Law
Commission
Reforming the law

Electronic execution of documents
Consultation paper

Consultation Paper Number 237

Law Commission
Reforming the law

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21 August 2018

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The Law Commission – How we consult

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Honourable Mr Justice Green,[1] Chair, Professor Nicholas Hopkins, Stephen Lewis, Professor David Ormerod QC, Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: Electronic execution of documents, including electronic signatures and the electronic execution of deeds. This consultation paper seeks consultees' views on provisional conclusions and proposals for reform.

Geographical scope: This consultation paper applies to the law of England and Wales.

Availability of materials: The consultation paper is available on our website at https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

Duration of consultation: We invite responses from 21 August 2018 to 23 November 2018.

Comments may be sent:

Using an online form at https://consult.justice.gov.uk/law-commission/electronic-execution (where possible, it would be helpful if this form was used).

Alternatively, comments may be sent:

By email to electronic-execution@lawcommission.gov.uk. An optional response form is available at: https://www.lawcom.gov.uk/project/electronic-execution-of-documents/

By post to Commercial and Common Law Team, Law Commission, 1st Floor, Tower, 52 Queen's Anne Gate, London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

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[1] The Honourable Mr Justice Green joined the Law Commission on 1 August 2018. The terms of this consultation paper were agreed by the previous Chair of the Law Commission, the Right Honourable Lord Justice Bean.

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Glossary

advanced electronic signature: A signature which meets the requirements of article 26 of eIDAS.

asymmetric cryptography: The process of encrypting and decrypting data using public and private keys. This is also known as "public key cryptography".

attestation: The process by which a witness records, on the document itself, that they have observed that document's execution.

biometrics: Physical characteristics, such as fingerprints, which may be used to verify a signatory's identity.

certificate: An electronic certificate issued by a certification authority which confirms the connection between a public key and an individual or entity.

certification authority: An entity which issues certificates. See also "certificate".

deed: A document which is executed with a high degree of formality, and by which an interest, a right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.

delayed delivery: A means of delivering a deed without the deed taking effect immediately. Delayed delivery can be achieved by delivering a deed into escrow, or by delivering it to an agent with instructions to deal with the deed in a certain way at a given time.

delivery: A requirement for the valid execution of deeds in which the maker signifies that they intend the deed to become binding and effective.

digital signature: An electronic signature produced using asymmetric or public key cryptography (see Chapter 2).

EDI: Electronic data interchange. This refers to the exchange of digital information, where the data is structured in such a way that it can be automatically understood and acted upon by the software of the recipient system. For example, stock re-ordering systems operated by large retailers and their suppliers.

eIDAS: 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.

electronic signature: A signature in electronic form (see Chapter 2 for a list of types of electronic signatures).

escrow: A deed delivered into escrow is one which does not take effect until the condition or conditions of escrow are fulfilled. See also "delayed delivery".

formalities: A formality is a procedure which a party must follow in order to give legal effect to a transaction. Formalities include requirements that certain transactions are made "in writing" or signed.

information digest: A unique fingerprint of an electronic document, used to create a digital signature.

IP address: A number allocated to a device that connects to the internet.

key: A cryptographic key is a very large number, usually represented by a long string of characters. A digital signature uses a "private key" to digitally sign a document, which can be verified using the signatory's "public key".

lasting power of attorney: A legal document used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs, made under the Mental Capacity Act 2005.

metadata: Data which consist of information about other data. For example, an electronic signature may produce metadata which relate to the time or location at which it was affixed.

public key infrastructure: A system in which a person's public key is the subject of a digitally-signed certificate provided by a certification authority. See "certificate" and "certification authority".

qualified electronic signature: A signature which meets certain requirements under articles 26, 28, 29, and annexes I and II, of eIDAS.

signing platform: Software providing an interface through which people can both create and upload documents to be signed electronically and affix electronic signatures to those documents. Such platforms may also provide an "audit trail" of a particular electronic document, which includes data such as the time at which it was signed and the IP address through which it was accessed.

trust deed: A deed which creates an express trust.

trust service provider: An entity which provides services such as the creation, verification and validation of electronic signatures.

wet ink signature: A signature affixed to paper using, for example, a pen or pencil. In this consultation paper we use the terms "wet ink" and "handwritten" interchangeably, to refer to non-electronic signatures.

witness: An individual who observes a person sign a document. A witness may also "attest" a document.

List of abbreviations

ECA 2000: Electronic Communications Act 2000

EDI: Electronic data interchange

eIDAS: 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

IP: Internet Protocol

LPA 1925: Law of Property Act 1925

LPMPA 1989: Law of Property (Miscellaneous Provisions) Act 1989

OPG: Office of the Public Guardian

PKI: Public Key Infrastructure

PIN: Personal identification number

UNCITRAL: United Nations Commission on International Trade Law

Chapter 1: Introduction

1.1 The law relating to signatures and other formal documentary requirements has a history spanning centuries. As far back as 1677, the Statute of Frauds required certain documents to be in writing and signed. It is still in force today. But the documents executed in today's world are no longer the same as those used over 400 years ago. Individuals, consumers and businesses demand modern, convenient methods for entering into binding transactions. Technological developments have changed the ways in which these transactions are made and will continue to do so at an ever-more-rapid pace.

1.2 Can the law of England and Wales keep up? Our common law system is inherently flexible and contracts can be created in many ways. Most transactions are not required to be executed in a particular manner. Electronic signatures are validly used instead of handwritten signatures in transactions every day. However, the law subjects particular types of documents to certain procedures, such as signing or witnessing. These procedures are called "formalities".

1.3 We have been told that issues around the electronic execution of documents are hindering the use of new technology where legislation requires a document to be "signed". The purpose of this project is to 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.

A REVIEW OF THE ELECTRONIC EXECUTION OF DOCUMENTS

1.4 The question of formalities is not new ground for the Law Commission, which has previously considered the execution of documents in 1987,[1] 1998[2] and 2001.[3] We discuss the details of these reports in Chapter 4. The most recent, and relevant, publication is a 2001 Advice from the Law Commission to Government. This considered the formal requirements for commercial agreements in England and Wales and asked whether various types of electronic communication could satisfy these requirements.[4]

1.5 This current project was suggested by stakeholders as part of our Thirteenth Programme of Law Reform, and we agree that this is the right time to revisit some of these issues, and to consider others for the first time. Not all stakeholders are convinced that an electronic signature may fulfil a statutory requirement for a signature. In addition, there is currently increased focus on the electronic execution of transactions because of interest in the use of blockchain and automated "smart" contracts to execute legal

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1 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93; Deeds and Escrows (1987) Law Com No 163.

2 The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253.

3 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/ (last visited 10 August 2018) ("2001 Advice").

4 2001 Advice, para 1.5.

contracts. It is important that businesses are clear about what they can and cannot lawfully do electronically, and that the law of England and Wales is seen to be capable of accommodating technological developments, as well as legal ones.

TERMS OF REFERENCE AND SCOPE OF THE CONSULTATION PAPER

1.6 The Ministry of Justice has asked the Law Commission:

(1) To consider whether there are problems with the law around the electronic execution of documents and deeds (including deeds of trust) which are inhibiting the use of electronic documents by commercial parties and, if appropriate, consumers, particularly with regard to:

(a) Electronic signatures;

(b) Witnessing;

(c) Delivery; and

(d) The consequences of the decision in *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin).

(2) Following consultation with relevant stakeholders, to consider whether and, if so, what legislative reform or other measures are needed to address these issues.

(3) This consideration is not expected to extend to the electronic execution of:

(a) Registered dispositions under the Land Registration Act 2002, which is being dealt with by HM Land Registry's project on electronic conveyancing and registration; and

(b) Wills, which are being dealt with by the Law Commission's project on "Making a Will".

1.7 This project extends to England and Wales only.

1.8 The terms of reference set out the broad scope of this consultation paper. The project covers documents which are required by law to be "signed" and documents which are required by law to be executed as deeds. We set out the requirements for a deed in detail in Chapter 4. In brief, to be validly executed a deed must be signed, witnessed and delivered.

1.9 The scope of this project covers a wide range of documents, including, but not limited to:

(1) deeds executed under section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") or sections 44 and 46 of the Companies Act 2006, including:

(a) a deed for a contract made without consideration;

(b) trust deeds;[5]

(c) powers of attorney under the Powers of Attorney Act 1971;[6]

(d) lasting powers of attorney under the Mental Capacity Act 2005;[7] and

(e) powers of appointment under the Law of Property Act 1925 ("LPA 1925")[8];

(2) contracts for sale or other disposition of an interest in land under section 2 of the LPMPA 1989; and

(3) consumer contracts which are required to be "signed", such as regulated credit agreements under the Consumer Credit Act 1974.

1.10 There are two significant types of document which are excluded from the scope of this project. The first of these is wills. A will is generally a document which expresses a person's wishes as to the disposition of their estate and which is intended to take effect upon their death.[9] Wills are distinct from deeds. Formalities relating to wills are dealt with under the Wills Act 1837 and are being addressed in the Law Commission's current project on Making a Will.[10]

1.11 The second type of document which is excluded is registered dispositions under the Land Registration Act 2002. Section 91 of the 2002 Act, which was recommended by the Law Commission,[11] sets out a regime for the registration of electronic documents which are deemed to be deeds.[12] We understand that HM Land Registry is currently working on this system.[13] Nothing in this project is intended to disrupt that work. Although our options for reform may affect a contract for the sale of land (set out above), they will not affect the registration of that interest at HM Land Registry.

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5 We discuss trust deeds and when a trust is required to be in writing at paras 6.23 to 6.24 below.

6 Powers of Attorney Act 1971, s 1.

7 Mental Capacity Act 2005, s 9.

8 LPA 1925, s 159.

9 L King, K Biggs and P Gausden, *A Practitioner's Guide to Wills* (2010) p 5. See also Making a Will (2017) Law Commission Consultation Paper No 231 para 1.7.

10 Making a Will (2017) Law Commission Consultation Paper No 231.

11 Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, paras 13.11 to 13.33.

12 Electronic conveyancing has not proceeded at the pace expected when the Land Registration Act 2002 was enacted. However, the land registration rules have recently been amended to bring dispositions of registered land within section 91, on the issuance of a notice by the registrar. HM Land Registry has recently published a notice to enable the electronic creation of mortgages as part of a pilot programme involving a single provider. See Land Registration Rules 2003, SI 2003 No 1417, rr 54A and 54D, as amended by the Land Registration (Amendment) Rules 2018, SI 2018 No 70; Notice 1 (under r 54C of the Land Registration Rules 2003): HM Land Registry Network Services – arrangements for the creation and registration of digital mortgages (6 April 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697065/Rule_54C_Notice_1_-_digital_mortgage__6.3.18_.pdf (last visited 14 August 2018).

13 The Law Commission's recent report on land registration also discusses electronic conveyancing. See Updating the Land Registration Act 2002 (2018) Law Com No 380, Ch 20.

IS THERE A PROBLEM?

1.12 Our initial discussions with stakeholders in the preparation of this consultation paper have informed our view of the issues around the electronic execution of documents. Although we have heard from some lawyers that they and their clients use electronic signatures confidently for all transactions, that is by no means the universal view.

1.13 Some stakeholders use electronic signatures only for low-value, low-risk, transactions. Others refuse to use them at all where there is a statutory requirement for a signature. We have heard from large organisations that they execute documents with wet ink, then shred the originals after scanning them for storage online.[14] This is inefficient – executing even some of these transactions electronically would save time, energy and resources.

1.14 Of course, there are non-legal factors which influence a party's decision to execute a document electronically or by "wet ink",[15] such as the security and reliability of electronic signatures, which we discuss in Chapter 2. However, we have been told expressly that the lack of clarity in the law is inhibiting some parties from using electronic signatures.

1.15 Deeds raise additional questions. Even where a party is confident that an electronic signature is a valid signature at law, there are questions as to how far the formalities for a deed (to be signed, witnessed and attested, and delivered) can be satisfied electronically. We consider these questions in Chapter 8 when we discuss potential options for reform.

The notes issued by The Law Society and The City of London Law Society

1.16 A joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees has published two notes which deal with the execution of documents and which were written with the advice of Mark Hapgood QC.

1.17 The first of these, published in 2009, deals with the execution of documents at virtual signings.[16] The second, published in 2016, considers the execution of documents using an electronic signature.[17]

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14 Where organisations adopt this method, they will need to satisfy themselves of the evidential value of the scanned copy.

15 In this consultation paper we use the terms "wet ink" and "handwritten" interchangeably, to refer to non-electronic signatures.

16 The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf (last visited 10 August 2018) ("2009 note").

17 The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on the execution of a document using an electronic signature" (July 2016), http://www.citysolicitors.org.uk/attachments/article/121/LSEW%20%20CLLS%20Joint%20Working%20Party%20-

1.18 We understand that these notes have alleviated some of the uncertainty around the execution of documents and we discuss them below.[18] In short, we agree with and endorse the conclusions outlined in these notes. However, we consider that there is a need for further clarification. The 2016 note was limited in scope to commercial contracts entered into in a business context, and did not apply to transactions involving consumers, or individuals outside of a business context.

CONSUMERS AND VULNERABLE PARTIES

1.19 This project covers the execution of a wide range of documents, from contracts for the sale of land between individuals, to trust deeds, to multi-million-pound transactions between commercial parties.

1.20 This project also covers the execution of documents by consumers and documents called lasting powers of attorney. A lasting power of attorney is used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs. It is therefore a very important document, which can have devastating consequences for an individual if it is executed under duress or fraudulently. Because of this, some stakeholders have raised concerns about including lasting powers of attorney within the scope of our project.

1.21 We have also been told that consumers are more likely to enter into agreements in haste or error if they use electronic signatures. Furthermore, consumers may be tricked into authorising payments to fraudsters using their electronic signatures. Some stakeholders also raised concerns about "digital poverty", particularly in relation to older or vulnerable individuals.[19]

1.22 These are significant concerns and we address them in Chapter 6. Our provisional conclusion is that it is not for the general law of execution of documents to address consumer protection matters – where necessary, specific legislation can and does provide additional protections for vulnerable parties. We invite stakeholders' views.

1.23 Stakeholders expressed concern about the possibility that if documents were required to be executed electronically, this might have a harmful effect on older or vulnerable individuals. For example, in 2017, 9% of adults in the United Kingdom had never used the internet, half of whom were adults aged 75 years or older. 22% of disabled adults

%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf (last visited 10 August 2018) ("2016 note").

[18] See chs 3, 7, 8.

[19] Digital poverty or "digital exclusion" refers to exclusion from the opportunities afforded by digital technologies, for example due to a lack of access to the internet. See HM Government, *Delivering Digital Inclusion: An Action Plan for Consultation* (2008), http://webarchive.nationalarchives.gov.uk/20120919213425/http://www.communities.gov.uk/documents/communities/pdf/1001077.pdf (last visited 10 August 2018). See also Age UK, *Digital Inclusion Evidence Review* (2013), https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/rb_sept13_age_uk_digital_inclusion_evidence_review.pdf (last visited 10 August 2018).

had never used the internet.[20] Mandating electronic execution could disproportionately and adversely affect a significant percentage of the population.

1.24 Our project is intended to enable or facilitate electronic execution. We do not propose that any form of electronic execution should be made mandatory. We emphasise this because of the effect that such a requirement might have on consumers, including more vulnerable individuals or those who may not have ready access to the necessary technology.

REGISTRATION OF DOCUMENTS

1.25 Sometimes, transactional documents must be registered with a particular body after execution, in order to give effect to the transaction. For example, it may be a term of a mortgage agreement over a ship that the mortgage must be registered on the UK Ship Register.[21] If the owner is a UK Company, it must also be registered at Companies House.[22]

1.26 The scope of this project is limited to questions of law around the execution of documents electronically. It does not extend to issues of registration. We consider, in this consultation paper, whether a document may be executed lawfully using an electronic signature. However, if a registry only accepts "wet ink" signatures, then the parties will not be able to execute documents electronically, regardless of the legal position. Therefore, we have contacted some of the relevant registries[23] to ascertain the position in relation to registration of documents.

STRUCTURE OF THIS CONSULTATION PAPER

1.27 The purpose of this consultation paper is to set out the law of the electronic execution of documents and deeds and to identify any areas that need clarification or reform. We also consider whether reform is required to facilitate the electronic execution of documents, taking into account the functions of formalities.

1.28 This consultation paper begins by considering the context in which we have approached this project. Chapter 2 introduces the concept of formal requirements ("the formalities") which parties must follow to give legal effect to particular documents and the purposes of these requirements. We also summarise the technology which may be used to satisfy formalities and consider some of the practical issues facing parties wishing to adopt this technology, particularly questions of evidential value, security and reliability.

1.29 In Chapter 3 and Chapter 4 we consider the current law governing the use of electronic signatures and the execution of deeds. In particular, we consider the legal

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[20] See Office for National Statistics, "Statistical bulletin: Internet users in the UK: 2017", https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2017 (last visited 10 August 2018).

[21] Merchant Shipping Act 1995, sch 1, para 7; Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993 No 3138, reg 59.

[22] Companies Act 2006, s 895A.

[23] In particular, Companies House, the UK Ship Register, the Small Ship Register and the Civil Aviation Authority.

developments regarding electronic signatures since the Law Commission's 2001 Advice. We provisionally conclude that that advice remains correct.

1.30 The international aspect of many transactions means that cross-border issues are particularly pertinent to this project. We analyse the law in six other jurisdictions and set out the common themes in Chapter 5.

1.31 Chapter 6 sets out the case for reform and the challenges of proposing legislation for this project, taking into consideration questions of technology, cross-border enforcement and the position of vulnerable parties. Drawing on the analysis in previous chapters, in Chapters 7 and 8 we outline our provisional proposals for reform for the electronic execution of documents. We ask whether legislative reform is required to clarify the position in relation to electronic signatures. We also propose various options to facilitate the electronic execution of deeds, particularly in relation to the requirement that a deed must be witnessed and attested. We ask whether our proposed options for reform are appropriate and workable for parties.

PROVISIONAL PROPOSALS FOR REFORM

1.32 In the following chapters we make provisional proposals in relation to electronic signatures and the electronic execution of deeds. Following our analysis of the law in Chapter 3, our provisional conclusion is that an electronic signature is capable in general of meeting a statutory requirement for a signature. We do not consider that legislative reform is necessary.[24]

1.33 We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues (such as the security of electronic signatures), which we have been told by stakeholders are inhibiting the use of electronic signatures.[25]

1.34 In relation to deeds, it appears from our discussions with stakeholders that the main difficulty is the requirement that a deed must be signed in the presence of a witness who attests the signature. Therefore, we provisionally propose that it should be possible to witness an electronic signature by a video link and then attest the document. We also outline some other potential options for reform which would require more significant changes to legislation as to the requirements for a validly executed deed.[26]

1.35 It is important to make clear that the proposals contained in this consultation paper are only provisional. At this stage, we are not making recommendations for law reform. It is during this open public consultation that we are inviting views on our provisional proposals. These views will be taken into account when forming our final recommendations, which will be published in a subsequent report.

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[24] See para 7.20 below.

