

# Dentons DCM Quick Guides

Practical summaries of 2021 DCM Hot Topics, condensed to be digested alongside your morning coffee...

## LOCKDOWN LOGISTICS: ELECTRONIC SIGNATURES FOR ENGLISH LAW DOCUMENTS

As all those involved in DCM transactions will be acutely aware, the coronavirus pandemic has raised novel logistical challenges regarding the remote signing of transaction documents. On 6 January 2021, the Law Society published a Q&A which explains how to use electronic signatures and complete virtual executions, and contains useful guidance as to the views of the Law Society's Company Law Committee as to general practice in commercial and contract law. This note is a brief summary of some of the considerations and practicalities for electronic signatures under English law.

In this note we refer to:

**Signing:** as the act demonstrating an intention of the party to authenticate a document; and

**Electronic signing:** being the signing of a document in electronic form by electronic means.

This is a high-level summary only, and does not address other legal issues relating to signing, such as capacity and authority of the parties to a transaction, or any internal policies parties may have, such as on the use of cloud-based electronic signing platforms.

### ARE ELECTRONIC SIGNATURES PERMITTED UNDER ENGLISH LAW?

Yes.

*The Law Commission's September 2019 report entitled "Electronic execution of documents":* "An electronic signature is capable in law of being used to validly 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." The report also confirmed that "an electronic signature is admissible in evidence in legal proceedings".

*Lord Chancellor, Ministerial Statement, March 2020:* "I agree with the report's conclusion that formal primary legislation is not necessary to reinforce the legal validity of electronic signatures. The existing framework makes clear that businesses and individuals can feel confident in using e-signatures in commercial transactions."

*Electronic Communications Act 2000*: Section 7 states that electronic signatures are admissible in English courts and Section 8 gives the UK government the power to modify any conflicting requirements under legislation to facilitate the use of electronic communications.

To confirm, the Law Commission's positive conclusion above, which has since been endorsed by the UK government (see the Lord Chancellor's statement above), is largely based on case law and general legislation rather than any specific statutory authority.

### WHICH METHOD OF ELECTRONIC SIGNATURE SHOULD BE ADOPTED?

Electronic signatures can take a number of different forms, including but not limited to:

- clicking on an "I accept" button on a website (although whether this constitutes a signature will depend on the precise mechanics);
- typing your name into a contract or into an email containing the terms of a contract;
- electronically pasting your signature (e.g. image/jpeg) into an electronic version of the contract;
- accessing a contract through a web-based electronic signature platform and clicking to have your name in a typed or handwriting font automatically inserted; and
- using a finger, light pen or stylus and a touchscreen to write your name electronically in the contract.

Note that not all of the above are recommended methods of signature, but they all provide some confidence that a person had a sufficiently clear intention to authenticate a document, as is the case when signing with a pen in an execution block.

The recommended methods of electronic signature are those that provide a secure/robust method to evidence the identity of the person applying the electronic signature, and thus being able to evidence that the intention to authenticate was applied by the appropriately authorised person (i.e. that the "correct" person signed).

### HOW DO YOU IDENTIFY THAT THE CORRECT PERSON HAS SIGNED?

**"Wet ink" signature** (i.e. pen on paper) identifies the signatory through the form of signature (for example, comparison to previously provided specimen signatures).

While some methods of **electronic signature** (such as the use of an electronic stylus) can also provide for identification through the form of signature, electronic signatures usually identify the signatory through the level of security limiting the ability of anyone other than the intended signatory from applying the electronic signature.

Electronic signature security can vary from:

- not very secure or robust processes, such as:
  - typing in the name of the signatory into a final form document (anyone (not just the correct signatory) is able to insert the name in this way); or
  - copying and pasting a jpeg of a handwritten signature into a final form document (anyone (not just the correct signatory) with access to the jpeg or indeed any copy of the handwritten signature can sign in this way); to
- more secure and robust processes, such as:
  - **electronic signing platforms**: in commercial transactions it is common to rely on the fact that the link to the platform is sent to an email address which the correct signatory has provided. This is on the basis that the parties to a DCM transaction will have generally spent significant time before signing communicating by email, giving the other parties comfort as to the identity of the individual with access to a designated email address. It is only via this email address that the relevant documents can be accessed for signing. Where additional security features are required, various platforms offer enhanced security features such as limited time access codes etc.

- **express email confirmations:** an alternative approach can also be for the authorised signatory to send an email confirmation (along with an electronic signature that has been applied to the final document) confirming that such signatory applied the electronic signature. This requires an email from the actual authorised signatory (NOT just someone on their behalf). This method can be more practical for the signatory and also provides a similar level of comfort to many electronic signing platforms by using a person's access to their email inbox to evidence their identity.

Transaction parties should always consider the evidential weight of a particular method of electronic signature in demonstrating the identity of the signatory as well as their intention to authenticate the document. The practicalities of execution should be considered alongside such evidential considerations. Whether wet-ink or electronic, any form of signature is not impervious to abuse – for example, the risk of forgery of handwritten signatures and the risk of improper accessing of emails for electronic signatures.

