

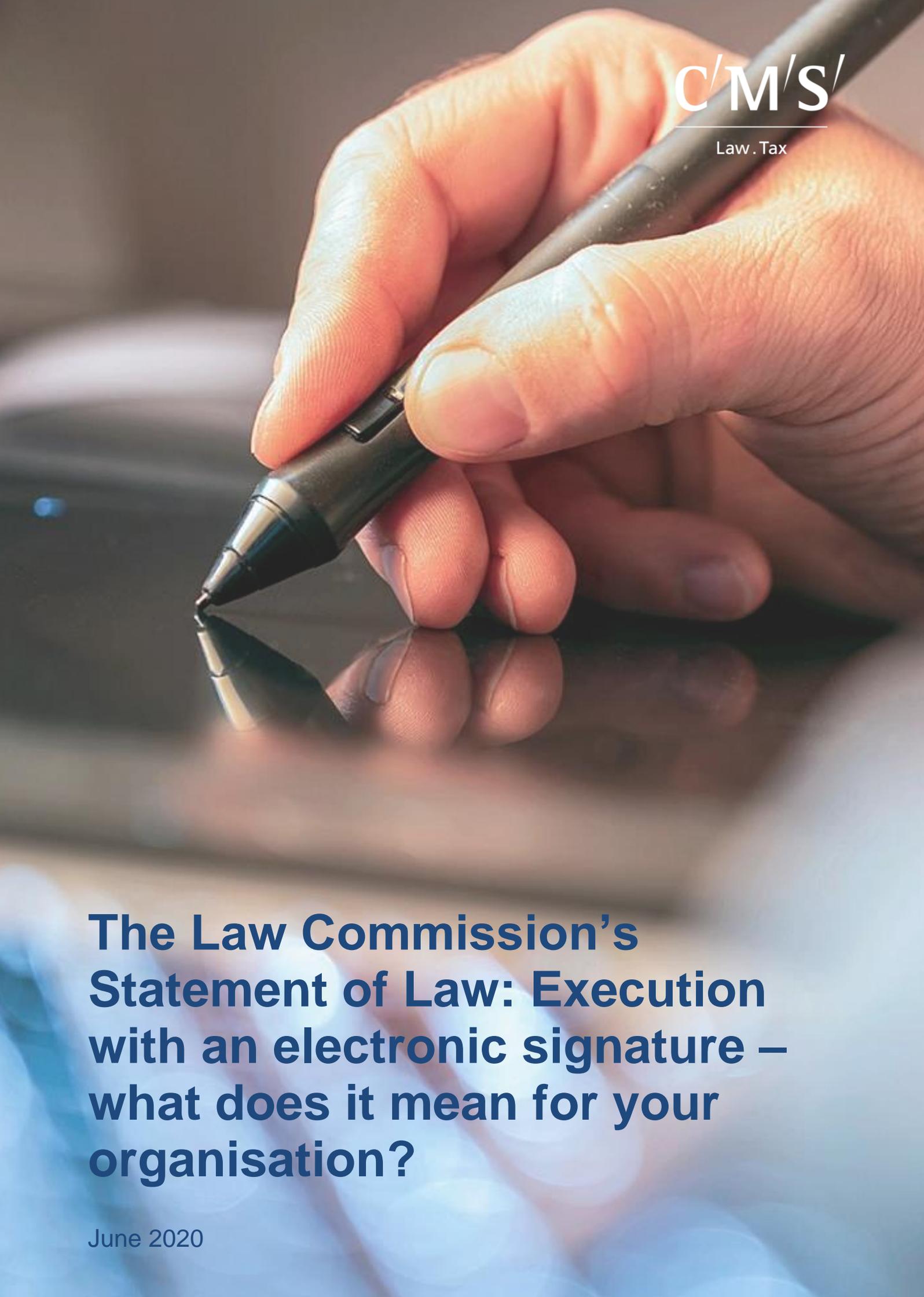


The Law Commission's Statement of Law:

Execution with an electronic
signature – what does it mean for
your organisation?



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The COVID-19 pandemic has made the in-person signing of deeds and documents impractical and created a nation of 'remote' workers.

Mercury-compliant 'virtual signings' (where the signature page of a hard copy document is signed in wet-ink and a PDF of the signed signature page is typically sent by email to the signatory's lawyer following the guidance in the Law Society's 2010 practice note on the execution of documents at a virtual signing or closing) are the preferred method for many businesses executing transaction documents. However, the use of electronic signature platforms such as Adobe Sign and DocuSign can, in many circumstances, provide a viable, and arguably often more user-friendly, alternative and they are gaining increasing traction in the market.

