

Legal Alert

October 2018

Electronic execution of documents – Law Commission consultation

Electronic signatures are now commonplace in many areas of our lives. When a parcel is delivered, we think nothing of “signing” for it on an electronic device, even though the “signature” we produce bears little resemblance to the one we carefully created in our teens. But when it comes to binding legal documents, we need to be more careful. As technology moves on, businesses expect to do the same, and lawyers are increasingly asked if deals can be concluded on the basis of electronic documents. The problem is that the current law on creating binding contracts and deeds was forged in the 19th century and has not adapted fast enough to answer all the questions that current technology presents. To address this issue, the Law Commission is proposing changes to the law and has launched a [consultation](#) on its initial thoughts.

The Law Commission’s starting point is that electronic signatures, in a variety of forms, are already capable of being legally binding under English law and that there is no need for any specific legislation on that point. The consultation is deliberately “technology-neutral”, so there is no suggestion that one type of electronic signature is better than another. The key point is that the “signature” must be added with the intention of authenticating the document. At its most simple, this could mean simply typing in a name. At the other end of the spectrum, there are secure, encrypted digital signatures and sophisticated signing platforms, which hold all documents electronically and allow all the parties to sign remotely.

In practice, the legal profession has been developing its own solutions to the digital challenge. In 2009, a joint working party of the Law Society and the City of London Law Society put together a protocol, setting out an agreed set of steps to enable lawyers to exchange and complete on transactions where clients have signed paper documents but returned scanned copies by email. The logical next step is a move to entirely electronic documents and the biggest change over the next year or so is likely to be a rise in the number of legal transactions concluded using a signing platform.

Real estate deals present particular challenges which do not apply to other areas of commerce. Real estate contracts must comply with a statutory requirement that they are in writing and signed by both parties. Land transfers and leases must be executed as deeds, which brings more formalities, including the requirement for signatures to be witnessed. Added to all of this are the Land Registry’s own rules, which currently mean that to register a transfer or lease, the lawyer needs to have a hard copy of the document, with a “wet-ink” signature. The Land Registry recognises the pressing need to enable fully digital property transactions and has launched a major digitisation project. Because of this, the Law Commission’s current consultation deliberately excludes transactions that need to be registered at the Land Registry. Some in the property industry are worried that this might result in electronic land transactions following a different path to all other aspects of e-commerce.

Electronic deeds are central to the Law Commission consultation. At present, where a deed is signed by an individual or where a company signs by one director, that signature must be witnessed by someone who also signs the same document. The witness underlines the additional formality of entering into a deed and is effectively a “second pair of eyes”, to make sure that the document is signed in a proper manner. The current consensus is that this requires the witness to be in the same room as the person signing and put their own signature on the same document. Recognising that this limits business flexibility, the Law Commission proposes to change the law and is seeking views on how best to do it. The options it suggests include:

- Allowing witnesses to observe the signature by video-link, then add their own signature via a signing platform or on an emailed copy of the signed document. This could be done with minimal change to the underlying law on deeds.
- Accepting that if a witness and signatory are both logged in to a signing platform, the witness can “see” the signature when it appears on screen in real time, without a video-link.
- Replacing the requirement for a witness with a secure digital signature. This has been done for some types of document in Scotland and seems likely to be part of the Land Registry’s digital solution. The Law Commission’s commitment to be “technology-neutral” means it is cautious about making something of this sort compulsory.
- Introducing a new concept of “acknowledgement”, which would allow the person signing to confirm to the witness that they had signed, with the witness then signing to say they had received that confirmation. This would be the biggest departure from the current law and probably raises the most questions. Would this provide enough reassurance about the authenticity of the signature or might it be more susceptible to fraud? How quickly should the witness give their confirmation? How long a delay would be too long?

The Law Commission is well aware that these very technical aspects of the law have a significant practical impact on businesses that have to work with them. To make sure any changes will work from a practical point of view, it is proposing an industry technical working group made up of lawyers and tech experts, to examine the actual impact of proposed changes.

If you would like to respond to the current [consultation](#) it is open until 23 November 2018. If you would like to discuss any of the issues around electronic execution of documents with someone at Maples Teesdale, please email [us](#) or speak to your usual contact.

Fiona Larcombe
Professional Support Lawyer
Maples Teesdale