[25] See para 7.28 below.

[26] See paras 8.16 to 8.60 below.

ACKNOWLEDGEMENTS AND THANKS

1.36 In the course of our work to date we have met or corresponded with the individuals and organisations listed in Appendix 1. We are grateful to them all for allowing us to draw on their experience and expertise.

1.37 We are also grateful to the Home Buying and Selling team at the Ministry of Housing, Community and Local Government, which organised two roundtable meetings with their Technology Working Group to discuss the use of electronic signatures for the execution of documents in conveyancing.

1.38 This project concerns the intersection between the law and technology. As such, we have drawn on an Advisory Panel of experts. The panel has commented on draft proposals and shared their expertise and experience with us. Their assistance and feedback has been invaluable. We extend our thanks to Nicholas Bohm (retired solicitor, General Counsel to the Foundation for Information Policy Research), Lorna Brazell (Consultant, Osborne Clarke LLP), Russell Hewitson (Associate Professor of Law, Northumbria University and Chair of the Conveyancing and Land Law Committee, Law Society of England and Wales), James Marquette (Senior Policy Adviser, Finance & Leasing Association), Stephen Mason (Barrister), Chris Reed (Professor of Electronic Commerce Law, Centre for Commercial Law Studies, Queen Mary University of London), Graham Smith (Partner, Bird & Bird LLP) and Elizabeth Wall (Head of Know-How for the Global Corporate Practice, Allen & Overy LLP and Chair of the Company Law Committee, Law Society of England and Wales).

THE TEAM WORKING ON THE PROJECT

1.39 The following members of the Commercial and Common Law team have contributed to this consultation paper: Laura Burgoyne (team manager); Siobhan McKeering (team lawyer); Daniel Zwi (research assistant); and Erica Li (research assistant).

Chapter 2: Formalities and technology

2.1 This chapter outlines the context in which we have approached this consultation paper. First, we introduce the concept of formal requirements which parties must follow to give legal effect to certain legal documents ("formalities"). Examples of such formalities include a requirement for writing or for a signature. Secondly, we summarise the technology available to satisfy such formalities in an electronic context. Finally, we consider some of the practical issues facing parties wishing to adopt this technology, particularly questions of evidential value, security and reliability.

FORMALITIES

The default position

2.2 A formality is a procedure which a party must follow to give legal effect to a transaction, whether that transaction is an agreement between parties or a unilateral document.[1] However, not all agreements or documents are subject to formality requirements. In fact, the default position in English law is one of flexibility: many contracts can be made informally.[2] A contract usually need not be in writing. It may be created orally or by conduct.[3] This consultation paper deals with the few instances in which a transaction must comply with statutory formality requirements in order to be valid.

Formalities and their purpose

2.3 The formalities required vary depending on the transaction. By way of example, the table below sets out a non-exhaustive list of transactions, and the formalities required for each.

Type of transaction	Formality requirement
Guarantee agreement	Writing, or evidenced by writing, and signed.[4]
Transfers of registered securities under the Stock Transfer Act 1963	Made "under hand"[5] (that is, in writing otherwise than by deed) in the form set out in Schedule 1 to the Stock Transfer Act 1963.

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1 J Cartwright, *Formation and Variation of Contract* (2014) para 4-01.

2 J Cartwright, *Formation and Variation of Contract* (2014) para 4-15; *Chitty on Contracts* (32nd ed 2015) Vol 1 para 5-001; *Dicey, Morris & Collins on the Conflict of Laws* (15th ed 2017) para 32-128.

3 *Goode on Commercial Law* (5th ed 2016) para 3.29. See also *Halsbury's Laws of England* (2012) vol 22 *Contract* para 220.

4 Statute of Frauds 1677, s 4.

5 We discuss the meaning of the phrase "under hand" in para 3.81 below.

Contract for the sale of land	In writing and signed, incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each document.[6]
Regulated credit agreement under the Consumer Credit Act 1974	In writing in a prescribed form, including information such as the remedies available under the Act to the consumer.[7]
Contract without consideration	Executed as a deed.[8]
Lasting power of attorney	Executed as a deed, in a prescribed form. Includes prescribed information as to the purpose and effect of the instrument. Also includes a certificate by a third party who confirms that the grantor of the power understands the purpose and scope of the document and that no fraud or undue pressure is being used to induce them.[9]

2.4 In our 1985 report *Transfer of Land: Formalities for Deeds and Escrows*,[10] the Law Commission identified three main aims of the formalities for making a deed:

(1) Evidential: providing evidence that the maker entered into the transaction, and evidence of its terms.

(2) Cautionary: trying to ensure that the maker does not enter into the transaction without realising what they are doing. This may also be complemented by a protective function, protecting weaker parties to a transaction (for example,

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6 Law of Property (Miscellaneous Provisions) Act 1989, s 2.

7 Consumer Credit Act 1974, ss 60 to 61 and Consumer Credit (Agreements) Regulations 2010, SI 2010 No 1014, reg 4(3)(a). In relation to consumers and recovery of debts, see the Limitation Act 1980 ss 29(5) and 30; R Rosenberg, "Extending the Limitation Period in a Digital Age" (2018) 48 *Quarterly Account* 16. In contrast, see the Consumer Credit Act 1974, s 88 and the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983 No 1561, reg 2(4A) which provides that notices given to consumers under the regulations must be provided "in paper form".

8 J Cartwright, *Formation and Variation of Contract* (2014) para 4-17. See the discussion in *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 259 and The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253, para 2.5. See from para 4.14 below on the execution requirements for deeds.

9 Mental Capacity Act 2005, s 9 and sch 1; Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253.

10 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, para 3.2. Lon Fuller refers to the "channelling" function of formalities, which is similar though not identical to the "labelling" function. See L Fuller, "Consideration and form" (1941) 41 *Columbia Law Review* 799, 801.

tenants, employees, debtors and sureties under consumer credit agreements, and consumers).[11]

(3) Labelling: making it apparent to third parties what kind of a document it is and what its effect is to be.

2.5 These aims are well established in the literature in relation to deeds and other transactions.[12]

2.6 In many cases, the purpose which a particular formality will serve is self-evident. For example, section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 requires that a deed must "make clear on its face that it is intended to be a deed". This fulfils the labelling and cautionary purposes.

2.7 Another example is section 4 of the Statute of Frauds 1677, which requires a guarantee agreement to be in writing, or evidenced by writing, and signed. The rules of civil procedure at the time barred parties from giving evidence in their own cause. Without a written agreement, there was scant evidence on which to base findings.[13] The formal requirement of writing served an evidential purpose by avoiding the need to rely on a third party's oral testimony as to the existence or terms of a contract.[14]

2.8 There is also interaction between different formalities. For example, a transaction may be required by statute to be "in writing" and "signed". If the "writing" requirement is not satisfied, then that is likely to affect whether the requirement for a signature has been satisfied. We discuss the contents of these requirements below in Chapter 3.

A NOTE ON TECHNOLOGY

2.9 This consultation paper is "technology neutral", by which we mean that we do not focus on or favour a particular type of technology. Accordingly, we use the term "electronic signatures" broadly, to cover everything from a scanned manuscript signature that is added to documents to digital signatures and Public Key Infrastructure. All are intended to link an identifiable person to information held in electronic form. The various technological approaches have differing degrees of trustworthiness of the information and the identity of the person signing the information.

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[11] *Chitty on Contracts* (32nd ed 2015) vol 1 para 5-001. For example: Landlord and Tenant Act 1985, s 4; Consumer Credit Act 1974, ss 60 to 61, 105; The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992 No 3288, reg 9; Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010, SI 2010 No 2960, reg 15. See also J Cartwright, *Formation and Variation of Contract* (2014) para 4-03 and M Sneddon, "Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact of the Statute Book" (1998) 21(2) *University of New South Wales Law Journal* 334.

[12] L Fuller, "Consideration and form" (1941) 41 *Columbia Law Review* 799 at 801 and S Mason *Electronic Signatures in Law* (4th ed 2016) pp 8 to 11. See also UNCITRAL, Model Law on Electronic Commerce with Guide to Enactment 1996, para 48, which sets out a summary of functions traditionally performed by "writing".

[13] J Cartwright, *Formation and Variation of Contract* (2014) para 4-05.

[14] *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN GL EN SpA* [2003] UKHL 17, [2003] 2 All ER 615 at [19].

2.10 Below we provide a brief summary of the main types of electronic signatures which we refer to in later chapters.[15] For further information on each of the technologies below, please see the references in the footnotes. Please note that we do not intend this to be a comprehensive list of all the technologies that are, or may become, available.

Scanned manuscript signatures

2.11 A signatory may use a pen to sign a piece of paper that is then scanned to create an electronic representation of the wet ink signature. This image may then be saved and incorporated into legal documents, including contracts and emails.[16]

Manuscript signing on screen

2.12 A signatory may use a stylus or fingernail to inscribe an image approximating to their usual manuscript signature. This is commonly used in courier deliveries. It may also produce a signature that can be saved and used in the same way as a scanned wet ink signature for signing documents, including on signing platforms. This kind of signature may be with or without capture of biodynamic characteristics (see below).

Clicking on "I accept"

2.13 A signatory may click on an "I accept" or "I agree" button on a website as a way of signing an agreement.[17] The Law Commission's 2001 Advice suggested that the click could reasonably be regarded as the technological equivalent of a manuscript "X" signature.[18]

Passwords/PINs

2.14 A signatory may sign a document by using a password and/or PIN. For example, a signatory may use a PIN to authorise a credit card transaction rather than signing a paper receipt.[19] Of course, although this may be a way of signing a document, not every use of a password or PIN constitutes a signature. As we discuss in Chapter 3 below, this question depends on whether there was an intention for the password or PIN to function as a signature and authenticate a document.

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[15] We also considered different types of electronic signatures, including typed names, scanned manuscript signatures, passwords, PINs, biometrics and digital signatures in our recent consultation: Making a Will (2017) Law Commission Consultation Paper No 231 paras 6.46 to 6.87.

[16] L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-009; S Mason, *Electronic signatures in law* (4th ed 2016) ch 12. See also Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), para 3.32, https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/ (last visited 10 August 2018) ("2001 Advice").

[17] See eg our discussion of *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 in Chapter 3.

[18] 2001 Advice, para 3.37.

[19] L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-007; S Mason, *Electronic signatures in law* (4th ed 2016) ch 9.

Typing a name

2.15 A signatory may type their name, initials or other identifier at the bottom of an electronic document (such as an email)[20] as a way of signing a document.[21] The Law Commission's 2001 Advice also considered that a system which is set up to add the name (or initials) automatically could provide an electronic signature.[22]

Email address

2.16 An email address which appears in the header of an email may be an electronic signature depending on whether the evidence demonstrates an intention that it constitutes a signature of the document.[23] We discuss this question in Chapter 3, below.

Associating a biometric with a signature

2.17 Biometrics may be used to verify the signatory's identity through reference to a physical characteristic, such as fingerprints.[24] Where that information is "attached to or logically associated with" [25] an electronic document, that process could amount to signing. We have not heard that these types of signatures are being used by stakeholders to sign complex or high-value legal documents as a matter of course. It appears though that a biodynamic version of a handwritten signature is increasingly being used. Here, a signatory draws their manuscript signature on a screen or special pad (see "manuscript signing on a screen", above). The unique way that the person signs is recorded as a series of measurements, together with a digital reproduction of the signature. [26]

Digital signatures

The term "digital signature"

2.18 "Digital signature" is a term that can be used in different ways.[27] For the purposes of this consultation paper, a digital signature is a type of electronic signature produced by using asymmetric or public key cryptography.

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20 See eg *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953, discussed in Chapter 3.

21 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-006; S Mason, *Electronic signatures in law* (4th ed 2016) ch 10.

22 2001 Advice, para 3.33.

23 See our discussion of *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 and *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [2012] CILL 3154 from para 3.59 below.

24 See L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-013 onwards for a detailed discussion of biometrics.

25 See the definition of "electronic signature" in 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, art 3(10) ("eIDAS").

26 S Mason, *Electronic signatures in law* (4th ed 2016) ch 13.

27 For example, we use it to refer to an electronic signature using public key cryptography. The term "digital signature" may also be used to mean a digital signature which includes the use of a certificate (discussed below under Public Key Infrastructure).

2.19 Under this system, a person has two keys. Each key is a very large number.[28] It is usually represented by long string of characters.[29] The first key is available to everyone ("the public key"). The owner of the public key may provide it to others or publish it. The second key must be kept secret ("the private key").[30]

2.20 Information can be associated with the private key to create a mathematical representation that is unique to that information ("the information digest"). This may be used to produce a digital signature.

> **Example**
>
> Alice creates data which is a unique fingerprint of the information or document ("the information digest"). This fingerprint, encrypted with Alice's private key, constitutes the digital signature.[31] Using the same function Alice used to create the information digest, Bob can recalculate it and compare the two versions. If these two versions of the data match (one created by Alice, the other created by Bob), then Bob can be confident that the information was signed using Alice's private key, and that the information has not been altered since it was signed.[32]

2.21 Our references to Alice and Bob perhaps give the impression that it is the users who always take the above actions. In practice, Alice and Bob are likely to have software which carries out these functions (although they will initiate them).

Digital signatures using Public Key Infrastructure

2.22 Public Key Infrastructure ("PKI") may become relevant when Alice and Bob do not have a pre-existing relationship and Bob wishes to verify that the public key used by Alice does in fact belong to her. In those cases, a person's public key may be the subject of a digitally-signed certificate provided by a trusted third party ("a certification authority"). The purpose of such a certificate is to provide a link between the public key, the person or entity to whom the key was issued and the identity of the person or entity to whom it belongs.[33]

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28 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-048.

29 This system of letters (A to F) and numbers is known as the "hexadecimal" system. For a person to use a public or private key, it is not necessary for them manually to input the number. Rather, the number which comprises the key may be stored on an electronic device.

30 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 3-044 onwards; S Mason, *Electronic signatures in law* (4th ed 2016) ch 14.

31 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) paras 3-050 to 3-051.

32 The digital signature technology may be used for purposes that are not signing the document. It may be used for purely evidential purposes, to show that the content of the document has not changed, without an intention to authenticate the document. It may also be used by entities other than natural or legal persons, such as, for example, a smart phone.

33 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 4-007; S Mason, *Electronic signatures in law* (4th ed 2016) para 14.16. The person to whom a key pair (public and private keys)

2.23 Certification authorities may hold directories of the certificates they have issued, to enable third parties to confirm that a certificate was in fact issued. They may also hold a list of certificates which have been revoked or suspended.[34] The trustworthiness of a certificate depends on the identification assurance level undertaken, that is, how rigorously did the certification authority check that the person presenting themselves as Alice was not an impostor?

Signatures under eIDAS

2.24 We turn now to consider electronic signatures under eIDAS. This is an EU regulation which applies directly in all member states without the need for national implementation.[35] Therefore, eIDAS is currently part of the law of the UK. On the date of the UK's withdrawal from the EU, eIDAS will be incorporated into UK domestic law.[36]

2.25 We discuss eIDAS in detail in Chapter 3. For current purposes, we consider only the three categories of electronic signature which are set out in eIDAS.

Electronic signatures

2.26 The first is an "electronic signature", which is defined broadly, as meaning:[37]

> 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.

2.27 Stephen Mason, the author of *Electronic signatures in law*, says that this broad definition is "in keeping with the wide nature of what is capable of constituting a signature in digital terms".[38]

2.28 Article 3(9) of eIDAS defines "signatory" as "a natural person who creates an electronic signature".[39]

Advanced electronic signatures

2.29 The second category of electronic signature in eIDAS is an "advanced electronic signature". This is an electronic signature which meets certain requirements:[40]

(a) it is uniquely linked to the signatory;

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is issued will not always be the key's owner. For example, Alice may be issued with a key pair to sign documents on behalf of a company. The keys are issued to Alice, but belong to the company. Another example is where the person/entity to whom the keys are issued is someone claiming the identity of the person/entity to which the keys are believed to have been issued. For example, a key is issued to Alice in Bob's name.

34 L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 4-016.

35 We discuss eIDAS in more detail from para 3.32 below.

36 European Union (Withdrawal) Act 2018, s 3(1).

37 eIDAS, art 3(10).

38 S Mason, *Electronic signatures in law* (4th ed 2016) para 4.12.

39 eIDAS uses the term "electronic seal" where a legal person, such as a company, signs a document: eIDAS, art 3(24).

40 eIDAS, art 26.

(b) it is capable of identifying the signatory;

(c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and

(d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

2.30 These requirements, particularly the requirement that any subsequent change in the data is detectable, indicate that, at least at present, an advanced electronic signature will be a digital signature, as described above.[41]

2.31 Commentators such as Lorna Brazell, the author of *Electronic Signatures and Identities Law & Regulation*,[42] and Stephen Mason have pointed out that a digital signature can only be "uniquely" linked to a signatory's private key, not to the signatory. That is, somebody else could potentially have access to, and use, another's private key.[43] There are also questions as to what "sole control" means and whether it can be satisfied by an electronic signature in the context of the reliability and security issues raised below.[44]

Qualified electronic signature

2.32 The third type of electronic signature under eIDAS, and the most complex, is a qualified electronic signature. A qualified electronic signature is an advanced electronic signature that is:

(1) created by a qualified electronic signature creation device; and

(2) based on a qualified certificate for electronic signatures.[45]

2.33 In summary, it is an advanced electronic signature with additional requirements and criteria. For example, a "qualified electronic signature creation device" must meet the requirements of Annex II to eIDAS.[46] Annex II includes requirements as to confidentiality, security and reliability.

2.34 A "qualified certificate for electronic signature" means a certificate which links the signature to a person (as discussed in the context of PKI, above), which is issued by a

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[41] Developments in technology may mean that signatures other than digital signatures may fulfil these requirements in the future. We have been told that there is already capability for the use of advanced electronic signatures in the market. For example, a card reader and credit/debit card issued by a bank would meet the requirements for an advanced electronic signature under eIDAS for transactions with that bank.

[42] L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008). The third edition is forthcoming.

[43] L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 5-067. S Mason, *Electronic signatures in law* (4th ed 2016) para 4.17.

[44] S Mason, *Electronic signatures in law* (4th ed 2016) paras 4.22 to 4.32. We refer to security and reliability issues from para 2.47 below.

[45] eIDAS, art 3(12).

[46] eIDAS, art 29.

"qualified trust service provider". It is likely that it will usually be a commercial body providing this service. It must also meet the requirements set out in Annex I to eIDAS.[47]

2.35 Our initial discussions with stakeholders have confirmed that qualified electronic signatures are not commonly used in England and Wales. This is confirmed by the 2016 note published by the joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees.[48] Stakeholders have suggested that businesses and lawyers do not want to rely on a third-party certificate provider, with the associated costs. Nor do they wish to incur the cost of the technology, when, as previously discussed, the majority of transactions may occur without the need for any formalities at all. We have also been told that the complicated process to become a qualified trust service provider is a barrier to the use of these signatures.[49]

2.36 We have described above different types of electronic signature, ranging from simply typing one's name at the end of an email to the much more complex qualified electronic signatures under eIDAS. Regardless of the type of signature used, there are practical questions to consider about the evidence generated by a signature, and the security and reliability of that technology. We turn now to consider these questions.