This article sets out the full text of the Law Commission's 2019 statement of law relating to the electronic execution of documents in England and Wales. To help you evaluate the statement in the context of how you may wish to use electronic signature platforms within your organisation, the text has been annotated to provide guidance on the interpretation of the statement's propositions and links to relevant legislation and case law.

This article is an edited, updated and extended version of an article originally written by Richard Oliphant (consultant, CMS) and published by Practical Law (Thomson Reuters) in March 2020. The statement of law is reproduced under Crown copyright and contains public sector information licensed under the Open Government Licence v3.0.

BACKGROUND

In January 2018, the Law Commission launched a project to review the law in England and Wales relating to the electronic execution of documents. It sought to address any uncertainty surrounding the formalities for executing deeds and other documents by electronic means and "ensure that the law governing the electronic execution of documents, including electronic signatures, is sufficiently certain and flexible to remain fit for purpose in a global, digital, environment." (*Law Commission 2018 Consultation on Electronic Execution*).

The Law Commission's report on the outcome of this project, entitled "Electronic execution of documents" was published on 4 September 2019 (*Law Commission 2019 Report*).

The report opens with a statement of law setting out the Law Commission's high-level conclusions regarding the validity of electronic signatures, summarised as a series of propositions (Statement of Law). It is intended to "assist users and potential users of electronic signatures to proceed with confidence" (paragraph 1.2, Executive Summary, *Law Commission 2019 Report*).

The Statement of Law is a good starting point for lawyers in England and Wales seeking to assess whether a particular document or deed may be executed with an electronic signature.

This article sets out the full text of the Statement of Law as taken from the executive summary to the *Law Commission 2019 Report*. It is annotated to provide guidance on the interpretation and application of the Statement of Law, particularly in the context of the use of commercial e-signing platforms such as Adobe Sign, DocuSign, Namirial and HelloSign, and to assist the development of effective corporate e-signing policies for domestic and overseas transactions.

On 3 March 2020, the Government published its [response](#) to the Law Commission 2019 Report. The Government has accepted and endorsed the Law Commission's conclusions on the legal position. This is an extra and very welcome layer of validation. It also signifies that the Government currently considers that no further primary legislation is necessary to reinforce the legal validity of electronic signatures.

A [glossary](#) of abbreviations is set out at the end of this article.

THE LAW COMMISSION'S STATEMENT OF THE LAW: EXECUTION WITH AN ELECTRONIC SIGNATURE

PROPOSITION 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.

Proposition 1: annotations

What is an electronic signature?

An electronic signature is “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” (*Article 3(10)*, eIDAS) (see also *section 7(2)*, ECA 2000).

Article 3(9) of eIDAS defines “signatory” as “a natural person who creates an electronic signature”. A legal person, such as a company, cannot use an electronic signature. eIDAS introduced a new concept: the electronic seal. Some commentators have mistakenly equated the electronic seal to an electronic signature for legal persons. However, this is not the case. A legal person may use an electronic seal for the purpose of validating the origin and integrity of an electronic document, rather than signing it. An electronic seal is also not a form of, or substitute for, a common seal and will not satisfy statutory requirements of section 44 of the Companies Act 2006 or section 74 of the Law of Property Act 1925.

An electronic signature may take many different forms. These include:

- Typing a name or initials at the bottom of an electronic document such as an email, or in the signature block of a Word document.
- A scanned handwritten signature that is incorporated into an electronic document.
- Clicking an “I accept” or “I agree” button on a website (see *Drafting note, Proposition 7: annotations*).
- Using a stylus or finger to sign an electronic document via a touchscreen or digital pad.
- Using a web-based e-signing platform such as Adobe Sign or DocuSign to generate:
 - an electronic representation of a handwritten signature; or
 - a *digital signature* using public key cryptography which is backed by a digital certificate from the platform (or a trusted third party) to verify the signatory’s identity and link the signatory to their public key.

Proposition 1 is based on the provisions of eIDAS, the ECA 2000 and case law relating to electronic signatures and signatures more generally.

The function of a signature – electronic or otherwise – is to demonstrate an intention of the party to authenticate the document. By “intention to authenticate”, the Law Commission means an intention to sign and be bound by the document.

