

COVID-19 and "Electronic" Execution of English Law Documents

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In light of the on-going Covid-19 pandemic, many organisations are implementing remote working policies and limiting access to offices in order to effect social distancing measures.

Notwithstanding the changes to usual working practices, organisations continue to enter into binding contractual arrangements with their commercial counterparties.

From a practical perspective, remote working policies mean that authorised signatories may no longer have the ability to execute English law governed documents in the usual way, which would be by attending physical signing meetings, or following "Mercury compliant" Law Society signing guidelines which prescribe for signature pages to be printed out and PDF scanned copies of the hard copy signature pages to be emailed to their lawyers and released in due course.

"Electronic" or "digital execution" of documents is likely to be increasingly used in the coming months if traditional methods of executing documents are unavailable. This note summarises the position under English law in relation to "electronic execution" of documents.

The Current Law

Electronic signatures are a valid means of executing a document^{1,2}, including simple contracts and deeds, provided that:

- the individual signing the document intends to authenticate the document; and
- any formalities relating to the execution of the document are satisfied.

Intention to Authenticate

Satisfying the test is a question of intention and, in a commercial context, is unlikely to be disputed where steps have been taken to execute a document electronically, particularly given that the executed signature page will be shared with the counterparty.

The Courts have considered what constitutes "signing" a document, and have confirmed that the following methods will suffice:

- printing a name;³

- signing with initials⁴; and
- signing with an “X”⁵.

Commercial parties are unlikely to rely on methods of signature which might be considered ambiguous, such as those set out above, but can be reassured in this context that the Courts have taken such an expansive view.

In reality, commercial parties will be more likely to use clearer methods of digital execution, such as:

- electronic signature services, such as DocuSign; or
- adding an existing scanned signature of an authorised signatory to the signature page for the relevant document.

If either of these methods are not available, organisations may sign simple contracts (which do not require specific execution formalities) by way of less formal means, such as via email. The Courts have confirmed that a name typed at the bottom of an email can constitute a signature and as such this is an approved means for executing simple contracts.⁶

To avoid ambiguity as to whether a document has been validly executed by email, parties should consider including express wording in the relevant document acknowledging that the document has been signed by way of email.

Parties should also consider agreeing express language in the email message by which the document is signed with their counterparties, as well as attaching a PDF of the final agreed form of the document when signing the document.

Execution Formalities

English law imposes certain formalities on the execution of certain types of agreement. These are summarised in the table below.

Agreement/Type of Document	Formalities for execution by a Company or a Limited Liability Partnership
Simple Contract	No specific formalities, merely offer, acceptance, certainty as to terms and intention to create legal relations.
Deed	Must be in writing, signed, witnessed if signed by one director or member, and delivered.
Guarantee	Must be in writing, or evidenced by writing, and signed.

Transfers of registered securities under the Stock Transfer Act 1963	Must be made “under hand” ie in writing but not necessarily by deed, in the form provided in Schedule 1 to the Stock Transfer Act 1963.
Contract for the sale of land	Must be in writing and signed, incorporating all the terms which the parties have expressly agreed in one document (or, if contracts are exchanged, in each document).
Unilateral Promise	Must be executed by way of deed.
Lasting power of attorney	Must be executed by way of deed in a prescribed form and containing prescribed information.

An agreement signed by way of electronic signature must comply with these formalities to ensure that the document is validly executed.

The most onerous formality to satisfy where a document is executed electronically is likely to be the requirement for a deed to be witnessed. The Law Commission’s interpretation of the current law, that the a deed must be signed “in the presence of a witness”, is that the witness must be physically present at the time of signature, and that “virtual witnessing”, such as over video conference, will not satisfy this requirement.

Witnesses to the signature of a deed are required to be independent so that they can provide unbiased evidence of what was signed and by whom, if required. As such, witnesses should not be a spouse, partner or family member of the signatory, nor should witnesses have any interest in the deed being executed. Similarly, a party to the deed should not witness another party’s signature.

Given that signatories may be in quarantine, it may be difficult to find someone other than a family member to witness the signature of a document. One potential solution may be for a neighbour (who is not related and who does not have an interest in the document) to witness the signature of the document and sign themselves, whilst practising appropriate social distancing measures.

General Requirements for Virtual Execution of Documents

In addition, the typical requirements for virtual execution of documents will apply in respect of documents signed by way of electronic signature following the *Mercury* case.⁷

The Law Society has produced guidance on “best practice” in this respect. This guidance is summarised in the table below.

Agreement/Type of Document	Option 1 – Return Entire document with the signed signature page	Option 2 – Return the signature page only	Option 3 – Pre-signed signature pages
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Simple Contract (not incorporating a guarantee or for the sale of land)	Yes	Yes	Yes
Deed	Yes	No	No
Guarantee	Yes	Yes	Yes
Contract for the sale of land	Yes	No	No

¹ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (“eIDAS”) Article 25(1), Article 3(10) and Recital 49.

² Law Comm No 386, HC 2624

³ *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) at [26]

⁴ *Ibid.*

⁵ *Jenkins v Gaisford & Thring* (1863) 3 Sw & Tr 93.

⁶ *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 at [32]

⁷ *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721