OTHER ISSUES TO CONSIDER WHEN USING ELECTRONIC SIGNATURES

2.37 This consultation paper focuses on whether an electronic signature is capable of satisfying a statutory requirement for a signature, and how a deed may be executed electronically.

2.38 However, in our initial discussions with stakeholders, we have heard that it is not only legal uncertainty which is impeding the use of electronic signatures for certain types of transactions. Practical issues, such as the security of electronic signatures and the extent to which it may be compromised, are also important.

2.39 These issues arise in the context of three fundamental questions that should be considered for any document, whether signed electronically or in wet ink. The first question is, how can one be confident that Alice signed the document, and not Bob, or another person, pretending to be Alice?[50] The second question is, does Alice have the

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47 eIDAS, art 3(15).

48 The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on the execution of a document using an electronic signature" (July 2016), http://www.citysolicitors.org.uk/attachments/article/121/LSEW%20%20CLLS%20Joint%20Working%20Party%20-%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf (last visited 10 August 2018) ("2016 note").

49 For information on this process, see the Information Commissioner's Office, "Achieving 'qualified status' and ceasing to provide qualified trust services under eIDAS" (March 2017), https://ico.org.uk/media/for-organisations/documents/2013751/eidas-regulation-information-for-trust-service-providers.pdf (last visited 10 August 2018).

50 The question of identity assurance is broad and technical. It is outside the scope of this project, which has a narrow focus on legal validity.

requisite authority to sign the document, either for herself or for her principal, usually a body corporate? The third question is, what is the document that is being signed?[51]

2.40 Users of electronic signatures should satisfy themselves that the system they have adopted will have sufficient evidential weight to answer these questions for the purposes of their transaction. The notion of complete convenience, where an entire transaction is executed using electronic means to establish trust between the parties and an audit trail of evidence, is an attractive one. However, as discussed below, it may not be realistic. Parties should consider whether there may be slightly less convenient ways of establishing that trust and evidence which provide more certainty. For example, a signatory could telephone their counterpart, confirming their identity and what they are signing.

Questions of evidence

2.41 It is important to distinguish between the validity of an electronic signature, on the one hand, and its evidential weight, on the other.[52]

2.42 An electronic signature may satisfy a statutory requirement that a document must be "signed". However, parties will also need to consider the evidential weight which may be given to such a signature if there is a dispute about whether, for example, it was Alice who in fact signed the document, or about the content of the document that was signed. This may raise questions as to whether Alice caused the electronic signature to be affixed to the document, whether her intention was to sign the document, and whether Alice has authority to affix the signature.[53]

2.43 Should a dispute arise, one or more of the parties will seek to prove that Alice applied her electronic signature to a document and that the document alleged to have been signed is what was signed. We note that this does not have to be proven absolutely. In general, the standard of proof for civil matters is "on the balance of probabilities": if there is evidence to say that something is "more probable than not", then the burden of proof is discharged.[54]

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[51] It is a general principle that a person is bound by their signature and is estopped from denying their consent to be bound. However, if a party has been misled into executing a deed or document which is fundamentally different from that which he or she intended to execute, that party may plead "non est factum" ("it is not his deed"). If such a defence is made out, the deed or document is void. For further information on "non est factum" see *Halsbury's Laws of England* (2012) vol 32 *Deeds and other instruments* para 257; (2012) vol 22 *Contract* para 285; *Chitty on Contracts* (32nd ed 2015) vol 1 paras 3-049 to 3-056; *Emmet & Farrand on Title* (2018, loose-leaf) vol 1 para 3.008; *Osborn's Concise Law Dictionary* (12th ed 2013).

[52] G Smith, "Can I use an electronic signature?" *Digital Business Law* (12 May 2017), http://digitalbusiness.law/2017/05/can-i-use-an-electronic-signature/ (last visited 10 August 2018). Section 7 of the Electronic Communications Act 2000 provides that an electronic signature shall be admissible in evidence. However, it does not prescribe the evidential weight to be given to an electronic signature. We discuss this provision from para 3.41 below.

[53] S Mason, "Documents signed or executed with electronic signatures in English law" [2018] 34(4) *Computer Law & Security Review* 933. For example, where an email system automatically adds a person's name or initials to the end of an email, that person may claim that they did not intend to be bound by their "signature" or that another person had access to their email account.

[54] H Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 6-56. The standard of proof in criminal cases is "beyond reasonable doubt". However, even this does not mean that an allegation must be proven absolutely.

2.44 Not all evidence which goes to show that Alice applied her electronic signature to a document will be of a technical nature. There may also have been correspondence or meetings about the transaction which connects the alleged signatory to the signature.[55]

2.45 However, technical expert evidence may be able to help answer the questions set out above, particularly in relation to who signed the document and what was the document that was signed. Such evidence may show:

(1) that the electronic document was accessed via a certain email account or computer;

(2) the location from which it was accessed;

(3) that the document was accessed through the use of a password and/or PIN or encryption key;

(4) that the document was accessed after an authentication process which involved answers to a series of questions which were personal to the signatory;

(5) the time at which the signature was applied;

(6) whether the document was amended after signing, and whether there are differences between the signed document as held by different parties; and

(7) that the document had not been amended between when it was uploaded to a signing platform[56] and when the final signatory executed it.

2.46 Of course, handwritten signatures require their own risk assessment. Where a dispute arises over the authenticity of a handwritten signature, the signature itself may provide significant forensic evidence, as we discuss in our consultation paper on Making a Will.[57] Such evidence may show whether the signature is original and whether it has the features of natural writing, in order to establish whether a signature was made by a particular person. However, handwritten signatures are themselves not impervious to risk. A signature may be forged, particularly where it is simply the signatory's initials or

A jury must be "satisfied" or "sure" of guilt. This does not mean "certain": H Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 6-51.

[55] N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1 at 2. This is also the case for wet ink signatures. Any witness to a signature may also provide evidence (for example, in the case of a deed): see also L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 8-012.

[56] A signing platform is software providing an interface through which people can both create and upload documents to be signed electronically, and affix electronic signatures to those documents. Such platforms may also provide an "audit trail" of a particular electronic document, which includes data such as the time at which it was signed and the IP address through which it was accessed. We discuss signing platforms in relation to witnessing in Chapter 8.

[57] Making a Will (2017) Law Commission Consultation Paper No 231 paras 6.53 to 6.56. See also N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1 at 1.

a manuscript "X".[58] It is also possible that a wet ink signature could be applied to an unintended document or that the signature page could be removed and reattached to another document.

Questions of security and reliability

2.47 The question of whether an electronic signature is secure or reliable is a different matter from whether that signature is valid in law.[59] Nevertheless, whether an electronic signature is secure and reliable is clearly a significant question for the parties.[60]

2.48 In the context of PKI, it has been said that "Security is a chain; it's only as strong as the weakest link".[61] This statement applies equally to electronic signature technology. Certain types of electronic signature will obviously be less secure than others. For example, a typed name at the end of a document is extremely simple to forge.[62] Likewise, anyone with access to a scanned manuscript signature may affix it to a document. However, more complex and secure types of technology may also be at risk of being compromised.[63]

2.49 These risks may arise from various sources. Software is written by humans and, therefore, is unlikely to be free from errors.[64] Users of this technology may not understand the underlying system and may not be able to assess the reliability of the system. This may lead them to presume that the system is reliable[65] and not to question whether the system may have been compromised.

2.50 Similarly, where a system, such as a private key, is protected by a PIN or password, it will only be as secure as that password.[66] Thought should also be given to where keys

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[58] 2001 Advice, para 3.35. See also G Smith, "Legislating for electronic transactions" (2002) *Computer and Telecommunications Law Review* 58, 59 when discussing the reliability of paper as a medium.

[59] As the 2001 Advice noted, "reliability is not essential to the validity of a signature": 2001 Advice, para 3.35.

[60] S Mason, "Documents signed or executed with electronic signatures in English law" [2018] 34(4) *Computer Law & Security Review* 933.

[61] C Ellison and B Schneier, "Ten Risks of PKI: What You're not Being Told about Public Key Infrastructure" (2000) vol XVI(1) *Computer Security Journal* 1.

[62] See for example N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1 at 4.

[63] Article 13 of eIDAS sets out that "trust service providers", such as providers of electronic signatures and certification authorities, shall be liable for damage caused by a failure to comply with the Regulation. Trust service providers may limit their liability where they inform customers in advance: art 13(2). Questions of liability fall outside the scope of this project. For further information on liability, see L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) paras 5-094 and 5-095 and S Mason, *Electronic signatures in law* (4th ed 2016) ch 15.

[64] S Mason and T S Reiniger, "'Trust' Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?" (2015) 21(5) *Computer and Telecommunications Law Review* 135, 138.

[65] S Mason and T S Reiniger, "'Trust' Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?" (2015) 21(5) *Computer and Telecommunications Law Review* 135, 139.

[66] N Bohm and S Mason, "Identity and its verification" (2010) 26 *Computer Law & Security Review* 43, 50.

are kept.[67] Breaches may involve unauthorised transactions, actions under duress and impersonation of parties or certificate authorities.[68] They may even involve inducing a signatory to approve one document for signature, only to replace it with another document at the time the signature is applied.[69]

Conclusion

2.51 This chapter has provided an introduction to the main formalities involved in the execution of documents, and the main technologies currently in the market which may deliver those formalities. This provides a background for this consultation paper, which is technology neutral and which concentrates instead on the legal requirements that have to be met. In Chapter 6 we discuss the challenges and risks of legislating for technology in detail.

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67 For example, keys may be kept in a "key store" (a database) on an individual's computer, phone, tablet, or on the cloud.

68 C Ellison and B Schneier, "Ten Risks of PKI: What You're not Being Told about Public Key Infrastructure" (2000) vol XVI(1) *Computer Security Journal* 1.

69 C Ellison and B Schneier, "Ten Risks of PKI: What You're not Being Told about Public Key Infrastructure" (2000) vol XVI(1) *Computer Security Journal* 1, 5; N Bohm, "Watch what you sign!" (2006) 3 *Digital Evidence and Electronic Signature Law Review* 45.

Chapter 3: Electronic signatures – the current law

3.1 In this chapter we consider the current law around electronic signatures, taking account of the Law Commission's 2001 Advice to Government ("the 2001 Advice").[1] In that advice the Law Commission concluded that statutory formality requirements, including requirements for signatures, could be satisfied electronically in most contexts. We outline the basis of that conclusion below and consider whether subsequent legal developments, such as case law and EU and domestic legislation, lead to a different conclusion today.

3.2 We conclude that the analysis contained in the 2001 Advice remains correct. Indeed, we believe that its conclusions have been strengthened in the period since its publication almost 20 years ago. eIDAS,[2] which came into force in 2016, governs the admissibility and legal effect of electronic signatures. Domestic legislation has facilitated the use of electronic signatures in specific contexts. And on a number of occasions since 2001, courts have held that electronic methods of signing satisfy statutory requirements that documents must be signed.

3.3 As we discussed in Chapter 1, the execution of wills is excluded from the scope of this project. Formalities relating to wills are dealt with under the Wills Act 1837 and are being addressed in the Law Commission's current project on Making a Will.[3]

THE LAW COMMISSION'S 2001 ADVICE

3.4 The 2001 Advice considered the formalities which applied in relation to commercial agreements in England and Wales and asked whether various types of electronic communication could satisfy these requirements.[4] Its purpose was to review the law "to ensure that it is up to date and that it reflects both existing and anticipated developments in trading practices".[5] It focused on the international sale and carriage of goods and the associated banking and insurance transactions.[6]

3.5 Unlike the 2001 Advice, this project has a broad scope. As set out in Chapter 1, it covers all transactions which have a statutory requirement for a signature, including unilateral

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1 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/ (last visited 10 August 2018) ("2001 Advice").

2 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 ("eIDAS").

3 Making a Will (2017) Law Commission Consultation Paper No 231.

4 2001 Advice, para 1.5.

5 2001 Advice, para 1.3.

6 2001 Advice, para 1.8.

deeds and contracts for the sale of land.[7] We consider the 2001 Advice a useful starting point. As we explain below, subsequent developments have been broader in application than commercial transactions. However, the same principles as set out in the 2001 Advice in our view apply more generally.[8]

3.6 Below, we summarise the Law Commission's conclusions on the meaning of "in writing", "document" and "signature" or "signed" in the electronic context, and discuss developments of these concepts since those conclusions.

"IN WRITING"

The 2001 Advice

3.7 Schedule 1 to the Interpretation Act 1978 defines "writing" as follows:

> "Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.

3.8 The 2001 Advice interpreted that definition as including the natural meaning of "writing" as well as the specific forms referred to in the provision. The natural meaning will include any updating of its construction, for example, to reflect technological developments.[9]

3.9 However, the Law Commission noted that "words in a visible form" limits the definition.[10] It noted that electronic communications have a dual form, comprising:

(1) their display on a screen; and

(2) their transmitted or stored form as files of binary (digital) information.[11]

3.10 The 2001 Advice argued that the second of these two forms alone was insufficient to satisfy the requirement that the process represent or reproduce "words in a visible form".[12] However, where the writing was also represented or displayed on a screen, it would satisfy the statutory definition.[13]

3.11 Accordingly, the Law Commission concluded that emails and website trading would generally satisfy the definition in the Interpretation Act 1978 of writing.[14] Electronic data

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7 See para 1.9 above. As we said in Chapter 1, wills and registered dispositions are excluded from the scope of this project: see paras 1.10 and 1.11 above.

8 We consider whether it is appropriate to include consumers and vulnerable individuals within the scope of our review in Chapter 6.

9 2001 Advice, para 3.7. See *Bennion on Statutory Interpretation* (7th ed 2017) paras 14.1 and 14.2.

10 2001 Advice, para 3.8.

11 2001 Advice, para 3.8.

12 2001 Advice, para 3.9.

13 2001 Advice, paras 3.14, 3.17.

14 2001 Advice, para 3.23.

interchange ("EDI") would not, however, satisfy this definition.[15] EDI messages are exchanged between computers – they are not intended to be read by any person. The EDI message is not in a form (or intended to be in a form) which can be read.[16]

Developments after 2001

3.12 From our preliminary discussions with stakeholders, there appears to be broad support for, and continued reference to, the Law Commission's approach and conclusions in the 2001 Advice.[17] Recent cases have confirmed that electronic documents will, in general, satisfy a statutory requirement for writing.[18]

3.13 For example, in *Golden Ocean Group v Salgaocar Mining Industries PVT Ltd*[19] an exchange of emails was held to satisfy the rule in section 4 of the Statute of Frauds 1677 that contracts of guarantee must be in writing. The sequence of emails was taken to comprise one contract which (when viewed cumulatively) incorporated all the bargain's terms.[20] Similarly, in *J Pereira Fernandes SA v Mehta*,[21] the court held that an email is capable of being a written note or memorandum for the purposes of that section. This approach also applies to contractual requirements for writing.[22]

3.14 We therefore agree with the 2001 Advice that electronic documents viewed on a screen will satisfy the requirement for "writing".

"DOCUMENT"

The 2001 Advice

3.15 The Law Commission dealt briefly with the meaning of "document" in its 2001 Advice, noting:[23]

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15 EDI refers to the exchange of digital information designed to be acted upon by the software of the recipient system without the need for human intervention: for example, stock re-ordering systems operated by large retailers and their suppliers. This definition, as well as those of other terms used in this consultation paper, is contained in the Glossary.

16 2001 Advice, para 3.19. This reasoning has implications for smart contracts if used for contracts which are required to be "in writing". We think that this would only affect cases where the smart contract is the legal contract rather than the means by which it is performed, and where there is a statutory requirement that the contract must be in writing.

17 See eg J Cartwright, *Formation and Variation of Contract* (2014) para 4-06, where Professor Cartwright refers to the purposive approach adopted by the Law Commission as "entirely justifiable".

18 G Smith, "Can I use an electronic signature?" *Digital Business Law* (12 May 2017), http://digitalbusiness.law/2017/05/can-i-use-an-electronic-signature/ (last visited 10 August 2018).

19 [2012] EWCA Civ 265, [2012] 1 WLR 3674.

20 [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [20]. Tomlinson LJ also said at [22] that it was unimportant whether the sequence of emails manifested in a series of individual emails, or in a chain, since this is simply a matter of "happenstance, or metaphorically, the pressing of a button".

21 [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [16].

22 *C&S Associates UK Ltd v Enterprise Insurance Company plc* [2015] EWHC 3757 (Comm) at [123]; *Swinton Reds 20 Ltd v McCrory* [2014] EWHC 2152 (Ch) at [33].

23 2001 Advice, para 3.41. The 2001 Advice referred to the Court of Appeal decision in *Victor Chandler International v Customs and Excise Commissioners* [2000] 1 WLR 1296 where it was held that a computer

There is consensus that information stored in an electronic form (whatever that form) is a 'document' and would (except where the context otherwise dictates) satisfy a statutory requirement for a document. This consensus extends to those who hold differing views in respect of other statutory form requirements. Given this consensus, we do not comment further on this issue.

Developments since 2001

3.16 We continue to take the view that this point is settled and that information stored in an electronic form will constitute a "document", at least where it can be viewed on a screen, or printed, in the form of letters and/or numbers. This is the case unless interpretation of the relevant statute leads to a different conclusion. We have not been told by stakeholders that this point is disputed. *Phipson on Evidence* states that it has become "accepted" that "document" may include computer files, including text messages.[24]

3.17 Recent case law dealing with disclosure of documents in litigation has held that "documents" extend to electronic documents, including email and databases.[25]

A "SIGNATURE" OR "SIGNED"

The 2001 Advice

3.18 While we have seen above that the Interpretation Act 1978 defines "writing", there is no statutory definition of "signed" or "signature" which applies generally.[26] In that context, the Law Commission considered the common law, noting that "the common law takes a pragmatic approach as to what will satisfy a signature requirement".[27] Courts have held that a requirement for a signature has been satisfied by various forms, including:

(1) signing with an "X";[28]

(2) signing with initials only;[29]

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system and an electronic database were documents for the purposes of the Betting and Gaming Act 1981. In *Derby v Weldon (No 9)* [1991] 1 WLR 652, 658, data stored on a computer was held to be a document for the purposes of discovery.

24 H Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 41-01. In *R v Taylor (George Charles)* [2011] EWCA Crim 728, [2011] 1 WLR 1809, the Court of Appeal held that records kept on computer were within the expression "book or paper affecting or relating to the company's property or affairs" (in the context of s 206 of the Insolvency Act 1986). For a discussion of the meaning of document, see S Mason, "Documents signed or executed with electronic signatures in English law" [2018] 34(4) *Computer Law & Security Review* 933.

25 *Marlton v Tectronix* [2003] EWHC 383 (Ch) at [13] to [14]. See also *White Book 2018* vol 1, para 31.4.1 and *Atkin's Court Forms* (2014) vol 15 *Disclosure and information requests* para 213.