In its 2001 Advice, the Law Commission suggested that the courts should apply the following purely objective test: would the conduct of the signatory indicate an authenticating intention to a reasonable person?

Although it does not affect the legal validity of an electronic signature, it is important to consider how trustworthy, secure and reliable is the technology used to create it. For example, a typed name at the end of a document may be easily forged. The point is well made in the 2016 BEIS Guide:

“Electronic signatures are only as secure as the business processes and technology used to create them. High value transactions need better quality electronic signatures – signatures used

for these transactions need to be more securely linked to the owner in order to provide the level of assurance needed and to ensure trust in the underlying system.” (page 5, 2016 BEIS Guide)

Better quality electronic signatures demonstrate:

- **Authenticity.** Whether an electronic document comes from a particular person or other source.
- **Integrity.** Whether there has been any tampering with or changes to the electronic document.
- **Non-repudiation.** That the signatory cannot deny that he or she signed the electronic document.

One of the many advantages in using an e-signing platform is that the digital audit trail (see *Drafting note, Proposition 3: annotations*) provides – in the absence of fraud – strong proof of the signatory’s intention to authenticate the document.

The formalities of execution under English law are examined in *Proposition 2* below.

PROPOSITION 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).

Proposition 2: annotations

Execution of simple contracts

The general rule under English law is that a contract does not need to be made in any particular form. Most commercial and consumer contracts governed by English law can be made informally and are not subject to a legal requirement for signature at all. In fact, in many instances they can be concluded orally or by conduct provided the essential elements for an enforceable contract are present: that is, offer and acceptance, consideration, certainty of terms and an intention to be legally bound. Therefore, most simple contracts which the parties choose to record in writing may be validly concluded with an electronic signature because there is no legal requirement for signature in the first place.

An electronic signature will be admissible as evidence in any legal proceedings regarding the authenticity or integrity of the electronic document (*section 7(1), ECA 2000* and *Proposition 3* below). Where a claimant alleges that the electronic document is not authentic (for example, it has been produced fraudulently, has not been signed by the person who had purportedly done so, or has not been properly witnessed) or has been tampered with after signature, the claimant would have to prove their claim on the balance of probabilities.

Formalities

A formality is a procedure which a party must follow in order to give legal effect to a transaction. Where a transaction is subject to formalities, these usually derive from statute.

Formalities have three main aims:

- **Evidential.** Providing evidence that the party entered into the transaction, and evidence of its terms.
- **Cautionary.** Ensuring that the party does not enter into the transaction without realising what they are doing and protecting weaker parties to a transaction (such as employees and consumers).
- **Labelling.** Making it apparent to third parties what kind of transaction it is and what its effect is to be.

Formalities vary but they typically require that the transaction be recorded “in writing”, “signed” by the parties or executed as a deed. Common examples of English law transactions which are subject to formalities include guarantees, contracts for the sale of land, transfers of registered securities, regulated

credit agreements, powers of attorney, copyright assignments and dispositions made without consideration.

Recent case law confirms that electronic documents will, in general, satisfy a statutory requirement for writing (see, for example, *Golden Ocean Group v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 and *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch)).

The *Law Society 2016 Practice Note* concluded that an electronic contract or deed executed with an electronic signature is capable of satisfying a statutory requirement to be in writing and/or signed and/or made under hand. The 2019 Report is less bullish but reinforces this conclusion subject to two important caveats – the signatory must intend to authenticate the electronic document and satisfy any execution formalities (see *Drafting Note, Proposition 1: annotations*).

It is rare that statutory formalities would preclude the use of an electronic signature. However, there are two notable exceptions:

- **Wills.** The Law Commission indicated in its 2017 consultation paper *Making a Will (No. 231)* that “the formality rules most likely preclude the electronic execution of wills” under *section 9* of the *Wills Act 1837*.
- **HM Land Registry digital reforms.** HM Land Registry has embarked on an ambitious programme that will eventually pave the way for digital conveyancing and land registration. Changes to the *Land Registration Rules 2003* have established the legal scaffolding for registrable dispositions of “registered estates and charges” to be made as electronic deeds and authenticated with an electronic signature (see rr54A-D of the Land Registration Rules 2003 and section 91 of the Land Registration Act 2002)). However, at the present time (June 2020), this is limited to the *digital mortgage service* and requires that the signatory uses HM Land Registry’s own purpose-built solution for generating and certifying the digital signature. HM Land Registry will not accept an electronic deed for registration that is authenticated by a digital signature (and digital certificate) via a commercial e-signing platform.