The English courts will generally accept the signature (whether wet-ink or electronic) on a document at face value unless an opponent presents evidence to the contrary.

### ARE ALL DOCUMENTS SUITABLE FOR ELECTRONIC SIGNATURE?

While electronic signatures might be a more practical approach at first glance, there are various considerations that should be kept in mind when choosing to follow the electronic signature route:

- Further formalities around the execution of the document – for example, for certain signing methods, English and Welsh parties are required to have signatures to a deed witnessed, which is clearly more problematic in a lockdown context.
- Registries and tax authorities will not always accept electronic signatures for all types of document, and even if they do accept electronic signatories for the relevant document/filing, additional requirements may apply. For example, while HM Land Registry relaxed its requirements to allow electronic signatures from 27 July 2020 on some types of registrable documents, prescriptive

requirements still apply to the manner of electronic signature of those documents. In addition, as a temporary measure, HMRC is currently only accepting stock transfer forms in electronic form and these can be signed with electronic signatures.

- Requirement for a physical global instrument (for example, a global bearer bond). Where rights are given to the “bearer” (or person in possession) of the document, it is usually preferable for there to be a single hard copy original of the document. A workaround developed during 2020 is that, where an issuer elects to sign the global bearer bond electronically, the agent will subsequently print the version electronically signed by the issuer, and manually authenticate the printed document, ensuring that there is still one physical original copy of the signed and authenticated bearer instrument, to which the legal rights attach. The mechanics of the transaction will need to allow for this (for example, the Agency Agreement).
- Cross-border issues, including:
  - Foreign law governed documents will have to be considered in light of the relevant governing law.
  - English law governed documents with non-UK counterparty(ies). Points to consider in this scenario are:
    - Is there any reason under the relevant company law that the entity cannot effectively authorise an individual to sign electronically on its behalf?
    - To the extent any registration/filing/notarisation of the document needs to be done in the entity's jurisdiction, can that be done if the document is signed electronically?
    - Would an electronically signed document be admissible in the relevant entity's local courts and would those local courts assign the same level of evidential weight to an electronically signed document?
    - Is there a tax or other reason that the document must be signed in a particular location or jurisdiction? If so, a wet-ink signing of the document may provide more certainty as to the location of signing.

## ARE THERE ANY PRACTICALITIES TO WATCH OUT FOR?

- **Counterparts:** Signing electronically has no impact on the ability under English law to sign either (i) in counterpart or (ii) by one authorised signatory signing followed by the other adding their signature to the same version (electronic or hard copy) of the agreement or deed.
- **Mercury:** Signing electronically has no impact on the requirements for the execution of deeds set out in *R (Mercury Tax Group Ltd) v. Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.
- **Combination of signing methods:** English law governed documents may be signed using a combination of different methods, provided that each party uses a valid signature method (this can be facilitated by signing in counterpart).
- **Originals:** Consideration should be given as to whether any of the parties require originals and, if so, what form they require these to take (e.g. trustees / clearing systems).

## ELECTRONIC SIGNATURES AND BEST PRACTICE DEAL MANAGEMENT

- Issuers and guarantors should be encouraged to consider this option early in a transaction in order to allow time to ensure that all parties (including any trustees/agents) and legal counsel co-ordinating the documentation are on board.
- Consider the type of document being executed. Are there any execution formalities or any post-signing registration requirements/overseas aspects?
- Keep an audit trail. There is no legal requirement to do so but, from an evidential perspective, it is best practice to request a separate email confirmation provided by the signatory as to their authenticating intention.
- Consider using either (i) an electronic signing platform where this is feasible, given the jurisdictions and documents involved, or (ii) a form of electronic signature accompanied by a confirmatory email from the signatory. In our experience on DCM transactions, most transaction parties are comfortable that the "correct" signatory can be identified if the application of their signature (whether through an electronic signing platform or a less sophisticated method of electronic signature) is confirmed via the signatory's individual email address (whether by means of the internal processes of the electronic signing platform, or by the individual signatory confirming explicitly and directly by email that they applied the electronic signature).



This note is an overview of a complex topic. It is not legal advice and no person should take any specific action on the basis of its contents. Please contact the Dentons Debt Capital Markets team if you want to discuss the logistics of lockdown, or any other issues in the debt capital markets. We are happy to chat, on the phone or via video-conference.

The Dentons Debt Capital Markets team is led by **David Cohen**. Other members of the team include **Nick Hayday**, **Catriona Lloyd** (Trustee partner) and **Cameron Half** (US Securities Law partner). The partners are supported by Senior Associate **Victoria Wyer** and associates **A. Moeen Qayum**, **Niharika Khimji**, **Yash R. Ranade** and **Zeeshan Hussain**. **David Ferris** is the team's Senior Professional Development Lawyer. **Adam Pierce** is the Knowledge Partner of the Dentons Banking and Finance Practice in London.

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