26 In the context of deeds, the Law of Property (Miscellaneous Provisions) Act 1989, s 1(4) provides that "sign" includes "making one's mark on the instrument" ("LPMPA 1989").

27 2001 Advice, para 3.25.

28 *Jenkins v Gaisford & Thring* 3 Sw & Tr 93; S Mason, *Electronic signatures in law* (4th ed 2016) para 1.38; 2001 Advice, para 2.7. See also LPMPA 1989, s 1, which defines "sign" as including "making one's mark on the instrument".

29 *Phillimore v Barry* (1818) 1 Camp 513; *Chichester v Cobb* (1866) 14 LT 433. See also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [26].

(3) using a stamp of a handwritten signature;[30] and

(4) printing.[31]

3.19 Indeed, provided that the "signatory" intends to authenticate the document, it need not be the "signatory" who actually signs.[32]

3.20 The Law Commission said that the common characteristic of the case law was that the courts looked to whether the method of signature used fulfilled the function of a signature; that is, demonstrated an authenticating intention.[33] The Law Commission therefore proposed a "purely objective" test: "would the conduct of a signatory indicate an authenticating intention to a reasonable person?". We suggested that this approach, consistent with the authorities in 2001, would produce the greatest certainty over time.[34]

3.21 The 2001 Advice then considered whether the following types of electronic signature would, in general, satisfy that objective test:[35]

(1) digital signature (that is, a public key encryption system involving a certification authority);

(2) scanned manuscript signature;

(3) typing of a name, for example, at the end of an email; and

(4) clicking on a website button.

3.22 Although a signature requirement must be interpreted in its statutory context,[36] the 2001 Advice concluded that all these methods of signature could demonstrate an authenticating intention and were therefore capable of satisfying a statutory requirement for a signature.[37]

3.23 Importantly, the Law Commission acknowledged that, although clicking on a website button may be less secure than a signature in wet ink, "reliability is not essential to

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30 *Goodman v J Eban LD* [1954] 1 QB 550 (a stamp of a handwritten signature in the name of the firm).

31 *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215 (name of town clerk printed at the foot of a statutory notice issued by a local authority under the Public Health Act 1875); *Tourret v Cripps* (1879) 48 L J Ch 567 (note in handwriting of party, on printed letterhead which included the name of the sender).

32 *In re Whitley Partners Limited* (1886) 32 Ch D 337 (the signature by an agent to a memorandum of association of a company was sufficient to render the agent's principal an original member of the company under the Companies Act 1862).

33 2001 Advice, para 3.26.

34 2001 Advice, para 3.29. See G M Andrews and R Millet, *Law of Guarantees* (7th ed 2015) para 3-024: "The guiding principle as to what will constitute a signature is whether the 'signature' authenticates the note or memorandum as evidencing a binding agreement. The purpose for which the person signed it is irrelevant."

35 2001 Advice, paras 3.31 to 3.39.

36 2001 Advice, para 3.30.

37 2001 Advice, para 3.39.

validity".[38] We set out below our provisional conclusion that an electronic signature is a legally valid way of executing a document.[39] However, regardless of that conclusion, we recognise that parties may opt not to use electronic signatures, or certain types of electronic signatures, based on their assessment of the questions of security and reliability that we have described in Chapter 2.

Developments since 2001

3.24 Below, we outline legal developments since 2001 and conclude that these have confirmed and strengthened the 2001 Advice's position.

The European context

3.25 There are two pieces of European legislation which are relevant to electronic signatures. The first is the E-Signatures Directive, which was adopted in 1999, and the second is eIDAS, which replaced it in 2014.

E-Signatures Directive 1999

3.26 The E-Signatures Directive[40] was adopted in December 1999 and had to be implemented by members states by July 2001. As discussed below, it was implemented in the UK (at least in part) by the Electronic Communications Act 2000 ("ECA 2000").

3.27 The purpose of the Directive was "to facilitate the use of electronic signatures and to contribute to their legal recognition". [41]

3.28 The E-Signatures Directive established two categories of electronic signature. Member states were required to ensure that "advanced electronic signatures" which were based on a "qualified certificate" and "created by a secure signature creation device" would satisfy any legal requirements in the same way as a handwritten signature.[42]

3.29 Other electronic signatures did not have that same automatic legal validity. However, the Directive provided that an electronic signature could not be denied legal effectiveness solely on the basis of its electronic nature.[43] This is similar to the approach in eIDAS, discussed below.

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38 2001 Advice, paras 3.35, 3.38.

39 See para 3.86 below.

40 Directive on a Community framework for electronic signatures 1999/93/EC, Official Journal L 013 of 19/01/2000 p 12 ("E-Signatures Directive"). The E-Signatures Directive was adopted by the European Parliament and Council on 13 December 1999 and member states were required to implement the Directive by 19 July 2001: art 13(1). The 2001 Advice does not deal with the Directive directly, focusing instead on the Electronic Communications Act 2000 ("ECA 2000"), which implemented the Directive.

41 E-Signatures Directive, art 1.

42 E-Signatures Directive, art 5(1). "Advanced electronic signatures" were defined by art 2(2). The requirements for a secure signature creation device were set out in Annex III. The requirement for a "qualified certificate" were set out in Annex I and II.

43 E-Signatures Directive, art 5(2).

3.30 "Electronic signature" was defined broadly in article 2 as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication".

3.31 The E-Signatures Directive was implemented in the UK by the ECA 2000 and the Electronic Signatures Regulations 2002.[44] The 2002 Regulations related to the supervision of the providers of qualified certificates.[45] The ECA 2000, which is discussed below, implemented provisions in the Directive relating to the admissibility, but not expressly relating to the validity, of electronic signatures as evidence in legal proceedings.[46]

eIDAS Regulation (2014)

3.32 The E-Signatures Directive was repealed with effect from 1 July 2016 and replaced by eIDAS.[47] EU Regulations apply directly in all member states without the need for national implementation. On the date of the UK's withdrawal from the EU, eIDAS will remain part of UK domestic law.[48] As a matter of EU law, however, eIDAS will cease to apply to the UK on 30 March 2019, subject to the terms of any withdrawal agreement.

3.33 In eIDAS, the two categories of electronic signature have been expanded into the following three categories. These are electronic signatures (broadly defined as data in electronic form attached to or logically associated with other data in electronic form and used by the signatory to sign), advanced electronic signatures and qualified electronic signatures.[49] We outlined these three categories in Chapter 2 above.[50]

The legal effect of electronic signatures under eIDAS

3.34 Article 25 of eIDAS sets out the legal effect of electronic signatures:

> 1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.
>
> 2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

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44 SI 2002 No 318. These regulations were revoked by the Electronic Identification and Trust Services for Electronic Transactions 2016, SI 2016 No 696, reg 4. The ECA 2000 applies to all parts of the UK: see ss 9, 16.

45 For example, see reg 4 which imposes a duty on the Secretary of State to keep under review the activities of certain providers and to establish and publish a register of providers.

46 See the explanatory notes to the Electronic Signatures Regulations 2002, SI 2002 No 318.

47 eIDAS, arts 50, 52. As to direct application of EU regulations, see P Craig and G De Búrca, *EU Law, Text, Cases, Materials* (5th ed 2011) ch 7.

48 European Union (Withdrawal) Act 2018, s 3(1).

49 eIDAS, art 3.

50 See paras 2.24 to 2.35 above.

3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States.

3.35 Article 25 replaces article 5 of the E-Signatures Directive. Significantly, it maintains the distinction between types of electronic signatures.[51] Qualified electronic signatures are said to satisfy any legal requirements in the same way as a handwritten signature. Other electronic signatures cannot be denied legal effectiveness solely because of their electronic nature.[52] However, such a signature could be rejected by a court if it did not meet other standards as to security or reliability.

3.36 Article 2(3) of eIDAS provides that the regulation "does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form".[53] Therefore, a document which is signed using an electronic signature is not automatically executed validly – other domestic formality requirements will still apply. For example, as we discuss below in Chapter 4, a deed is required to be signed in the presence of a witness.[54] If a document was signed with an electronic signature but not witnessed, it would not be validly executed as a deed.[55] We do not consider that this invalidity would be in breach of article 25.[56]

3.37 Therefore, although eIDAS provides that electronic signatures shall not be denied legal effect, it is clear that it is also necessary to consider domestic law when analysing whether an electronic signature will meet a statutory requirement for a signature.

Domestic legislation

Electronic Communications Act 2000

3.38 The ECA 2000 implemented provisions of the E-Signatures Directive relating to the admissibility of electronic signatures as evidence in legal proceedings.[57] It has since

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51 This is known as a "two-tier" approach. See L Brazell, *Electronic Signatures Law and Regulation* (2nd ed 2008) paras 5-054 and p 627.

52 Article 25 does not contain an express presumption of the integrity of the data to which a qualified electronic signature is attached. Such a presumption (as well as others) arises in relation to qualified electronic seals and qualified electronic registered delivery services pursuant to arts 35(2) and 43(2) of eIDAS. However, we do not consider that the absence of this presumption in art 25 alters the legal effect of qualified electronic signatures. As a digital signature, a qualified electronic signature maintains the integrity of the data to which it is attached so that any change in the data is detectable (art 26(d)). Data has "integrity" if it has not been tampered with: see S Mason, *Electronic signatures in law* (4th ed 2016) para 14.1(ii).

53 This tension was also identified in Making a Will (2017) Law Commission Consultation Paper No 231, para 6.29.

54 See paras 4.52 to 4.57 below.

55 However, see our discussion of *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, at paras 4.41 to 4.47 below.

56 The Law Commission's consultation paper on Making a Will considered eIDAS in the context of wills: see Making a Will (2017) Law Commission Consultation Paper No 231, paras 6.24 to 6.30.

57 See the explanatory notes to the Electronic Signatures Regulations 2002, SI 2002 No 318.

been amended by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 to supplement provisions of eIDAS.[58]

3.39 Section 7 of the ECA 2000 provides for the admissibility of electronic signatures in legal proceedings. Section 8 created a power to modify primary or secondary legislation to authorise or facilitate the use of electronic communications for certain purposes.[59]

3.40 There have been over 50 statutory instruments made under section 8 of the ECA 2000. Most of these statutory instruments address the provision of notices or information electronically, rather than the use of electronic signatures.[60]

3.41 Section 7 of the ECA 2000 provides:

> (1) In any legal proceedings—
>
> > (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
> >
> > (b) the certification by any person of such a signature,
>
> shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.

3.42 This section defines "electronic signature" broadly as:

> so much of anything in electronic form as—
>
> (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and
>
> (b) purports to be used by the individual creating it to sign.

3.43 As seen above, subsection 7(1) of the ECA 2000 deals with the admissibility of electronic signatures, rather than their inherent validity. The Law Commission has previously commented that it does not "assist in determining to what extent existing statutory signature requirements are capable of being satisfied electronically".[61] This was acknowledged by the Joint Working Party of The Law Society Company Law

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58 See the explanatory notes to the Electronic Identification and Trust Services for Electronic Transactions 2016, SI 2016 No 696.

59 These purposes include the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, notice or instrument and the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed: ECA 2000, s 8(2).

60 Exceptions to this include, but are not limited to, the Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004 No 3236, the Registration of Marriages etc (Electronic Communications and Electronic Storage) Order 2006, SI 2006 No 2809 and the Social Security (Electronic Communications) Order 2011, SI 2011 No 1498.

61 2001 Advice, para 3.27.

Committee and The City of London Law Society Company Law and Financial Law Committees in its 2016 note.[62]

3.44 However, there are opposing views. In apparent contrast, Mr Justice Popplewell in *Bassano v Toft* said that section 7 "recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity".[63]

3.45 It is also possible that the drafters of the ECA 2000 decided not to include a statement of validity in section 7 because the flexibility of the common law made it unnecessary. The explanatory notes to section 7 state:[64]

> 42. This section provides for the admissibility of electronic signatures and related certificates in legal proceedings.
>
> 43. It will be for the court to decide in a particular case whether an electronic signature has been correctly used and what weight it should be given (e.g. in relation to the authentication or integrity of a message) against other evidence. Some businesses have contracted with each other about how they are to treat each other's electronic communications. Section 7 does not cast any doubt on such arrangements.

3.46 The explanatory notes imply that that electronic signatures will be valid in at least some circumstances – or, at the very least, that it will be for courts to decide on a case-by-case basis.

3.47 In the second reading of the Bill in the House of Lords, the Minister for Science and Innovation said:[65]

> Part II of the Bill confirms the legal admissibility of electronic signatures. It would give Ministers the powers to update the statute book by providing electronic equivalents to paper signatures, records and documents. Lawyers argue about whether or not electronic signatures would be recognised as valid by the courts. We cannot afford to wait while lawyers argue and courts decide. Instead, Clause 7 will allow business and consumers to have confidence in electronic signatures. It puts beyond doubt that a court can admit evidence of an electronic signature and a certificate in support of a signature, not only for the purpose of establishing who the communication came from, but also in establishing the date and time it was sent and in some cases whether it was intended to have legal effect.

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62 The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on the execution of a document using an electronic signature" (July 2016), http://www.citysolicitors.org.uk/attachments/article/121/LSEW%20%20CLLS%20Joint%20Working%20Party%20-%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf (last visited 10 August 2018) ("2016 note"). See also Hodge Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 40-13.

63 *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 at [42].

64 Explanatory notes to the ECA 2000, paras 42 to 43.

65 *Hansard* (HL), 22 February 2000, vol 610, col 187 per the Minister for Science, Department of Trade and Industry (Lord Sainsbury of Turville).

3.48 We consider it is clearly arguable that the question of legal validity was not expressly dealt with in the ECA 2000 because it was not thought necessary to do so. Instead, the common law was considered to be sufficiently flexible to allow for electronic signatures.

3.49 Nonetheless, it remains the case that there is no unequivocal legislative statement that an electronic signature is as valid as a wet ink signature where there is a statutory requirement that a document must be signed. eIDAS creates a distinction between electronic signatures generally and qualified electronic signatures. The ECA 2000 expressly deals with the admissibility of an electronic signature as evidence, but not with its inherent validity where legislation requires a document or deed to be signed. It may be argued, therefore, that there is a gap in the legislation. However, we consider that recent case law, set out below, fills that gap.

Domestic case law

3.50 As we have said, the Law Commission noted in 2001 that "the common law takes a pragmatic approach as to what will satisfy a signature requirement".[66] Our examination of recent case law confirms this conclusion.

FirstPost Homes Ltd v Johnson

3.51 First, we consider *FirstPost Homes Ltd v Johnson*,[67] a Court of Appeal case about section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989"). Section 2 requires that a contract for the sale of land or other disposition of an interest in land must be in writing and signed, incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.[68] The case was not considered in the 2001 Advice which, as we have explained, was limited to specific types of commercial transactions.

3.52 The parties entered into an oral agreement for the sale of land. The buyer prepared a typed letter for the seller to sign, which was addressed to the buyer. There was also a plan of the land attached to the letter. The seller signed the letter and the plan, but the buyer only signed the plan. The buyer claimed that there was a concluded contract, but the seller argued that there was no contract which satisfied the requirements of section 2.

3.53 The Court of Appeal held that the "document" for the purposes of section 2 was the letter, not the plan. The letter was addressed to the buyer, and therefore included the buyer's name, but had not been signed by the buyer. In relation to the requirement for a signature, Lord Justice Peter Gibson said:[69]

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66 2001 Advice, para 3.25.

67 [1995] 1 WLR 1567.

68 Section 2 replaced s 40 of the Law of Property Act 1925 ("LPA 1925"), which had only required the contract to be evidenced in writing. Section 40 of the LPA 1925 was based on s 4 of the Statute of Frauds 1677.

69 *FirstPost Homes Ltd v Johnson* [1995] 1 WLR 1567, 1575.

> It is an artificial use of language to describe the printing or the typing of the name of an addressee in the letter as the signature by the addressee when he has printed or typed that document. Ordinary language does not, it seems to me, extend so far …

3.54 He also referred to the decision in *Goodman v J Eban Ltd*, quoting Lord Denning's dissenting judgment:[70]

> In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it.

3.55 The court held that the buyer's name in the letter did not constitute a signature for the purposes of section 2.

3.56 We understand that this decision continues to cause doubts about whether an electronic signature may satisfy section 2. We acknowledge these concerns and make the following points.

3.57 The finding in *FirstPost* that the plan did not form part of the "document" for section 2 meant that the only potential signature could be the buyer's name as addressee, which the buyer had typed into the letter. The decision focused on the fact that the alleged signature of the buyer was the name of the buyer as addressee of the letter, not that it was not hand written.[71] Indeed, the Court of Appeal expressly limited the application of its decision, saying:

> This decision is of course limited to a case where the party whose signature is said to appear on a contract is only named as the addressee of a letter prepared by him. No doubt other considerations will apply in other circumstances.

3.58 We consider that this leaves it open for an electronic signature to satisfy the requirement for a signature in section 2, where, as we explain above, there is an intention to authenticate the document.[72] Indeed, as we discuss below, the High Court has said subsequently that, in principle, a string of emails, containing the typed signatures of the parties, could create a contract under section 2.[73] Furthermore, this decision has been the subject of academic criticism, with Professor Julian Farrand QC and Professor Alison Clarke arguing that it "should be confined to its own peculiar facts and not followed".[74]

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[70] *Goodman v J Eban Ltd* [1954] 1 QB 550, 561. Lord Justice Peter Gibson also referred to comments made by the Master of the Rolls in the same decision.

[71] See G Smith, *Internet Law and Regulation* (4th ed 2007) para 10-113, n 79.

[72] See also *Goodman v J Eban Ltd* [1954] 1 QB 550, 557 where the Master of the Rolls said that "[T]he essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as personally to authenticate the document".

[73] *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [44] to [45]. See also B McFarlane, N Hopkins and S Nield, *Land Law* (2017), paras 4.13 and 4.16.

[74] In particular, Professor Julian Farrand QC and Professor Alison Clarke criticise the Court of Appeal's reliance on *Goodman v J Eban Ltd* [1954] 1 QB 550: see *Emmet & Farrand on Title* (2018, loose-leaf) vol 1 para 2.041.

J Pereira Fernandes SA v Mehta

3.59 In *J Pereira Fernandes*, the High Court[75] considered whether an email sent from the defendant's email address constituted a guarantee which satisfied the requirements of section 4 of the Statute of Frauds 1677. Section 4 requires that a guarantee agreement, "or some memorandum or note thereof" is in writing and signed.

3.60 The defendant's name did not appear in the body of the email but his email address appeared in the header of the email.

3.61 Judge Pelling QC held that the email containing the alleged guarantee was an offer made in writing which contained the essential terms of the contract, and was a sufficient "note or memorandum" for the purposes of section 4.[76] However, he found that an email address automatically inserted by an internet provider did not satisfy the requirement that the document be signed.