On 4 May 2020, HM Land Registry *introduced* some changes to its registration practices for the purposes of registration of a transfer and certain other deeds in response to the COVID-19 pandemic (it is not yet clear if these will be temporary or permanent). HM Land Registry has now relaxed its requirement that these registrable deeds be signed in wet-ink and will accept registrable dispositions and certain other deeds that are made in compliance with the *Mercury* signing protocols. A signatory may sign the deed before a witness who is physically present and signs the signature page. The signature is then captured with a scanner or camera to produce a PDF or JPEG of the signed signature page. The signatory sends a single email to their lawyer attaching the signed signature page and the final agreed version of the deed. The lawyer can then combine the transfer deed and signature pages either by their being: (i) electronically combined; or (ii) printed out and then physically combined. They must then certify the resulting transfer as a true copy of the original in the usual way. For the purposes of the certificate, the single document produced by the lawyer combining the final agreed transfer and signature pages is to be treated as the original transfer. (The same applies for the other deeds that can be *Mercury*-signed.) This will enable the lawyer to register the deed with HM Land Registry. Where there has been electronic combination, the combined deed (such as a transfer and signature pages) can be directly uploaded as a single document.

Formalities may also be contractual. A common example is where a contract stipulates that any amendments must be made in writing. Unless the contract expressly provides otherwise, an electronic signature will be capable of satisfying this requirement.

Finally, remember to check the constitutional documents of any legal entity to ensure there is no restriction on using an electronic signature.

PROPOSITION 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.

Proposition 3: annotations

This proposition reflects the position under *section 7(1)* of the ECA 2000. This provides that, in any legal proceedings, an electronic signature (or the certification by any person of such a signature) is admissible in evidence in relation to any question as to the authenticity or integrity of an electronic document.

Where a transaction is executed using an e-signing platform such as Adobe Sign or DocuSign, a digital audit trail is generated. This records who signed the document including their email and IP address, any additional steps taken to authenticate the signatory (such as a passcode sent to the signatory's mobile phone) and it is time-stamped. The digital audit trail is admissible in evidence under section 7(1) of the ECA 2000.

The basic method for e-signing platforms to authenticate signatories (that is, verify their identity) is an email address. An email address may be compromised or spoofed, and users may therefore opt for two-factor authentication (such as sending a passcode to the signatory's mobile phone) for greater peace of mind.

For transactions which demand more rigorous authentication of the signatory, it may be more prudent to use a digital signature. eIDAS defines two categories of digital signature: an “**advanced electronic signature**” and a “**qualified electronic signature**”. Digital signatures are available from the leading e-signing platforms. They are generated using public key infrastructure. The signature is encrypted and bound to the document itself. A trusted third party (or certification authority) verifies the identity of the signatory by checking their passport, ID card or driver's licence, and issues a digital certificate attesting to the signatory's identity. The digital certificate – especially if it relates to a qualified electronic signature – gives the counterparty far greater assurance that the signatory is who they claim to be. Thus, a digital signature carries more evidential weight than an electronic signature in any dispute over the authenticity or integrity of the document or transaction.

Digital signatures are more prevalent in civil law jurisdictions and in highly regulated industries, such as pharma and financial services. To date they have not been widely adopted in England and Wales. However, the advent of cloud-based digital signature platforms is very likely to change this. As awareness of digital signatures grows, they may eventually become the *de facto* standard for executing cross-border client transactions.

The qualified electronic signature has equivalent legal standing to a handwritten signature and benefits from mutual recognition across all EU member states (*Article 25*, eIDAS) and countries in the EEA. Executing transactional documents with a qualified electronic signature significantly improves the likelihood that they will be recognised, registrable or enforceable in all relevant jurisdictions.

The Law Commission has recommended that the Government convene an industry working group to consider the “practical and technical issues” arising from the electronic execution of documents. On 3 March 2020, the Lord Chancellor announced that the Government will follow this recommendation (see *Government's response to the 2019 Report*). The mandate of the industry working group should include an analysis of how digital signatures might alleviate the difficulty of executing cross-border transactions.

PROPOSITION 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.

