

## Electronic Signatures – Remote Working and the Execution of Deeds

March 31, 2020

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The requirement to work remotely due to COVID-19 has meant that individuals and businesses are relying increasingly on the use of technology and concluding agreements using electronic means. Although this is a highly convenient and necessary method in which to bind transactions, there is still a bit of uncertainty around the validity of electronic signatures in some transactions, particularly when it comes to the execution of deeds. We should clarify that electronic signatures (such as DocuSign) are not the same as executing an electronic version of the deed (printing and signing a PDF).

For a deed to be validly executed, there are certain formalities which need to be complied with namely: the document must be signed in the presence of witness (or by two directors/authorised signatories) and delivered to the person who takes the benefit of the deed. The fact that a deed needs to be signed in the presence of a witness poses a challenge to signatories of deeds who are either self-isolating or working remotely without access to a witness. Last year, the Law Commission issued a report on electronic signatures which provided guidance in respect of the electronic execution of documents but did not go far enough in respect of guidance for the execution of deeds and therefore some uncertainty still remains.

### The 2019 Law Commission Report

In September 2019, the Law Commission issued a report (the “Report”) on the electronic execution of documents. The Report was the culmination of the Law Commission’s review on the following two aspects:

1. the use of electronic signatures to execute documents where there is a statutory requirement that the document must be “signed”; and
2. the electronic execution of deeds, including the requirements of witnessing and attestation and delivery.

In March 2020, the UK Government confirmed its agreement with the Law Commission’s legal conclusions in the Report and authorised the establishment of an industry working group to provide practical guidelines on the topic.

### What does the Report say about the validity of electronic signatures?

The Report states that in most cases electronic signatures can be used as a viable alternative to handwritten ones.<sup>1</sup> However, there are certain transactions which require specific formalities, such as the execution of deeds, which need to be signed “in the presence of a witness” and “attested”.

The Report sets out the following statements of law:

- An electronic signature is capable in law of being used to execute a document (including a deed) provided that the person signing is authorised to do so and any necessary formalities are carried out. The term “formalities” could include a signature being witnessed or that a signature be in a specific form.
- An electronic signature can also be used as evidence in legal proceedings. The courts have confirmed that there is no specific form or type of signature that the e-signature must take (unless this has been specified).

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<sup>1</sup> Law Commission Electronic Execution of Documents – September 2019.

- A name typed at the bottom of an email, clicking an “I accept” tick box on a website and the header of a SWIFT message are valid forms of electronic signatures.

### **What does the Report say about deeds and witnessing electronically?**

In relation to deeds and the witnessing requirements, the Report states that a deed must be signed in the physical presence of a witness who can attest to the signature.<sup>2</sup>

### **Practical Implications**

The requirement for the physical presence of the witness may be difficult given the current COVID-19 lockdown; therefore, parties may need to look for practical and pragmatic approaches to arranging for execution including using two directors/authorised signatories for deeds on separate counterparts. Parties should also consider whether a deed, rather than a simple contract, is strictly necessary.

One suggestion in the market is for signatories to have their signature witnessed over video conference. In this scenario, the signatory would sign in the presence of a witness (via video call) and then courier the signed originals to the witness for the witness to sign and input their details. At this stage, Katten cannot confirm that this would be legally valid, but it could become an acceptable way of executing deeds without having the witness physically present.

### **Conclusion**

Whilst we hope that the Law Commission industry working group and the UK Government will provide guidance on using e-signing for the execution of deeds, the requirement for a witness to be physically present for any execution of a deed by one signatory may pose an issue for signatories working remotely or in isolation during the COVID-19 pandemic.

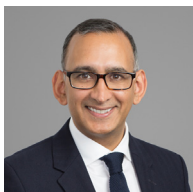
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<sup>1</sup> <https://www.lawcom.gov.uk/project/electronic-execution-of-documents/#related>

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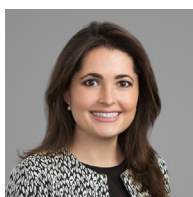
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