3.62 Judge Pelling QC accepted that a typed name at the end of an email could amount to a signature for the purpose of section 4.[77] However, absent evidence to the contrary, an automatically included email address was incidental and so did not meet the requirement that it was intended to authenticate the document.[78]

3.63 Commentators have suggested that this decision is open to question, given that any mark has the capacity to demonstrate intent.[79] However, it is consistent with the position that there must be an intention to authenticate the document.[80]

WS Tankship II BV v Kwangju Bank Ltd

3.64 In the subsequent High Court decision in *WS Tankship II BV v Kwangju Bank Ltd*,[81] Mr Justice Blair considered a similar issue to that in *J Pereira Fernandes*. One question before the court was whether there was a valid guarantee under section 4 of the Statute of Frauds 1677. The guarantee was contained in a SWIFT message. SWIFT is a provider of secure financial messaging services to banks and other institutions. Similarly to an email, a SWIFT message contains a header including the sender's and recipient's names.

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75 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 (Judge Pelling QC sitting as a High Court Judge).

76 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [16].

77 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [28].

78 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [29].

79 Stephen Mason raises several concerns about this decision in *Electronic signatures in law* (4th ed 2016) paras 11.4 to 11.41. For example, he suggests that the action of clicking on the "send" button is the act of authentication and plays the same role as the use of headed notepaper in *Tourret v Cripps* (1879) 48 L J Ch 567. Similarly, Clive Freeman and Jake Hardy note that, if viewed in its entirety, the process of sending an email includes steps which evidence the sender's intention to authenticate the document: C Freedman and J Hardy, "J Pereira Fernandes SA v. Mehta: A 21st century email meets a 17th century statute" (2007) 23(1) *Computer Law and Security Review* 77.

80 L Brazell, *Electronic Signatures and Identities: Law and Regulation* (2nd ed 2008) para 2-027.

81 [2011] EWHC 3103 (Comm).

3.65 The bank, which was the guarantor, acknowledged that it had intended the guarantee to be relied upon by the beneficiary. However, it argued that it was not bound by the guarantee, because the requirement for a signature in section 4 had not been met. The bank accepted that the requirement in section 4 for the document to be "signed" would be satisfied by the guarantor's name being written or printed in the document. Although the name of the bank appeared in the header of the SWIFT message, it did not appear in the body of the guarantee – the bank was referred to as "we". The bank argued that the document was, therefore, unsigned and that the guarantee was not binding.

3.66 Mr Justice Blair accepted that the bank's name, appearing in the header of the SWIFT message, was a signature for the purposes of the Statute of Frauds 1677. This was notwithstanding the bank's argument that the header was text generated automatically by the SWIFT messaging system. Distinguishing *J Pereira Fernandes*, Mr Justice Blair said:[82]

> The words "Kwangju Bank Ltd" appear in the header, because the bank caused them to be there by sending the message. They were "voluntarily affixed" in the words of the old cases ... Whether or not automatically generated by the system, and whether or not stated in whole, or abbreviated (in fact the name of the bank appeared here in complete form), this is in my judgment a sufficient signature for the purposes of the Statute of Frauds.

3.67 The distinction to be drawn between this case and *J Pereira Fernandes* is that in *Kwangju Bank*, the bank accepted that the guarantee was properly issued, authorised and intended to be relied upon by the beneficiary. Therefore, there was an intention to authenticate the guarantee by sending it by SWIFT. The automatically inserted header with the name of the bank satisfied the requirement that the document be "signed". In contrast, in *J Pereira Fernandes*, the court held that the automatic insertion of an email header was incidental. Without evidence that it was intended to authenticate the document, it did not constitute a signature.[83]

Golden Ocean Group Ltd v Salgaocar Mining Industries PVT

3.68 This decision of the Court of Appeal[84] also considered section 4 of the Statute of Frauds 1677. The question was whether a chain of emails satisfied the requirements of that provision.[85] The final email confirming the contract of guarantee contained the first name of the broker ("Guy") at the bottom of the email.

3.69 Before the Court of Appeal, counsel argued that the broker's first name was not a signature – it was a salutation delivered in a familiar fashion. If it was a signature, it was only a signature of the communication and was not effective to authenticate a contract of guarantee.

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[82] *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [2012] CILL 3154 at [155].

[83] *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [29].

[84] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674.

[85] For a history of the provision see G M Andrews and R Millet, *Law of Guarantees* (7th ed 2015) para 3-002.

3.70 However, Lord Justice Tomlinson, with whom Sir Mark Waller and Lord Justice Rix agreed, said:[86]

> Chartering brokers may communicate with one another in a familiar manner but that does not detract from the seriousness of the business they are conducting. In my judgment Mr Hindley put his name, Guy, on the e-mail so as to indicate that it came with his authority and that he took responsibility for the contents. It is an assent to its terms. I have no doubt that that is a sufficient authentication.

Bassano v Toft

3.71 The court in *Bassano v Toft*[87] considered whether clicking on a button marked "I Accept" was a signature for the purposes of the Consumer Credit Act 1974 and the Consumer Credit (Agreement) Regulations 2010.[88]

3.72 Mr Justice Popplewell found that regulated credit agreements could be executed with an electronic signature:[89]

> Mrs Bassano electronically communicated to Borro her agreement to be bound by the terms of the Borro Loan Agreement by clicking on the "I Accept" button and thereby generating a document sent to Borro bearing her typed name which authenticated the document and communicated her agreement to be bound by its terms. That constituted signing it so as to fulfil the requirements of s 61 of the Act.

3.73 This decision is consistent with the 2001 Advice, where the Law Commission concluded that clicking on a website button "can reasonably be regarded as the technological equivalent of a manuscript "X" signature" and "therefore capable of satisfying a statutory signature requirement".[90] Although Mr Justice Popplewell did not refer to the Law Commission's 2001 Advice, he adopted a similar approach, saying:[91]

> A signature need not consist of a name, but may be of a letter by way of mark, even where the party executing the mark can write: *Baker v Dening* (1838) 8 Ad & El 94, 7 LJQB 137, 2 Jur 775 … In the Borro Loan Agreement, the signature is made by the electronic communication of the words "I Accept" which are in the space designated for a signature. They constitute a good signature because the word "I" can be treated as being the mark which is unambiguously that of Mrs Bassano affixed for the

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86 *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [32]. In the recent case of *Payne v Payne* [2018] EWCA Civ 985, [2018] 1 WLR 3761 at [31] the Court of Appeal referred to a "cheque or other formal document" requiring "an identifiable and probably unique personal mark". This was a case about wills, which are outside of the scope of this project. The comment was also made obiter.

87 *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117. In this case, Mr Justice Popplewell sat additionally as a judge of the Central London County Court. An action to enforce a regulated agreement under the Consumer Credit Act 1974 must be brought in the County Court: see Consumer Credit Act 1974, s 141 and *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 at [24].

88 SI 2010 No 1014.

89 *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 at [43] to [44].

90 2001 Advice, para 3.37.

91 *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 at [45].

purposes of authenticating and agreeing to be bound by the terms of the document. The signature is therefore in the designated space by reason of the words “I Accept” being in that space. The name on page one is of relevance because it is evidence that “I” is Mrs Bassano's mark, if any were needed in addition to the evidence that it was she who clicked the button; but it is the words “I Accept” which constitute the signature, not the name on the previous page.

Other recent cases

3.74 The courts have also considered whether emails containing an inserted email signature or a typed name satisfy the requirements of other legislation relating to agreements.

3.75 In *Green v Ireland*,[92] the High Court considered whether a chain of emails containing an agreement to grant a charge over property met the requirements of section 2 of the LPMPA 1989. Section 2 requires a contract for the sale, or other disposition, of an interest in land to be made in writing and signed by or on behalf of each party to the contract.

3.76 The court held that the emails did not amount to a contract.[93] The emails did not suggest binding obligations on the parties nor did they state any contractual terms; rather the emails suggested that a further document would be prepared. However, the court accepted in principle that a string of emails, containing the typed signatures of the parties, could create a contract under section 2:[94]

> Section 2(3) requires also that the document incorporating the terms be signed by or on behalf of each party. The liquidator accepts that Miss Gillis’ email to Mrs Ireland and Mrs Ireland’s reply constitutes a single document for these purposes. In my view, this is right where, as here, the second email is sent as a reply and so creates a string, as opposed to be simply a new email referring to an earlier email. It is the electronic equivalent of a hard copy letter signed by the sender being itself signed by the addressee.

3.77 In *Lindsay v O’Loughnane*[95] the High Court considered an email containing a fraudulent misrepresentation in the context of section 6 of the Statute of Frauds (Amendment) Act 1828 which requires representations about another person’s character to be in writing and signed by the party. Mr Justice Flaux, as he then was, accepted that an email containing a typed signature of the party could satisfy the requirements of section 6. He said:[96]

> In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email includes a written indication of who is

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92 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297.

93 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [46] to [50].

94 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [44] to [45]. See also B McFarlane, N Hopkins and S Nield, *Land Law* (2017), paras 4.13 and 4.16.

95 [2010] EWHC 529 (QB), [2012] BCC 153.

96 *Lindsay v O’Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153 at [95].

sending the email. It seems that it is not enough that the email comes from a person's email address without his having "signed" it in the sense of either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email: see the decision of HHJ Pelling QC (sitting as a High Court Judge) in *Pereira Fernandes v Mehta* …

3.78 Mr Justice Flaux held that an email containing a typed signature of the party could satisfy the requirements of section 6. He also said that it would not be enough without a "written representation" of who is sending the email, "either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email". This appears to be a departure from the other cases discussed above, which emphasise the intention of the parties as the key factor as to whether a person's mark constitutes a signature.[97]

3.79 In *Orton v Collins*,[98] the High Court considered whether an agreement to settle made by email constituted an offer to settle pursuant to Part 36 of the Civil Procedure Rules.[99] The court accepted that the typed name of the law firm at the end of the email amounted to a signature meeting the relevant requirements, being "intended to signify that document was being sent out with the authority of the defendants' legal representative".[100]

Conclusion

3.80 The review of the case law above demonstrates that electronic signatures have been found to satisfy a statutory requirement for a signature where there has been evidence of an intention to authenticate the document. Such findings have been made under the LPMPA 1989, the Consumer Credit Act 1974 and the Statute of Frauds 1677. A finding of validity of an electronic signature does not appear to be limited to a particular type of signature – a typed name at the end of an email is sufficient, as is clicking an "I accept" button on a website. It has been suggested that an email header may not be sufficient.[101] However, it is arguable that even this may function as a signature if there was sufficient evidence to demonstrate an intention to authenticate the document.[102]

DOCUMENTS EXECUTED "UNDER HAND"

3.81 There are also a small number of legislative provisions which refer to the execution of documents taking place "under hand". Documents are said to be executed "under hand"

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97 See in particular our discussion of *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 and *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [2012] CILL 3154 at paras 3.59 to 3.67 above.

98 [2007] EWHC 803 (Ch), [2007] 1 WLR 2953.

99 Civil Procedure Rules 1998, SI 1998 No 3132.

100 *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953 at [21].

101 See both *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 and *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153.

102 See discussion above of *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543.

when they are executed otherwise than by deed.[103] For example, the Stock Transfer Act 1963 provides that certain registered securities may be transferred by "an instrument under hand" in a particular form.[104]

3.82 We agree with the 2016 note that an electronic signature inserted with the intention of authenticating the document would be sufficient to satisfy the requirement that it must be executed "under hand".

CONCLUSIONS

3.83 In 2001 the Law Commission concluded that, for specific types of commercial transactions, a statutory requirement for "in writing" would be satisfied by electronic methods such as email and website trading (but not by EDI)[105] and that information stored in an electronic form was a "document". It also concluded that an electronic signature would satisfy a statutory requirement for a signature where an objective "authenticating intention" could be demonstrated. This would not depend on the type of electronic signature applied.

3.84 Subsequent legal developments have not affected the conclusions of the 2001 Advice, which we believe remain correct in relation to documents generally. Domestic and EU legislation addresses the admissibility of electronic signatures as evidence and provides that certain types of electronic signature will have the same effect as a handwritten signature. It also provides that an electronic signature should not be denied legal effect simply because of its electronic nature.

3.85 Moreover, since the 2001 Advice the courts have considered whether an electronic signature satisfies the requirement for a signature in various statutes, including the LPMPA 1989, the Statute of Frauds 1677 and the Consumer Credit Act 1974. These cases have in general concluded that electronic methods of signing, such as a typed name in an email or clicking on an "I Accept" button, have satisfied a statutory requirement for a signature where there is an intention to authenticate the document.

3.86 Our provisional conclusion is that, under the current law, an electronic signature is capable of satisfying a statutory requirement for a signature, where there is an intention to authenticate the document.[106] In Chapter 7 we consider whether further confirmation, in the form of legislative reform, is required to put the matter beyond doubt.

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[103] An "instrument under hand only" is a document in writing which either creates or affects legal or equitable rights or liabilities, and which is signed but not executed as a deed. See *Halsbury's Laws of England* (2012) vol 32 Deeds and other instruments para 339, which was endorsed in *Trustee Solutions Ltd v Dubery* [2006] EWHC 1426 (Ch), [2007] ICR 412 at [33] (this case was reversed on appeal, though not in relation to the meaning of "under hand": [2007] EWCA Civ 771, [2008] ICR 101).

[104] Stock Transfer Act 1963, s 1(1), sch 1.

[105] EDI is defined in the Glossary.

[106] An electronic signature may also be used instead of a handwritten signature even where there is no statutory requirement for a signature.

Consultation Question 1.

3.87 Our provisional conclusion is that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document. Do consultees agree?

Chapter 4: Deeds – the current law

4.1 In this chapter we focus on deeds, which are a type of document with more onerous formality requirements than a document which requires writing or a signature. We discuss the formal elements of a deed, including the requirements that deeds must be witnessed and delivered. Finally, we look at the decision in *Mercury*,[1] which raised concerns about the use of "virtual" or electronic signings to execute deeds.

4.2 Unlike signatures, there are no statutory provisions which set out how a deed may be executed electronically. In Chapter 8, we consider how electronic execution of deeds may be possible under the current law, and ask whether legislative reform would be appropriate.

WHEN HAS THE LAW COMMISSION PREVIOUSLY CONSIDERED DEEDS?

4.3 The Law Commission has considered the law of deeds previously. In 1987 it published a report on deeds and escrows.[2] The recommendations in the 1987 report led to section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989"), which sets out the main requirements for the execution of deeds, and is discussed below.

4.4 In 1998 the Law Commission considered the execution of deeds by or on behalf of bodies corporate ("1998 Report").[3] This report focused on how the existing law would or should apply to bodies corporate rather than more general questions about when deeds should be required or whether the distinction between deeds and other documents should be maintained. It did not discuss the electronic execution of deeds in detail.[4]

4.5 The execution of documents (though not specifically deeds) was next considered in 2001. As discussed in Chapter 3, the Law Commission's 2001 Advice to Government on electronic commerce examined the extent to which formalities such as writing and signing could be satisfied electronically.[5]

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1 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

2 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93 (1985 Working Paper); Deeds and Escrows (1987) Law Com No 163 ("1987 Report").

3 The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253 ("1998 Report").

4 1998 Report, paras 1.13 to 1.14.

5 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/ (last visited 10 August 2018) ("2001 Advice").

4.6 Also in 2001, the Law Commission and HM Land Registry published a report on land registration.[6] This report included a section on electronic conveyancing. It proposed a legislative framework by which electronic documents meeting certain requirements are deemed to be deeds, for the purposes of registered dispositions of land.[7]

WHAT IS A DEED?

4.7 In its 1998 Report, the Law Commission defined a deed as a written instrument which is executed with the necessary formality, and by which an interest, right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.[8]

4.8 Deeds fall into two categories. The first is deeds expressly stated to be made between two or more named persons. Deeds of this type are known as "indentures" or "deeds inter partes". The second category is unilateral deeds, namely deeds which bind one party only. Such deeds are also known as "deeds poll".[9] This consultation paper deals with both types of deed.

WHEN ARE DEEDS USED?

4.9 While there are relatively few transactions which must be made by deed rather than simple contract, deeds are required in certain circumstances either by statute or at common law.[10] However, parties may choose to execute a document as a deed even when they are not required by law to do so, to secure longer limitation periods in the event of litigation.[11]

A statutory requirement for a deed

4.10 Deeds are required by statute to be executed for various arrangements relating to property, including conveyances of land or interests in land[12] and mortgages.[13] They are also required for instruments registered under the Land Registration Act 2002, which are not within the scope of this project.[14]

4.11 Deeds are also required by statute for:

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6 Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271.

7 See Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, para 13.19. This report led to the enactment of s 91 of the Land Registration Act 2002.

8 1998 Report, paras 2.4 to 2.5.

9 M Anderson and V Warner, *Execution of documents* (3rd ed 2015) para 16.3; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 203.

10 *Halsbury's Laws of England* (2012) vol 22 *Contracts* para 223 and *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 210 onwards.

11 See the Limitation Act 1980, ss 5 and 8 and J Cartwright, *Formation and Variation of Contract* (2014) para 4-10.

12 Law of Property Act 1925, s 52 (LPA 1925). "Conveyance" is defined by s 205(1)(ii) of the LPA 1925.

13 LPA 1925, ss 101(1), 104(1) and 155.

14 Land Registration Act 2002, s 27, sch 2; Land Registration Rules 2003, SI 2003 No 1417, sch 9.

(1) powers of attorney, including lasting powers of attorney;[15]

(2) exercise of powers of appointment;[16]

(3) certain actions under the Trustee Act 1925, such as the appointment or discharge of a trustee;[17]

(4) bills of sale;[18]

(5) certain ecclesiastical matters;[19] and

(6) other transactions, which seldom take place now, such as leases under the Settled Land Act 1925[20] and transfers of shares under the Companies Clauses Consolidation Act 1845.[21]

Common law requirements for a deed

4.12 In certain circumstances, the common law requires a document to be executed as a deed. Significantly, an agreement without consideration must be made by deed.[22] Therefore, where, for example, a parent company guarantees a loan to a subsidiary, without consideration, that guarantee agreement must be executed as a deed.

4.13 The common law also requires a deed for:

(1) a gift of tangible goods, without delivery of possession;[23]

(2) a conveyance of an "incorporeal hereditament", such as a rent issuing out of land;[24]

(3) a grant of a right to enter land and to remain there;[25] and

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15 See Powers of Attorney Act 1971, s 1(1); Companies Act 2006, s 47; Mental Capacity Act 2005, s 9 and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253, reg 5.

16 LPA 1925, s 159.

17 Trustee Act 1925, ss 39 and 40.

18 Bills of Sale Act (1878) Amendment Act 1882, s 9 and schedule.

19 Ecclesiastical Leasing Act 1842, s 1 (leases granted by ecclesiastical corporations); Clerical Disabilities Act 1870, s 3 (relinquishment by ministers of holy orders).

20 Settled Land Act 1925, s 42.

21 Companies Clauses Consolidation Act 1845, s 14.

22 See the discussion in *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 259; J Cartwright, *Formation and Variation of Contract* (2014) para 4-17 and 1998 Report, para 2.5.

23 *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 213.

24 *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 210; *Stroud's Judicial Dictionary* (9th ed updated 31 July 2017).

25 *Wood v Leadbitter* (1845) 13 M&W 838, 842 to 843; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 211.

(4) an express release of certain rights.[26]

WHAT ARE THE FORMALITIES REQUIRED FOR DEEDS?