Proposition 4: annotations

In rare circumstances, the law is more prescriptive as to the form or type of signature required. This occurs, for example, where there is something explicit in legislation or case law relating to the relevant document that mandates the use of a particular type of signature. For instance, the formality rules under the Wills Act 1837 preclude the electronic execution of wills. The testator and two witnesses must use a wet-ink signature.

Impact of registration requirements

Although not directly addressed in the Statement of Law, lawyers should always consider whether a transactional document must be filed with a public registry to give full effect to the transaction. And, if so, does that registry impose requirements regarding the type of signature? A document may have been validly executed with an electronic signature, but this is of no benefit if the relevant registry only accepts hard copy documents bearing a wet-ink signature. For example:

- The Intellectual Property Office, the Civil Aviation Authority and the UK Ship Register generally accept electronic signatures for online filings.
- Companies House generally accepts electronic signatures. It operates an online filing service which allows most forms and notices to be signed and delivered electronically. It will also accept certified copies of a document creating a charge that have been signed with an electronic signature, in accordance with the registration requirements under *section 859A* of the Companies Act 2006.
- HM Land Registry and the Land Charges Registry ordinarily require wet-ink signatures for registrable dispositions (such as transfers or leases) and certain other documents submitted to them whether in paper form or via the Land Registry Portal (with the latter, the conveyancer must give a certificate that the scanned document is a true copy of the “original”, which HM Land Registry appear to understand to be a wet-ink document). However, HM Land Registry has relaxed this policy in response to the COVID-19 outbreak (see *Drafting note, Proposition 2: annotations*).
- HM Revenue and Customs (**HMRC**) normally expects to stamp a wet-ink version of a document where stamp duty is payable, such as a stock transfer form. However, it has suspended its rules from 25 March 2020 in light of the impact of the COVID-19 pandemic. HMRC now insists that instruments of transfer are not submitted by post. Instead, it will accept emails attaching an electronic copy (for example a scanned PDF). It will also accept electronic signatures while COVID-19 measures remain in place.
- The Office of the Public Guardian (**OPG**) has partially digitised the process for making and registering a lasting power of attorney. The donor of the power may fill out the details online but must print the document and sign it in wet-ink for registration. In its response to the Law Commission’s 2018 consultation paper which preceded the 2019 Report, the OPG has confirmed that it has no plans to permit registration with an electronic signature at the present time.

PROPOSITION 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”.

Proposition 5: annotations

This illustrates the flexibility and pragmatism of the common law in determining what will satisfy a signature requirement. The courts adopt an objective approach, taking account of all of the surrounding circumstances to gauge whether the method of signature demonstrated an “intention to authenticate” the document.

PROPOSITION 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.

Proposition 6: annotations

This view is borne out by the existing case law discussed in relation to Proposition 7 below (see *Drafting note, Proposition 7: annotations*).

PROPOSITION 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
- the header of a SWIFT message.

Proposition 7: annotations

This proposition references the following cases:

- *Golden Ocean Group v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, where the court found that the requirement in *section 4* of the Statute of Frauds 1677 for a contract of guarantee to be “in writing” could be satisfied by reference to a chain of negotiating e-mails, and that the name of the chartering broker which was typed at the bottom of the final e-mail in the chain was sufficient authentication.

- *Bassano v Toft* [2014] EWHC 377 (QB), where it was held that clicking on a button marked “I Accept” was a signature for the purposes of the *Consumer Credit Act 1974* and the *Consumer Credit (Agreements) Regulations 2010*.
- *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm) where it was held that the automatic addition of a party’s name to a header, by reason of its utilising the SWIFT system, was caused by the sender and accordingly constituted a sufficient signature for the purposes of creating an enforceable guarantee under section 4 of the Statute of Frauds 1677.

The position in *Bassano* has not been met with universal approval. Some commentators have argued that clicking on a website button is not equivalent to signing a document with the intention of authenticating its contents. In the absence of clear judicial authority, it is advisable that the “I accept” button be accompanied by a clear statement that it is intended to constitute an (electronic) signature.

Subsequent to the 2019 Report, in *Neocleous v Rees* [2019] EWHC 2462 (Ch), it was held in the Manchester County Court that an automatically generated email footer containing the name and contact details of the sender constituted a signature for the purposes of *section 2(3)* of the Law of Property (Miscellaneous Provisions) Act 1989.

The case law is conclusive: an electronic signature is generally capable of satisfying a statutory requirement for a document to be signed and made in writing.

