote signing, our view is that the uptake on electronic signatures for remote completions will grow significantly in the next 12 months. Alongside this, our expectation is that the platforms offering this service will enhance their security and functionality to continue to alleviate perceived risks of fraud and complexity.

That said, in our experience of remote completions, there is no substitute for detailed planning, as to the availability of signatories, witnesses and potential tax, cross-border or jurisdictional issues in order to avoid an impact on the timetable of the transaction. We have managed many transactions to completion during lockdown, all of which have employed a combination of electronic and wet ink execution protocols particular to the companies, jurisdictions and often the personalities involved.

### Best Practice Tips

**Signatory availability** – The deal team should ensure the list of authorised signatories is up to date and readily available. If the usual signatories are not available, then consider whether additional authorisations or approvals need to be put in place in good time – it would be sensible to consider whether additional signatories should be approved to provide maximum flexibility.

**Problems with witness availability** – Where the witnessing of a deed may be difficult due to a director/attorney not having a witness physically present, it may be necessary to review the availability of having the deed executed by two directors (with no witness) (s.44(2)(a) of the Companies Act 2006). The company's articles of association and/or internal constitutional documents (e.g. investment agreements, shareholders agreements, etc.) will set out whether the company can sign by way of two directors and without a witness.

**Witness location confirmation** – To avoid any future questions over the location of a witness, ensure that the individuals acting as witnesses confirm via email that they are in the same location as the signatory to the extent this is not possible via the relevant e-signature application used.

**Family witnesses** – Given that the purpose of requiring a party's signature to be witnessed is to provide, if necessary, unbiased evidence of what was signed, when and by whom, independent witnessing is always best practice. That being said, in the COVID-19 world, it may well be the case that family members witnessing signatures is the only available option and the law dictates that a spouse or family member witnessing a document will be sufficient.

**Appointing an attorney** – As commonly happens in transactions, where many signatories are required to sign numerous documents, having each signatory appoint a single attorney to sign on their behalf can make the execution process easier and more efficient, particularly the case in light of the pandemic. **Reminder – The power of attorney appointing the attorney must be signed as a deed and must be witnessed (taking account of the considerations above).**