4.14 A deed must, in order to be executed validly, fulfil certain requirements. These requirements are prescribed by statute and, in the limited circumstances where statute does not apply, by the common law.

Statutory requirements for deeds

4.15 Subsection 1(2) of the LPMPA 1989 provides that an instrument shall not be a deed unless:

(1) it makes clear on its face that it is intended to be a deed (the "face value" requirement); and

(2) it is "validly executed as a deed".

4.16 The statutory requirements for valid execution of deeds are set out in several pieces of legislation. Whether an instrument has been "validly executed as a deed" will depend on the circumstances and who is executing the deed. We set out the main scenarios below, starting with deeds executed by an individual.

Deeds executed by an individual

4.17 Section 1 of the LPMPA 1989 provides that for an individual to validly execute a deed, the instrument must be signed "in the presence of a witness who attests the signature and delivered as a deed".[27]

Deeds executed by a company formed under the Companies Act 2006

4.18 Deeds executed by companies under the Companies Act 2006 are dealt with by sections 44 and 46 of that Act. Section 46 provides that a deed is validly executed for the purposes of section 1 of the LPMPA 1989 if it is duly executed and delivered as a deed.[28]

4.19 Under section 44, a document may be executed in two ways by a company:

(1) By affixing the common seal; or

(2) By the signatures of:

(a) two authorised signatories (such as a director or the secretary of the company);[29] or

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26 See eg *Bank of Credit and Commerce International SA (in liquidation) v Ali* [1999] ICR 1068 at [12]; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 212.

27 Law of Property (Miscellaneous Provisions) Act 1989, s 1(3) ("LPMPA 1989").

28 A document is presumed to be delivered upon execution unless a contrary intention is proved: Companies Act 2006, s 46(2). We discuss presumptions of delivery below.

29 Companies Act 2006, s 44(2) and (3).

(b) a director of the company attested by a witness.

4.20 These provisions are modified by statutory instrument to apply to limited liability partnerships,[30] unregistered companies[31] and overseas companies.[32] Similar provisions apply, with modifications,[33] to registered societies, which are membership organisations carrying on a social or community purpose.[34]

4.21 In addition to statutory requirements, a deed made by a company must in general be executed in accordance with any formality requirements in its constitution.[35]

Deeds executed by other bodies

4.22 There are specific rules dealing with the execution of deeds by other corporate bodies, including companies formed under previous Companies Acts.[36]

Lasting powers of attorney

4.23 A lasting power of attorney is used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs, in circumstances where the donor has lost the capacity to do so.[37] We discuss concerns around lasting powers of attorney in Chapter 6.[38]

4.24 A lasting power of attorney must be executed as a deed before it is registered with the Office of the Public Guardian ("OPG").[39] This means that it must fulfil the requirements for valid execution in section 1 of the LPMPA 1989, as set out above.

4.25 There are additional formality requirements for lasting powers of attorney in schedule 1 to the Mental Capacity Act 2005. These include that the lasting power of attorney must be made "in prescribed form" and include certain information about the purpose and effect of the document. It must include a statement by the donor that they have read the prescribed information. It must also be accompanied by a certificate by a third party

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30 Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009 No 1804, reg 4.

31 Unregistered Companies Regulations 2009, SI 2009 No 2436, reg 3, sch 1, para 3.

32 Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, reg 4.

33 See eg Co-operative and Community Benefit Societies Act 2014, s 53, and compare s 44(2) of the Companies Act 2006.

34 Pension Funds and Social Investment (2017) Law Com No 374, paras 7.23 to 7.25.

35 *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 241. For example, the articles of association made under the Companies Act 1985 and the Companies Act 2006 allow for a further use of a company seal. See M Anderson and V Warner, *Execution of documents* (3rd ed 2015) para 18.8.

36 For example, corporations sole (eg the Public Trustee) and corporations aggregate (eg local government authorities): see *Halsbury's Laws of England* (2010) vol 24 *Corporations* paras 312 to 314. For a summary of formality requirements for these types of corporate bodies, see M Anderson and V Warner, *Execution of documents* (2015 3rd ed) ch 17 and *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* paras 240 to 243.

37 Mental Capacity Act 2005, s 9(1).

38 See paras 6.32 to 6.35 below.

39 Powers of Attorney Act 1971, s 1(1).

confirming that the donor understands the purpose of the document and that the donor is not being induced to execute the document by undue pressure or fraud.[40]

Common law

4.26 The common law has also developed rules as to the formalities which must be satisfied to execute deeds validly. These include that the deed must be signed, sealed and delivered.[41] The common law requirements are relevant only rarely[42] and therefore in this consultation paper we concentrate on statutory formalities.

Conclusion on formalities for deeds

4.27 Although it is important to be aware of the differences in execution of deeds by different bodies, under statute law, the three key requirements are:

(1) signature;

(2) witnessing; and

(3) delivery.

4.28 We have discussed the law around signatures in Chapter 3 above. We now turn to witnessing and delivery.

WITNESSING

Witnessing and attestation

4.29 As a starting point, it is useful to clarify the difference between two terms which are used in the relevant legislation, namely "witnessing" and "attestation".

4.30 Witnessing involves observing the execution of a document. Attestation involves the additional step of recording, on the document itself, that the witness has observed the execution.[43] Typically, this is achieved by the witness signing an "attestation clause", which confirms that the document was duly executed in the presence of the witness.

When is witnessing required?

4.31 Under section 1 of the LPMPA 1989, deeds must be:[44]

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[40] Mental Capacity Act 2005, sch 1. See also the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253, which set out the forms for lasting powers of attorney, who may provide a certificate and the order in which a lasting power of attorney must executed.

[41] *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* paras 228 to 229.

[42] *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 227 explains that the common law applies to instruments delivered as deeds before 31 July 1990 (ie the entry into force of s 1 of the LPMPA 1989). It also applies to deeds required or authorised to be made under the seal of the county palatine of Lancaster, Duchies of Lancaster or Cornwall: see LPMPA 1989, s 1(9).

[43] See for example *Burdett v Spilsbury* 10 Cl & Fin 416, 417; *Wright v Wakeford* [1803-13] All ER Rep 589, 591; and *Re Selby-Bigge* [1950] 1 All ER 1009, 1011. See also the definition of "attesting witness" in J Cartwright, *Formation and variation of contract* (2014) para 4-07, n 63.

[44] LPMPA 1989, s 1(3).

(1) signed by the individual in the presence of a witness who attests the signature; or

(2) signed at the direction and in the presence of the individual, as well as in the presence of two witnesses who attest the signature.

4.32 Under the Companies Act 2006, one way for a company formed under the Companies Act 2006 to execute a document is for a director to sign the document in the presence of a witness, who attests the signature.[45]

4.33 There are other circumstances in which witnessing and attestation are prescribed. For example, the execution of a deed for a bill of sale must be attested by "one or more credible witness or witnesses, not being a party or parties thereto".[46]

What is the purpose of witnessing?

4.34 In Chapter 2 we stated that the use of formalities may fulfil several purposes and that such purposes may be evidential, cautionary/protective or labelling.

4.35 It is clear that witnessing, with attestation, furthers the evidential aim of formalities: an attestation clause indicates that the document was indeed signed by the signatory.[47] Attestation may also facilitate trust between the transacting parties in their commercial relationship, by reassuring each party that the other's signature was genuinely affixed.[48]

4.36 However, witnessing evidences the fact of execution by a particular person, rather than the contents of the document.[49] There is no general requirement that a witness must read the document or do anything other than watch the signatory sign and attest to that fact.

4.37 Nor is the aim of witnessing to vouch for the identity of the signatory.[50] This is evident from the fact that a witness does not need to know the signatory, and is not obliged to identify the signatory prior to attestation (for example, by requesting sight of a passport or driving licence).

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45 Companies Act 2006, s 44(2)(b).

46 Bills of Sale Act 1878, s 10.

47 *Emmet & Farrand on Title* vol 2 *Execution of deeds* para 20-015. In 1985, the Law Commission said that attestation "would give rise to an evidential presumption of due execution". See 1985 Working Paper, para 8.3(i). See also *Re Sandilands* (1871) LR 6 CP 411, 413 per Montague Smith J; and *First National Securities Ltd v Jones* [1978] Ch 109, 118 per Buckley LJ.

48 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [29] per Pill LJ.

49 In the context of wills, Lord Eldon LC explained in *Wright v Wakeford* [1803-13] All ER Rep 589, 591 that "it is not the will that is attested but the act of the testator".

50 Stephen Mason and Nicholas Bohm explain that the task of a witness is not to guarantee that, for example, Joe Bloggs signed a deed. Rather, the witness only needs to be able to say that "I saw that document signed, and that person over there is (or is not) the person who did it. Correspondence with S Mason and N Bohm, 9 March 2018. See also L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) para 8-012.

4.38 Witnessing does, however, represent another step in the execution process, which underlines the significance of the transaction and prevents the signatory from too readily incurring obligations. This furthers the cautionary function of formalities.[51]

4.39 Witnessing may also further the protective function of formalities by guarding against forgery or duress. A witness is "another pair of eyes" whose presence may ensure, for example, that the grantor's signature was not affixed by a beneficiary, and that the signatory executed the agreement voluntarily. At the very least, a witness may provide evidence as to the absence of vitiating factors if there is a subsequent dispute.[52]

4.40 It is less obvious whether the "labelling" function of formalities apply to witnessing and attestation. The presence of an attestation clause may be seen as a way of highlighting the nature of the document to third parties. However, it is arguable that this function is adequately met by other formalities (such as the "face value" requirement for deeds).[53]

Discussion of witnessing in *Shah v Shah*

4.41 We have discussed above the significant overlap between the purposes of witnessing and those of other formalities. In *Shah v Shah*, the Court of Appeal considered the purpose of witnessing in the context of an argument based on estoppel.[54]

4.42 *Shah v Shah* concerned a deed under which a bank's executives agreed to be liable personally for repayment of the claimant's loan of £1.5 million to the bank. While the deed was valid on its face, the defendants later sought to resile from their repayment obligations, arguing that the deed had not been properly executed. Although the deed appeared to have been executed validly, in fact the defendants had not signed the document in the presence of a witness. Instead, the defendants had signed the document, and their secretary had taken the document to the witness, who had then attested the signature.

4.43 The claimant argued that the defendants were estopped from denying the validity of the document as a deed. The defendants submitted that the wording of section 1 reflected public policy that there must be compliance with the section. They argued that estoppel could not "render valid a transaction which the legislature has enacted to be invalid".[55]

4.44 The Court of Appeal held that estoppel could be raised and the claimant could bring an action on the document as a deed. Section 1 of the LPMPA 1989 did not exclude the operation of estoppel where a party attempted to escape the consequences of an

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51 1985 Working Paper, para 8.3(i).

52 1985 Working Paper, para 8.3(i); *Log Book Loans Ltd v Office of Fair Trading* [2011] UKUT 280 (AAC) at [73] and *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [29].

53 We refer to the labelling function of formalities at paras 2.4 to 2.6 above. We refer to the "face value requirement" at para 4.15 above.

54 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [30]. *Halsbury's Laws* defines "estoppel" as "a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable)": see (2014) vol 47 *Estoppel* para 301; and *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, 241.

55 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [26].

apparently valid deed, simply by claiming that the attesting witness was not present at the time of signature.[56]

4.45 In reaching this decision, Lord Justice Pill considered the purpose of the requirement for attestation. He acknowledged the protective aspect of witnessing and attestation:[57]

> I also accept that attestation has a purpose in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed. The beneficial effect of the requirement for attestation of the signature in the manner specified in the statute is not in question. It gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation. It gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary.

4.46 However, when considering whether there was a statutory intention to exclude an estoppel, he characterised witnessing as a subsidiary formality process, which is less crucial than a signature:[58]

> The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature.

4.47 As we have discussed above,[59] a witness is "another pair of eyes" whose presence may ensure that a document has been executed voluntarily and without duress. Witnessing furthers the protective function of formalities by guarding against forgery or duress, particularly where consumers or vulnerable individuals are involved.[60] However, *Shah v Shah* indicates that, at least in certain circumstances, the legal requirement for witnessing and attestation may be less important than other policy considerations.

Who can be a witness?

4.48 There is no express restriction as to who can be a witness under the LPMPA 1989 or the Companies Act 2006 and no requirement that an attesting witness to a deed must be independent from the signatory. Such restrictions do apply for lasting powers of

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56 See, in contrast, *Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] Ch 212, where only some of the signatures to a set of deeds were attested. The court found that no estoppel arose and drew a distinction with *Shah v Shah* because the documents did not appear on their face to have been validly executed (at [43]). See also *Bank of Scotland plc v Waugh* [2014] EWHC 2117 (Ch).

57 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [29].

58 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [30]. See *Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] Ch 212 at [40].

59 See para 4.39 above.

60 See Making a Will (2017) Law Commission Consultation Paper No 231 paras 5.6, 5.22, 6.42.

attorney. Neither the person giving the lasting power of attorney, nor the attorney, may be a witness.[61]

4.49 Case law has, however, imposed restrictions on who can act as a valid attesting witness. For example, a party to a deed cannot also witness and attest it.[62] Only an individual can act as a witness; a company cannot attest to the execution of a document.[63] A further restriction, at least in the case of wills, is that a witness must be able to observe the execution.[64]

4.50 Other than for wills, which we are not addressing in this project, there is no general requirement that a witness must be independent in relation to the signing parties.[65] A husband or wife can witness the other's signature[66] and an employee can witness the execution of a document by their employer.[67]

4.51 However, HM Land Registry points out that, given that the purpose of attestation is to provide reliable evidence of due execution, the use of independent witnesses is best practice.[68]

What does witnessing involve?

4.52 Section 1 of the LPMPA 1989 and section 44 of the Companies Act 2006 require a deed to be "signed … in the presence of a witness who attests the signature". We consider that these provisions require the physical presence of a witness when the document is signed.

4.53 Our conclusion is based on the purposes of witnessing and attestation, particularly the protective purpose, described above. *Brooke's Notary* says, in relation to section 1 of the LPMPA 1989, that "[t]hese stringent requirements make it clear, among other things, that the witness or witnesses must be present in person at the signing of the deed".[69]

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61 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253, reg 9.

62 *Seal v Claridge* (1881) 7 QBD 516, 519 and *Freshfield v Reed* (1842) 9 M&W 404.

63 *Log Book Loans Ltd v Office of Fair Trading* [2011] UKUT 280 (AAC) at [78].

64 In *Re Gibson* [1949] P 434, 437 the court held that a blind person in whose presence a will was signed was not a witness; and quoted *Hudson v Parker* (1844) 1 Rob Ecc 26 which suggested that a person must be "mentally present" and not "asleep, intoxicated or unsound mind". See also *Log Book Loans Ltd v Office of Fair Trading* [2011] UKUT 280 (AAC) at [51].

65 See eg *Northern Bank Limited v Rush and Davidson* [2009] NI Ch 6 at [12]. See also s 15 of the Wills Act 1837 which invalidates gifts made in a will to witnesses and their spouses or civil partners; and Making a Will (2017) Law Com No 231, paras 5.28 to 5.29.

66 *Halsbury's Laws of England*, (2012) vol 32 *Deeds and other Instruments* para 236.

67 *Log Book Loans Ltd v Office of Fair Trading* [2011] UKUT 280 (AAC).

68 HM Land Registry, *Practice Guide 8: Execution of deeds* (13 November 2017), para 2.1.2.

69 N P Ready, *Brooke's Notary* (14th ed 2013), para 11-09. See *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 236. For a consideration of attestation see M Dray, "Deeds speak louder than words. Attesting time for deeds?" [2013] *The Conveyancer and Property Lawyer* 298.

The signature of the witness must also be affixed at the time of execution.[70] This supports the conclusion that a witness must be physically present when the document is signed.

4.54 Older case law also supports this view. For example, in *Freshfield v Reed*, the court explained:[71]

> The term "attest" manifestly implies that a witness shall be present, to testify that the party who is to execute the deed has done the act required by the power; the object of which was, that some person should verify that the deed was signed voluntarily.

4.55 However, much of the relevant case law was decided in the nineteenth century, when presence other than physical presence would not have been within the contemplation of the court or the parties. Furthermore, not all courts have emphasised the importance of physical presence at attestation. We referred above to Lord Justice Pill's statement in *Shah v Shah* that he could "detect no social policy which requires the person attesting the signature to be present when the document is signed".[72]

4.56 Notwithstanding this, we consider that a requirement that a deed must be signed in the presence of a witness requires the physical presence of a witness when the document is signed.[73] In Chapter 8, we discuss whether this requirement should also be capable of being satisfied by "remote" witnessing, such as by video link.[74]

Consultation Question 2.

4.57 Our provisional conclusion 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. Do consultees agree?

DELIVERY

4.58 A validly executed deed must be "delivered". Historically, delivery consisted of the physical act of handing the deed to the other party, or instructing that party to "take up

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70 *Wright v Wakeford* [1803-13] All ER Rep 589, 591 and 128 ER 310, 315. In the Australian case of *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [148] to [169], following an extensive survey of English authorities, the court concluded that attestation must be contemporaneous with execution by the signatory.

71 *Freshfield v Reed* (1842) 9 M&W 404, 405; *Ford v Kettle* (1882) 9 QBD 139, 144 to 145. See also *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 236.

72 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [30]. This statement should be read in the context of the facts of that case, where one party was seeking to avoid its obligations under a deed: see para 4.42 above. In any event, we do not consider that *Shah v Shah* contradicts the principle that the signature must take place in the presence of the witness. The Court of Appeal did not hold that the document in *Shah v Shah* had been validly executed as a deed. Instead, the court held that the defendants were estopped from denying that they were bound by that document and that the LPMPA 1989 did not (on public policy grounds) bar that estoppel from arising.

73 See also Making a Will (2017) Law Commission Consultation Paper No 231, para 6.32.

74 See paras 8.24 to 8.33 below.

the deed". However, over time, the transfer of physical possession has become less important. In 1998 the Law Commission explained:[75]

> [T]he matter is now essentially a question of the intention of the maker of the deed: a deed may be delivered even though the maker retains possession of it, provided it is clear that he intended the deed to become binding on him.

4.59 The purpose of delivery is to signify that the deed maker intends it to become effective and that he or she is bound by it. A deed takes effect from the date of delivery, not from the date of execution.[76]

What may satisfy the requirement of delivery?

4.60 The delivery of deeds is required by both the LPMPA 1989 and the Companies Act 2006. However, "delivery" is not defined in either statute. For corporate bodies, there are statutory presumptions of delivery upon a deed's execution (unless a contrary intention is proved).[77] These are discussed below.