PROPOSITION 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.

Proposition 8: annotations

Deeds can be validly executed with an electronic signature by an individual (under *section 1(3)* of the Law of Property (Miscellaneous Provisions) Act 1989) and by a company (under *section 44* and *section 46* of the Companies Act 2006).

However, the Law Commission has given a clear signal that witnessing formalities require the witness to be “physically present” when the deed is signed. The First-Tier Tribunal (Property Chamber) has subsequently followed this lead and held that a deed may not have been validly executed if the witness was not physically present when the signatory signed the deed (*Man Ching Yuen v Landy Chet Kin Wong* First Tier Tribunal (Property Chamber), 2020 (ref 2016/1089)). The current law does not permit ‘remote’ witnessing via a video link.

The 2019 Report recommended that the industry working group (see *Drafting note, Proposition 3: annotations*) should consider the “practical and technical obstacles to video witnessing of electronic signatures on deeds and attestation”. The Law Commission has also proposed that, following the work of the industry working group, the Government should consider amending the ECA 2000 to allow for video witnessing.

The Law Commission and the Government have both committed to undertake a *further review* of the law of deeds more generally, although the timing of this review is uncertain.

Witnessing via e-signing platforms

There are several important practice points for lawyers when witnessing deeds via an e-signing platform:

- The digital audit trail will record the IP address of the witness when they attest the deed. The theory goes that the IP address of the signatory and witness should match and constitute evidence that the witness was “physically present” when the electronic signature was affixed to the deed. But this is not always the case. For example, if the signatory uses a Wi-Fi network to sign the deed but the witness uses a mobile network to complete the attestation process, their IP addresses will differ despite being in the same physical location. Conversely, if the signatory

and witness are not both physically present in the same location but use the same virtual private network (VPN) to get online, it may appear as if they are working from the same IP address. The IP address may therefore not furnish proof that the witness was physically present when the deed was executed. From a practical perspective, to avoid any discrepancy in the IP addresses of signatory and witness which might cause the location of the witness when the document was signed to be called into question, it is prudent for the signatory and witness to complete the execution and attestation process using the same device or via a connection to the same Wi-Fi network. This should, be sufficient (given that the digital audit trail is also time-stamped), but if the parties have any residual concerns, they could consider securing a statement from the witness confirming they were present in person or record the event on their mobile phone.

- There are two ways in which a company may execute a deed under *section 44(2)* of the Companies Act 2006, without using its common seal:
 - by the signatures of two authorised signatories (either two directors or a director and secretary of the company) (*section 44(2)(a)*); or
 - by the signature of a director of the company whose signature is witnessed (*section 44(2)(b)*).
- In its 2019 Report, the Law Commission confirmed that where a deed is executed by the signature of two authorised signatories, there is no requirement for the signatures to be applied at the same time. Therefore, a company may already validly execute a deed with electronic signatures and without needing to satisfy a requirement for witnessing and attestation (*paragraph 5.37, 2019 Report*).
- Wherever possible, it is prudent for corporate undertakings to execute deeds on e-signing platforms by authenticating with the signatures of two authorised signatories (*section 44(2)(a)*). This removes any requirement for witnessing and attestation, and makes the signing workflow much simpler for the parties. It will also forestall any (erroneous) claims made by the other party's lawyers that the deed cannot be validly witnessed using an e-signing platform.

GLOSSARY

In this article, any reference to:

- **ECA 2000** is to the *Electronic Communications Act 2000*.
- **eIDAS** is to 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*. For further information on eIDAS, see *The European Commission's guidance on eIDAS and trust services*.
- **2019 Report** is to the Law Commission report on Electronic execution of documents (Law Com No 386), published on 4 September 2019.
- **2016 BEIS Guide** is to the guide to *Electronic signatures and trust services* published by the Department for Business, Energy & Industrial Strategy in August 2016.
- **2001 Advice** is to *E-commerce: formal requirements in commercial transactions – Advice from the Law Commission* published in December 2001.
- **Law Society 2016 Practice Note** is to the *practice note on execution of a document using an electronic signature* published by a joint working party of the Law Society and City of London Law Society on 25 July 2016, and updated on 7 May 2020 to take account of COVID-19 restrictions.
- **Mercury signing protocols** is to the Law Society's *practice note on the execution of documents by virtual means*, as updated on 7 May 2020 to take account of COVID-19 restrictions.

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COVID-19 Resources

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