

Remote working Signing legal documents using e-signatures

Is it possible to e-sign contracts?

Under English law, the signing of simple contracts using e-signatures should not be problematic.

What about e-signing deeds?

The legal considerations which relate to the use of e-signatures to execute deeds under English law are rather different.

In its recent report, the Law Commission concluded that, subject to certain requirements being met, an electronic signature was capable in law of being used to execute a document (including a deed). But the view has limits. Please see the paragraph entitled 'What about remote witnessing?'.

What about remote witnessing?

The Law Commission's view was that parties could not be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform.

This means that a witness may still attest the e-signing of a deed but he or she would need to be in the same room as the signatory. This is because there is considerable legal doubt about whether the witness can validly attest a deed remotely.

Our advice is not to execute deeds where the witness is not in the physical presence of the signatory and that remote witnessing e-signing on a screen is not enough. If the attestation is invalid, then the deed will not have been validly executed and will not constitute a valid deed.

When is e-signing not acceptable?

There are cases where e-signing may not be acceptable (for either contracts or deeds), including:

- Where a document requires registration at H.M. Land Registry or the Land Charges Registry. Both registries require original wet-ink signatures on the paper documents to be submitted for registration
- Where stamp duty is payable on a document
- Where it is necessary to establish the precise physical location where a document has been signed (such as where there are legal reasons why a document should be physically signed outside of England and Wales)
- Where a document requires notarisation. A notary will generally require a "wet ink" signature and for the document to be signed in the presence of the notary
- Where the laws of another relevant jurisdiction restrict or prevent it. Please see the paragraph entitled 'What about using e-signatures in other jurisdictions?'

Can you offer us any practical tips?

There may be documents which don't need to be deeds but which can instead be signed as contracts (i.e. where the consideration can be readily identifiable). Remember that a contract has certain disadvantages when compared to a deed (for example, it has a shorter limitation period).

Think about expanding the list of those who have power to bind and ensure that two of them are physically present at any offsite office – one to execute and the other to witness.

Think in advance about appointing more attorneys and have the relevant powers of attorney executed well in advance of any remote working. Remember that all powers of attorney must be executed as deeds.

It is best practice for a witness who attests a signature to be independent of the signatory.

Are board minutes and board resolutions different to other documents?

Yes. The e-signing of board minutes and resolutions should not be problematic.

What about notices?

Yes. Again, the e-signing of notices should not be problematic but bear in mind how delivery is proved.

What about using e-signatures in other jurisdictions?

The use of e-signatures may present challenges for entities incorporated in, and contracts governed by, the laws of some jurisdictions. Those jurisdictions include Canada, China, Germany, Kuwait, Russia, Singapore and Turkey.

We have significant experience of advising on a broad range of issues arising from the use of e-signatures within financial services, and the legal and regulatory impacts of this.

We have carried out a number of different cross-border regulatory surveys on this topic, including one covering all major financial centres (40 countries). This large survey was made up of a large number of questions, covering:

- The basics of e-signatures, e-delivery, e-capture, e-upload and other similar solutions, and if they are permitted in each country
- Enforceability of those solutions against customers in each country
- Regulatory consents required to use these solutions
- Consideration of issues relating to cross-border use of these solutions
- Formalities to be dealt with in order to use e-signatures and other solutions
- Types of documents/agreements that can and cannot be e-signed
- Related data privacy issues
- Document retention requirements and how to interpret these in an e-signatures context

Which e-signature provider should I use?

There are a number of e-signature providers in the global market. In choosing one, commercial factors are likely to play an important role.

Relevant considerations will include cost, convenience, data security, compatibility with existing systems, the location of physical servers and the adequacy of recovery planning.

The choice of whether to enter into documents using e-signatures will involve legal and commercial considerations across a range of organisational sectors.

March 2020

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