4.61 There are no such statutory presumptions for individuals, though the question of when or whether a deed is delivered has been considered in case law. There does not need to be a physical handing over of the deed to the other party.[78] There must, however, be an act or words showing an intention to be bound.[79] In *Xenos v Wickham*, Blackburn J said that although a party may retain physical possession of a deed, that deed will be delivered "as soon as there are acts or words sufficient to [show] that it is intended by the party to be executed as his deed presently binding on him".[80]

Delivery in escrow and delayed delivery

4.62 Delivery may be effected in different ways.[81] First, a deed may be executed and delivered concurrently as an "unconditional deed". This means that the deed takes immediate effect and is irrevocable.[82]

4.63 However, in the 1998 Report, the Law Commission pointed out that in the majority of transactions deeds will be executed before completion. The maker will not want the deed to take effect immediately, so there must be a means of delaying delivery. One way of achieving this is to deliver a deed into "escrow". This means that the deed is irrevocable, but it will not take effect until the condition or conditions of escrow are

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75 1998 Report, paras 6.1 to 6.2.

76 *Universal Permanent Building Society v Cooke* [1952] Ch 95, 101. See also 1998 Report, para 6.6.

77 Companies Act 2006, s 46(2).

78 1998 Report, paras 6.1 to 6.2.

79 *Chitty on Contracts* (32nd ed 2015) vol 1 para 1-121. *Xenos v Wickham* (1866) LR 2 HL 296 is cited by textbooks as authority for this proposition and it has most recently been cited by the Court of Appeal in *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66 at [35].

80 *Xenos v Wickham* (1866) LR 2 HL 296, 312.

81 *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 195, cited in *Silver Queen Maritime Ltd v Persia Petroleum Services plc* [2010] EWHC 2867 (QB) at [107].

82 See 1998 Report, para 6.5.

fulfilled, such as until transaction monies are received. Once those conditions are fulfilled, the deed becomes effective.

4.64 Another way of achieving delayed delivery is to deliver a deed to an agent to "hold to order". This means that the deed is deposited with an agent "with instructions to deal with it in a certain way in a certain event".[83] Unlike unconditional delivery and delivery into escrow, this form of delayed delivery is revocable. The party can change their mind until delivery occurs.

4.65 We discuss in Chapter 8 the ways in which parties currently satisfy the requirement for delivery using electronic methods.

Presumptions of delivery

4.66 There are certain situations in which delivery of an instrument as a deed is presumed as a matter of law. Most of these presumptions are expressly rebuttable if "a contrary intention is proved".

4.67 For example, under the Companies Act 2006 an instrument is presumed to be delivered in accordance with the LPMPA 1989 when it is executed (that is, signed or sealed in accordance with section 44 of the Companies Act 2006), "unless a contrary intention is proved".[84] Additionally, where a lawyer or their agent or employee purports to deliver an instrument as a deed on behalf of a party, "it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument".[85]

What has the Law Commission previously said about delivery?

4.68 The Law Commission has previously considered whether to retain the concept of delivery in 1987 and again in 1998. We set out our conclusions below.

The 1987 Report

4.69 The Law Commission's 1985 Working Paper on Transfer of Land: Formalities for Deeds and Escrows proposed that the concept of delivery should be abolished. It noted the evidential issues associated with delivery – in particular, the difficulty of proving if, and when, the signatory intended to be bound.[86]

4.70 The 1985 Working Paper suggested that the abolition of delivery would simplify the law without leading to adverse consequences. If delivery was abolished, deeds would "take

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[83] *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 195.

[84] Companies Act 2006, s 46(2). See also Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009 No 1804, reg 4 (in relation to limited liability partnerships), the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009 No 1917, reg 4 (in relation to overseas companies), the Unregistered Companies Regulations 2009, SI 2009 No 2436, reg 3, sch 1, para 3 (unregistered companies), Charities Act 2011, s 260(4) (in relation to charities) and the LPA 1925, s 74A (corporations aggregate).

[85] LPMPA 1981, s 1(5).

[86] 1985 Working Paper, para 8.2(iv).

effect as such as soon as all the other formalities were completed", subject to express conditions in the document.[87]

4.71 However, in the subsequent 1987 Report,[88] having consulted on the proposals contained in the 1985 Working Paper, the Law Commission recommended that the concept of delivery should be retained.

4.72 The 1987 Report noted that the earlier proposals to abolish delivery were "closely linked" with the Law Commission's recommendations for substantial reform of the law of escrows. Given that by 1987 the Law Commission no longer recommended such reform, the abolition of delivery was considered to be inappropriate. The 1987 Report concluded that although the present law of delivery "is not entirely satisfactory, no changes that we have been able to envisage as practicable would improve it sufficiently to warrant recommending them".[89]

The 1998 Report

4.73 The Law Commission dealt with delivery again in a 1998 report on the execution of deeds and documents by or on behalf of bodies corporate.[90] The 1998 Report considered whether the concept of delivery still served a useful purpose. It pointed out the practical difficulties in ascertaining parties' intentions as to delivery [91] and the fact that the concept of delivery was unknown in other jurisdictions and could impede cross-border transactions.[92]

4.74 The consultation paper had proposed an alternative system to replace the concept of delivery.[93] This comprised a statutory presumption that a deed which had been dated would be deemed to have been delivered unconditionally upon the date inserted in the document, unless a contrary intention was proved. This would have replaced the statutory presumptions of delivery upon execution, as set out above.

4.75 Ultimately, the Law Commission decided that the concept of delivery should be retained and the report did not recommend a new statutory presumption.[94] This was for several reasons, including the absence of stakeholder consensus.[95]

4.76 Additionally, the 1998 Report noted that if delivery was to be abolished, it should be abolished in relation to all deeds. The 1998 project, which dealt with the execution of

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87 1985 Working Paper, para 8.2(iv).

88 1987 Report.

89 1987 Report, para 2.10.

90 1998 Report.

91 1998 Report, para 6.16.

92 1998 Report, para 6.17.

93 The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1996) Law Commission Consultation Paper No 143.

94 1998 Report, para 6.18. A large majority of respondents agreed with the view that delivery still serves a useful purpose and should be retained: para 6.20. Respondents who disagreed gave reasons such as that the concept of delivery is unnecessarily complicated, out of date and potentially misleading: para 6.21.

95 1998 Report, para 6.29.

deeds by bodies corporate only, was not the appropriate vehicle for the abolition of delivery for deeds executed by individuals.[96] This is of relevance to this project, which deals only with electronic execution of documents. We discuss this further in Chapter 8, when we consider options for reform.

THE DECISION IN MERCURY

4.77 Witnessing and delivery are formalities required by statute. We now turn to a case which considered some of the practicalities of executing a deed. Although the case dealt with the execution of a deed with a wet ink signature, it is also relevant in relation to the execution of documents with an electronic signature.

4.78 *Mercury*[97] was a 2008 decision of Mr Justice Underhill, as he then was, in the High Court. The case involved a tax avoidance scheme, run by the claimants, which was being investigated by Her Majesty's Revenue & Customs ("HMRC"). Upon application, the Crown Court granted HMRC warrants to enter the claimants' premises and search for documents. The claimants applied for judicial review of that decision.

4.79 The claimants submitted that the material before the court at first instance was not sufficient to justify a reasonable suspicion that serious tax fraud had taken place. Before Mr Justice Underhill, the questions to be answered included whether there were reasonable grounds to suspect that there were serious flaws in the way that the scheme was implemented. In particular, it was alleged that the documents purporting to effect the relevant transactions had not been properly executed.

4.80 Mr Justice Underhill considered several alleged defects in the scheme which HMRC had pointed to as evidence that there were reasonable grounds to suspect that the implementation of the scheme was flawed. For our purposes, the most relevant of these alleged defects related to the signature pages of three deeds[98] which were used to implement the scheme.

4.81 The evidence showed that the claimants' clients signed signature pages on incomplete drafts of these documents, which were then detached and stapled to the final version. The draft documents had several blanks and square brackets, which were completed in the final versions. Some of these were trivial, others were more substantial. In particular, the documents signed by the clients referred to gilt stock maturing in 2003, but the final version of the documents referred to gilt stock maturing in 2004.

4.82 In support of this argument counsel for the claimants argued that it was common practice to alter a contract after signature, as long as there was authority to do so (or the alterations were subsequently ratified).[99] Counsel referred to the Court of Appeal decision in *Koenigsblatt v Sweet*.[100] That case involved an agreement for sale of leasehold properties. Mr Sweet, the seller, signed a contract of sale which included the

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[96] 1998 Report, para 6.22.

[97] *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

[98] These were a trust deed, an option agreement deed and a sale agreement deed.

[99] *Koenigsblatt v Sweet* [1923] 2 Ch 314.

[100] *Koenigsblatt v Sweet* [1923] 2 Ch 314.

names of both Mr and Mrs Koenigsblatt as the buyers. There were other blanks in the document, which Mr Sweet had authorised his agent to complete. The agents for the parties met to exchange counterparts, upon which Mr Sweet's agent realised that the part signed by the buyers only included the name of Mr Koenigsblatt. Mr Sweet's agent altered the document containing Mr Sweet's signature, to remove Mrs Koenigsblatt from the contract, and exchanged documents with Mr Koenigsblatt's agent.

4.83 Mr Sweet's agent subsequently told him of the alteration to the contract. Mr Sweet replied that the deletion of Mrs Koenigsblatt's name was immaterial and instructed his solicitors to go ahead with the sale. Later, he argued that his agent had no authority to make a contract with only Mr Koenigsblatt and that therefore there was no agreement or memorandum evidenced in writing as then required by section 4 of the Statute of Frauds 1677. The Court of Appeal held unanimously that Mr Sweet had ratified his signature to the document and that the requirement of section 4 was satisfied.[101]

4.84 In *Mercury*, counsel for the claimants argued that *Koenigsblatt v Sweet* applied. He pointed to letters from the claimants to their clients which had referred to 2004 stock and said that the clients should be taken to have authorised this alteration in the final documents.

4.85 Mr Justice Underhill was not satisfied that the evidence established that the claimants' clients had authorised or ratified all of the changes subsequently made to the documents. Although the correspondence referred to 2004 stock there was nothing that drew the clients' attention to the fact that it was a change or would require alterations to the documents that they had already signed. He also drew a distinction between *Koenigsblatt v Sweet* and the facts before him:[102]

> [I]n Koenigsblatt v Sweet the document which was altered after signature was the same document as that which the party had originally signed. I have been referred to no authority which deals with the situation in the present case – that is, the taking of a signature page from one document and its recycling for use in another. Mr Mitchell submits that there is no essential difference between the two situations. It should, he said, make no difference whether the (ex hypothesi, authorised) alterations are made to the selfsame document or whether, as is increasingly easy with modern technology, they are incorporated in a tidier form in a reconstituted document and the signature page from the earlier version is reattached. I do not agree. The parties in the present case must be taken to have regarded signature as an essential element in the effectiveness of the documents: that is to be inferred from their form. In such a case I believe that the common understanding is that the document to be signed exists as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing. The significance of this is not entirely talismanic (though it would not affect my view even if it were): the requirement that a party sign an actual

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101 *Koenigsblatt v Sweet* [1923] 2 Ch 314, 330, 325 to 326, 332. This decision has most recently been followed in *Simpole v Chee* [2013] EWHC 4444 (Ch) (in the context of s 2 of the LPMPA 1989) and *Smith-Evans v Smailes* [2013] EWHC 3199 (Ch), [2014] 1 WLR 1548 at [18].

102 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743 at [39] to [40].

existing authoritative version of the contractual document gives some, albeit not total, protection against fraud or mistake.

Further, even if I were wrong about the legitimacy of transferring signature pages in general, there is the additional factor that each of the three key documents in the present case was intended to be a deed. Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 reads as follows:

> "An instrument is validly executed as a deed by an individual if, and only if – (a) it is signed –
>
> > (i) by him in the presence of a witness who attests the signature; or
> >
> > (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and
>
> (b) it is delivered as a deed by him or a person authorised to do so on his behalf."

Mr Bird submitted, and I agree, that that language necessarily involves that the signature and attestation must form part of the same physical document (the "it") referred to at (a) which constitutes the deed.

4.86 In summary, Mr Justice Underhill said that, apart from the question of authority/ratification, a document (including a deed) must be executed as a discrete physical entity at the moment of signing in order to be effective. Mr Justice Underhill's comments were obiter (that is, not part of the binding decision). We note that *Koenigsblatt v Sweet* did not limit the methods of making amendments which could be authorised or ratified by the parties (although it did not consider the situation where signature pages were removed and attached to an amended contract).

4.87 These comments raised concerns among lawyers about the use of pre-signed signature pages and signings or closings where signature pages are sent by email or by fax. The decision in *Mercury* led to the publication of a note by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees.[103] This note provided a non-exhaustive range of options available to parties when executing documents at signings at which not all the signatories were physically present to ensure that such documents comply with the decision in *Mercury*. Although the note was aimed at the execution of documents in wet ink (which were then scanned), it is also relevant in relation to the execution of documents with an electronic signature. We discuss this further in Chapter 8, focusing on execution using electronic signatures.

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[103] The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf (last visited 10 August 2018).

Chapter 5: Comparative research

5.1 As advanced economies become increasingly digital, they are faced with similar questions of law and policy regarding electronic signatures and electronic execution. Therefore, in reviewing whether reform is necessary in England and Wales, it is instructive to examine the policy choices made in this area in other legal systems.

5.2 The jurisdictions considered below are New York, New South Wales (Australia), Scotland, Hong Kong, Singapore and Estonia. We have focused on these legal systems for several reasons. First, each of them has introduced legislation which deals specifically with electronic signatures and electronic execution. Secondly, with the exception of Estonia, they represent common law jurisdictions, with principles of property and commercial law similar to our own. Thirdly, while there are similarities between some of the statutory schemes described below, there are also important differences. Together, they therefore comprise a useful sample of potential approaches to facilitating the use of electronic documents in transactions.

5.3 In this chapter, we compare and contrast the way in which each jurisdiction has approached five key issues, namely:

(1) whether legislation includes an express statement confirming the validity of electronic signatures, and if so, how it is framed;

(2) the degree to which legislation tends to be technology neutral, and whether specific types of electronic signature are afforded greater legal effect or evidential weight;

(3) whether the legislation requires the consent of the recipient of the electronic communication as a condition for the validity of an electronic signature;

(4) whether the concept of a "deed" is recognised, and if so, the extent to which legislation provides specifically for electronic execution; and

(5) how statutory requirements for witnessing have been translated into an electronic context.

5.4 In this chapter we deal with the main themes which arise from our examination of other jurisdictions, describing the trends and points of contrast among the relevant statutes. In Appendix 2, we set out in detail the legislative schemes which apply in each jurisdiction.[1] The issues discussed in this chapter become particularly relevant when, in Chapters 7 and 8, we consider the options for reform of the law of electronic execution in England and Wales.

[1] Appendix 2 is intended as a supplement to this chapter: it is not necessary to read it in order to understand the discussion in Chapter 5. However, Appendix 2 may be of interest to readers who want additional information as to the legislative choices made in other jurisdictions.

THEMES EMERGING FROM ANALYSIS

Statements of validity

5.5 Each of the six jurisdictions examined contains a legislative provision affirming the validity or legal effect of electronic signatures. This is in contrast to the Electronic Communications Act 2000 which refers to the admissibility, but not the validity, of electronic signatures.

5.6 There are variations in the way in which these legislative provisions are framed. Some jurisdictions provide that an electronic signature will satisfy a rule of law which requires signing, so long as various conditions are met. Provisions of this type are based on the UNCITRAL Model Law on Electronic Commerce ("UNCITRAL Model Law"),[2] article 7 of which reads:

> (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
>
> > (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
> >
> > (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

5.7 Although article 7 provides a positive statement of validity, it is subject to the conditions in sub-paragraphs (a) and (b), including as to reliability of the method of signature.[3] Variants of this clause have been adopted in New South Wales,[4] Hong Kong[5] and Singapore.[6] UNCITRAL has stated that article 7 is intended to ensure that —

> a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents.[7]

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[2] UNCITRAL Model Law on Electronic Commerce 1996, art 7, http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf (last visited 10 August 2018) ("UNCITRAL Model Law").

[3] Article 25(2) of eIDAS states that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature (see paras 3.34 to 3.37 above). This does not leave it open for domestic laws to impose additional requirements for reliability or security. However, an electronic signature must meet stringent requirements in eIDAS in order to be a qualified electronic signature: see para 2.33 above.

[4] Electronic Transactions Act 2000 (NSW), s 9(1). We discuss this provision in Appendix 2 from para 2.21.

[5] Electronic Transactions Ordinance (Cap 553), s 6(1)(c).

[6] Electronic Transactions Act 2010, s 8. This provision is discussed in Appendix 2 at para 2.60.

[7] UNCITRAL, Model Law on Electronic Commerce with Guide to Enactment 1996, para 56. The UNICTRAL Model Law also contains a backstop provision in art 5 which, while not referring to electronic signatures specifically, states that "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message". A "data message" is defined in art 2(a) as "information generated, sent, received or stored by electronic, optical or similar means".

5.8 A second means of affirming the validity of electronic signatures adopts the phraseology of article 25(1) of eIDAS.[8] Provisions falling into this category do not positively confirm that an electronic signature will satisfy statutory signing requirements. Rather, they provide that "an electronic signature shall not be denied legal effect … solely on the grounds that it is in an electronic form".[9] This leaves it open for additional laws to impose security or reliability standards as conditions of validity.

5.9 Of the jurisdictions examined, the United States contains a provision of this type. The federal Electronic Signatures in Global and National Commerce Act ("ESIGN Act"),[10] which applies in New York to transactions affecting interstate or foreign commerce,[11] provides that:

> a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form…[12]

5.10 By virtue of the direct application of EU regulations, this type of provision is also in force in Estonia and the UK. Estonia has opted to rely on the bare application of article 25(1) of eIDAS.[13] Subsection 1(1) of the Electronic Identification and Trust Services for Electronic Transactions Act 2016[14] provides that the Act only applies to electronic transactions "to the extent that these are not regulated by [eIDAS]".

5.11 The Uniform Electronic Transactions Act ("UETA") – a model law adopted by the majority of US states, though not New York – contains both types of validity provision. Section 7(a) provides that a signature "may not be denied legal effect" solely because it is electronic form. Section 7(d) confirms that a law requiring a document to be signed may be satisfied using an electronic signature. This latter provision is described in the official commentary to UETA as a "particularised application" of the "shall not be denied" formulation.[15]

5.12 A third type of validity provision is contained in section 304 of New York's Electronic Signatures and Records Act ("ESRA").[16] This section provides that:

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8 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, art 25(1) ("eIDAS").

9 eIDAS, art 25(1).

10 15 USC §7001.

11 Electronic Signatures in Global and National Commerce Act, 15 USC §7001(a)(1).

12 Electronic Signatures in Global and National Commerce Act, 15 USC §7001(a)(1).

13 eIDAS, art 25(1).

14 https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/527102016001/consolide (last visited 10 August 2018).

15 National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (1999) with Prefatory Note and Comments, p 27, http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf (last visited 10 August 2018).

16 The Electronic Signatures and Records Act is contained in the New York State Technology Law, art III. It is available at https://its.ny.gov/nys-technology-law#ArticleIII (last visited 10 August 2018).

an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.[17]

5.13 This provision affords electronic signatures the equivalent legal effect to handwritten signatures; a status which eIDAS only extends to qualified electronic signatures.[18]

5.14 Finally, Scotland has adopted its own form of validity provision. In that jurisdiction, certain electronic documents are not valid in respect of the formalities of execution unless they contain the signatory's advanced electronic signature.[19] For all other documents, there is no requirement of writing or signing, so the question of the validity of an electronic signature does not arise.[20]

Technological neutrality

5.15 A second point of contrast among the jurisdictions considered is the extent to which they impose technical standards on electronic signatures.

5.16 New York imposes no such requirements. The general position is that an electronic signature must simply be "attached to or logically associated with an electronic record" and adopted with the "intent to sign the record".[21] An electronic signature which meets this definition will be afforded "the same validity and effect" as one that is handwritten, notwithstanding the method used to apply it.[22] The ESIGN Act and UETA contain similarly broad definitions of electronic signature. Consequently, no particular form of technology is required in order to enjoy the benefit of these statutes' validity provisions.[23]

5.17 In New York, technical specifications do, however, attach to electronic instruments affecting real property, in order for such instruments to be accepted by recording officers for registration.[24] These standards are not onerous. For example, instruments must be submitted to the recording officer in a "freely available, readable and searchable format",

17 Electronic Signatures and Records Act, §304. Legislation does not mandate that a specific technology must be used: see §303 and New York Codes, Rules and Regulations, part 540.

18 eIDAS, art 25(2).

19 Requirements of Writing (Scotland) Act 1995, s 9B(2)(c) and Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 2. An "advanced electronic signature" is defined in accordance with art 3(11) of eIDAS: reg 1(2).

20 Subsection 1(1) of the Requirements of Writing (Scotland) Act 1995 provides that "Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust".

21 Electronic Signatures and Records Act, §302.

22 Electronic Signatures and Records Act, §304.

23 Uniform Electronic Transactions Act, §2(8); Electronic Signatures in Global and National Commerce Act, 15 USC §7006(5).

24 New York Codes, Rules and Regulations, "Electronic recording of instruments affecting real property", §540.7.

such as a PDF or TIFF File, which ensures that the instrument can be retrieved in a fashion “that prevents content modification or destruction”.[25]

5.18 Jurisdictions with legislation based on the UNCITRAL Model Law are less accommodating when it comes to technical specifications for electronic signatures. New South Wales, Hong Kong and Singapore all require an electronic signature to be “as reliable as appropriate” given the purpose of the communication.[26] Again, this standard is not an exacting one. As long as the requisite level of reliability is attained, no specific technology is prescribed.[27] The standard is adjusted according to the importance of the communication, presumably recognising that for most day-to-day transactions a high level of security may be considered unnecessary.

5.19 Courts in New South Wales have observed that the provision is pitched at a “high level of generality”,[28] and rejected the notion that the recipient has to form an opinion as to the method’s appropriateness.[29] The Law Society of Singapore has described the standard as a flexible test that caters for different levels of reliability.[30]

5.20 However, Hong Kong differs from New South Wales and Singapore in an important respect. For transactions involving government, digital signatures with a certificate are required.[31] The requirement for digital signatures in government transactions was intended to provide “greater certainty and clarity” to members of the public as to the form of electronic signature to use when transacting with the government. It was also

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25 New York Codes, Rules and Regulations, “Electronic recording of instruments affecting real property”, §540.7(c). The technical standards which apply to the officer’s “electronic recording” of those instruments (rather than the instruments themselves) are more specific: see §540.7(a).

26 UNCITRAL Model Law, art 7; Electronic Transactions Act 2000 (NSW), s 9(1)(b)(i); Electronic Transactions Ordinance (Cap 553), s 6(1)(d) (Hong Kong); Electronic Transactions Act 2010, s 8 (Singapore).

27 In 2001 UNCITRAL adopted a second model law which included criteria by which a signatory could be confident that their method of signing would meet the “as reliable as was appropriate” standard. These criteria largely mirror the requirements for an advanced electronic signature under eIDAS. The 2001 Model Law has not been as widely implemented as its predecessor, with 33 as opposed to 150 jurisdictions having adopted it at the time of writing. See UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, paras 118 to 119 and art 6(3), http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf (last visited 10 August 2018); UNCITRAL, “Status: UNCITRAL Model Law on Electronic Commerce (1996)”, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last visited 10 August 2018); UNCITRAL, “Status: UNCITRAL Model Law on Electronic Signatures (2001)”, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html (last visited 10 August 2018).

28 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 at [14].

29 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869.

30 The Law Society of Singapore, “Update of the Electronic Transactions Act” *Law Gazette* (July 2010), http://v1.lawgazette.com.sg/2010-07/feature3.htm (last visited 10 August 2018).

31 Electronic Transactions Ordinance (Cap 553), s 6(1A). The Postmaster General in Hong Kong is a designated certification authority capable of issuing such certificates: Electronic Transactions Ordinance (Cap 553), s 34. Other bodies may apply to the Government Chief Information Officer to become a recognised certification authority: Electronic Transactions Ordinance (Cap 553), s 20.

thought to be more cost effective for government departments to process only one type of electronic signature.[32]

5.21 Although Singapore adopts the "as reliable as appropriate" standard, it departs from the UNCITRAL Model Law by differentiating between the evidential weight of digital and non-digital electronic signatures. It does not, as Hong Kong does, require digital signatures in transactions involving government. Rather, the Electronic Transactions Act 2010 provides that certified digital signatures attract certain presumptions relating to the authenticity of, and the signatory's intention to approve, the document.[33]

5.22 At the more prescriptive end of the spectrum is Scotland, which requires advanced electronic signatures.[34] Moreover, for documents to be accepted in certain registries, qualified electronic signatures are required.[35] On the other hand, pursuant to section 1(2) of the Requirements of Writing (Scotland) Act 1995, documents falling outside the scope of the legislation do not attract writing requirements, so any form of electronic signature is sufficient.

5.23 Estonia has adopted a different approach. It has introduced comprehensive infrastructure to facilitate the use of certified digital signatures by citizens. Estonians are issued with ID-cards[36] with which to create digital signatures. Digital signatures created with ID-cards are certified so as to link them to the signatory's "digital identity".[37] Details of this scheme can be found in Appendix 2.

Consent

5.24 The third issue which we examine is whether the recipient's consent to an electronic signature is generally required for an electronically signed document to be valid. Of the jurisdictions examined, two require the consent of the recipient as a condition of validity. The New South Wales legislation provides that, for an electronic signature to meet statutory signing requirements, "the person to whom the signature is required to be given [must consent] to that requirement being met [electronically]".[38] Hong Kong's Electronic Transactions Ordinance contains a similar requirement.[39] In both cases, the

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32 Hong Kong Legislative Council, *Report on the Bills Committee on Electronic Transactions (Amendment) Bill 2003*, LC Paper No CB(1)2150/03-04, para 8, http://www.legco.gov.hk/yr02-03/english/bc/bc16/reports/bc160623cb1-rpt-e.pdf (last visited 10 August 2018).

33 Certified digital signatures are referred to as "secure electronic signatures" in the legislation: Electronic Transactions Act 2010, ss 18 and 19; Sch 3.

34 Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 3.

35 Requirements of Writing (Scotland) Act 1995, s 9G(1); Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 6.

36 Aside from ID-cards, Estonians can use Mobile-IDs or Smart-IDs to create digital signatures. See E-Estonia, "e-identity", https://e-estonia.com/solutions/e-identity/ (last visited 10 August 2018).

37 See ID, "Electronic signatures" (2018), https://www.id.ee/?lang=en&id=31008 (last visited 10 August 2018).

38 Electronic Transactions Act 2000 (NSW), s 9(1)(c).

39 Electronic Transactions Ordinance (Cap 553), s 6(1)(e).

consent condition was included in recognition of the fact that individuals who are unwilling or unable to accept electronic execution should not be forced to do so.[40]

5.25 By contrast, New York, Scotland and Singapore do not make validity contingent on the consent of the recipient.[41] The divergence between New South Wales and Hong Kong on the one hand, and Singapore on the other, is particularly notable, given that these three jurisdictions have based their legislation on the UNCITRAL Model Law.[42] The UNCITRAL provision does not include a consent requirement, so New South Wales and Hong Kong have chosen to depart from UNCITRAL on this issue. In England and Wales, there have been orders made under section 8 of the Electronic Communications Act 2000 which require the recipient's consent to the electronic service of notices, rather than to the use of electronic signatures.[43]

Recognition of deeds executed electronically

5.26 Only some of the jurisdictions we considered use deeds, as that concept is understood in English law. New South Wales requires deeds in various circumstances including conveyances of real property,[44] with formalities which generally mirror those under the Law of Property (Miscellaneous Provisions) Act 1989.[45] Singapore also recognises deeds, and has formality requirements which reflect the English position.[46] Deeds are used in Hong Kong,[47] though there is no requirement that they be witnessed.[48] New York also recognises deeds for the purposes of conveyances which affect real property.[49] However, the formal requirements for deeds in New York, such as "proving" or "acknowledgement", differ from English law.[50] Deeds are not used in Estonia or Scotland.

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40 See Hong Kong Legislative Council, *Report on the Bills Committee on Electronic Transactions (Amendment) Bill 2003*, LC Paper No CB(1)2150/03-04, para 9, http://www.legco.gov.hk/yr02-03/english/bc/bc16/reports/bc160623cb1-rpt-e.pdf (last visited 10 August 2018). As to New South Wales, see the explanatory memorandum to the corresponding federal statutory provision: "This provision is based on the Government's general policy that a person should not be compelled to use an electronic communication". Electronic Transactions Act 1999 (Cth), Revised Explanatory Memorandum, https://www.legislation.gov.au/Details/C2004B00505/Revised%20Explanatory%20Memorandum/Text (last visited 10 August 2018).

41 New York's Electronic Signatures and Records Act, §304, simply states that "an electronic signature may be used by a person in lieu of a signature affixed by hand". Scotland's Requirements of Writing (Scotland) Act 1995, s 9B provides for the requirements of valid electronic signatures, and does not refer to the recipient's consent. See also Singapore's Electronic Transactions Act 2010, s 8.

42 UNCITRAL Model Law, art 7.

43 See, eg, Local Government (Electronic Communications) (England) Order 2015, SI 2015 No 5.

44 Conveyancing Act 1919 (NSW), s 23B.

45 Conveyancing Act 1919 (NSW), s 38.

46 See eg the Registration of Deeds Act 1988 and *Kuek Siew Chew v Kuek Siang Wei* [2014] SGHC 237 at [31].

47 *Halsbury's Laws of Hong Kong* (2016) vol 115 *Contract* para 115.016.

48 Conveyancing and Property Ordinance (Cap 219), s 19.

49 Real Property Law, §§258 and 291.

50 For an explanation of the formality requirements attaching to deeds in New York, see Appendix 2 and Real Property Law, §291.

5.27 The next question is the extent to which electronic execution of deeds is dealt with in legislation. New South Wales does not recognise electronically executed deeds. While the Electronic Transactions Act 2000 (NSW) stipulates that electronic signatures will be taken to satisfy signing requirements so long as standards of reliability are met,[51] this provision does not apply to signatures affixed by witnesses.[52] Hong Kong's Electronic Transactions Ordinance contains a carve-out for deeds affecting land.[53] Therefore, even though such deeds in Hong Kong do not need to be witnessed, they cannot be executed electronically. Singapore's legislation expressly excludes matters for which deeds are generally required, such as powers of attorney, wills and contracts for the sale or disposition of land.[54] It is therefore unlikely that Singapore allows for electronically executed deeds.

5.28 By contrast, section 291-i of New York's Real Property Law deals specifically with electronically signed deeds affecting real property. Although, there is no requirement that electronic signatures affixed to deeds must meet higher standards of security than for other documents, electronic deeds attract an additional layer of protection. "Recording officers" in New York can only accept electronic records from parties whose identities have already been electronically verified and authenticated.[55]

5.29 Although the term "deed" does not have a technical meaning in Scots law,[56] as described above, several types of document require higher levels of formality and can only be executed electronically with advanced electronic signatures.[57] These include transactions involving real rights in land, a gratuitous unilateral obligation undertaken outside the course of business and certain trusts.[58] Further, for certain documents to be accepted by registries such as the Land Register of Scotland, an electronic signature supported by a qualified certificate is required.[59]

Witnessing requirements

5.30 Among the jurisdictions which do recognise electronic deeds, the approach to witnessing is instructive. In New York, section 291-i of the Real Property Law specifically provides for witnessing. It states that witnessing requirements are satisfied where a digitised image of the witness's signature appears on the digitised (or scanned)

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51 Electronic Transactions Act 2000 (NSW), s 9.

52 Electronic Transactions Regulations 2017 (NSW), regs 5(f) and 6(f).

53 Electronic Transactions Ordinance (Cap 553), sch 1, para 6.

54 Electronic Transactions Act 2010, s 4 and sch 1.

55 New York Codes, Rules and Regulations, "Electronic recording of instruments affecting real property", §540.7(g).

56 W Green, *The Law of Contract in Scotland* (3rd ed 2007) para 4-01. Section 113 of the Land Registration etc (Scotland) Act 2012 simply defines a deed as "a document (and includes a decree which is registrable under an enactment)".

57 Requirements of Writing (Scotland) Act 1995, s 9B(2)(c) and Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 2.

58 Requirements of Writing (Scotland) Act 1995, s 1(2).

59 Requirements of Writing (Scotland) Act 1995, s 9G(1) and Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 3.

document, or when their electronic signature is added to the document. Thus, the concept of witnessing is not eliminated in an electronic context; and no provision is made for the way the document has to be witnessed, but only in relation to the way in which it is recorded. If a person affixed their electronic signature to a document without having seen the signatory execute it, this would appear to satisfy witnessing requirements under section 291-i.

5.31 In Scotland, there are no witnessing requirements for documents which are required to be in writing pursuant to section 1(2) of the Requirements of Writing (Scotland) Act 1995. For electronic documents to enjoy a presumption of authentication (a requirement for acceptance in certain registries), an electronic signature certified by a qualified certificate is required.[60] By contrast, traditional paper documents must be witnessed or endorsed by a court in order to enjoy such a presumption.[61] The absence of mandatory attestation in this context suggests that Scotland has opted to require higher technological standards in place of witnessing.

CONCLUSION

5.32 In this chapter we have reviewed a wide range of legislation in other jurisdictions dealing with the electronic execution of documents. The approach taken by these jurisdictions on issues such as legislative statements of validity of electronic signatures have provided us with useful points of comparison when developing our options for reform in Chapters 7 and 8.

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60 Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 3.

61 Requirements of Writing (Scotland) Act 1995, ss 3, 4 and 6.

Chapter 6: The case for reform, the potential impact of reform and other considerations

6.1 Having discussed the current law around electronic signatures and deeds, we turn now to consider the case for reform. We then introduce the potential impact of reform, and outline other issues which we have considered when developing our provisional proposals for reform set out in the next chapters.

THE CASE FOR REFORM

6.2 In Chapter 1, we said that although most transactions are not required to be executed in a particular way, some are. Certain transactions are required by law to be in writing and "signed" or executed as a deed. The purpose of this project is to ensure that the law governing those transactions is sufficiently certain and flexible to enable England and Wales to remain competitive in a global, digital, environment.

6.3 We have asked stakeholders whether they use electronic signatures regularly to execute legal documents. There has been a wide divergence in their responses. We have heard from some stakeholders that they and their clients use electronic signatures confidently for all transactions. Some stakeholders use electronic signatures only for low-value, low-risk, transactions but hesitate to use them for more complex or high-value transactions. Others refuse to use electronic signatures at all and instead execute all their documents with handwritten signatures.

6.4 There is particular uncertainty where transactions are executed by deed. The effect of the requirement that the deed must be signed "in the presence of a witness and attested" is that even when electronic signatures are used, stakeholders generally ensure that the signatory and the attesting witness are physically in the same room.

6.5 Stakeholders have told us that a lack of clarity in the law is discouraging some parties from using electronic signatures. For example, we have been told that, with regard to large financing agreements, lenders require a legal opinion confirming that documents in the transaction have been validly executed. Where there is a statutory requirement that a document must be signed, a number of law firms do not feel comfortable issuing an unqualified opinion to lenders to that effect, if an electronic signature has been used.

6.6 Further, the lack of clarity may disproportionately affect small businesses and start-ups, which do not have access to legal expertise in the same way as large commercial businesses.

6.7 For these reasons, there is a case for looking at whether legal reform is required, or would be beneficial. Some stakeholders have told us that they would like a clear legislative statement to avoid any doubt in relation to the validity of electronic execution.

6.8 Of course, there are also non-legal factors which may influence a party's decision to execute a document electronically or traditionally. We have discussed these factors in Chapter 2. They include the security and reliability of electronic signatures and questions of trust and identity. We have been told that logistical questions, such as to

the interoperability of electronic signature systems and the archiving of information, may also play a part.

THE POTENTIAL IMPACT OF REFORM

6.9 A move to increase the number of electronic transactions has the potential to produce significant benefits for business and individuals. Transaction costs associated with paper-based transactions absorb resources which could usefully be directed to other more productive activities. In Chapter 8 we set out a summary of what we expect to be the costs and benefits of our proposals, along with questions on the impact of reform.

OTHER CONSIDERATIONS IN DEVELOPING OPTIONS FOR REFORM

6.10 The road to certainty in relation to the execution of documents is not straight. In developing our potential options for reform, we have become aware of certain issues which should be considered when developing any proposals for reform, particularly those involving legislation.

6.11 These include the difficulty of legislating for technology and the cross-border dimension. There are also the Law Commission's previous conclusions that legislation was not necessary, although we are by no means bound by these conclusions. There are also special policy issues which should be considered in relation to the use of electronic signatures by individuals, especially consumers, who may not understand that they are entering into a binding contract. There may be particular risks in relation to vulnerable people or those who may not be confident using technology to enter into transactions.

Legislating for technology

6.12 Throughout our research and initial discussions with stakeholders on this project, we have been made aware of the challenges of proposing legislation to cater for technology. Although we would like to make it easier for parties to execute documents electronically, it is important that we do not propose legislation as a knee-jerk reaction, in circumstances where the current law is already sufficiently flexible to allow for such technological developments. Furthermore, in general, legislation should be made when it is necessary, and not merely "for the avoidance of doubt".[1]

6.13 Professor Chris Reed has pointed out that there is a trend for legislation, particularly in relation to technology, to become increasingly detailed.[2] Graham Smith has warned against legislation being so prescriptive that particular technologies or types of electronic information are implicitly favoured or unnecessarily excluded.[3]

6.14 It may be tempting to propose reform which prescribes the use of technology or provides in detail the way in which an action (such as signing electronically) may be achieved.

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1 See D Greenberg (ed), *Craies on Legislation* (9th ed 2008) para 1.8.2.

2 C Reed, "How to make bad law: lessons from the computing and communications sector" (2010) *Queen Mary University of London, School of Law Legal Studies Research Paper No 40/2010*, 2, http://ssrn.com/abstract=1538527 (last visited 14 August 2018).

3 See G Smith, "Legislating for electronic transactions" (2002) *Computer and Telecommunications Law Review* 58, 59.

However, there are risks associated with such an approach.[4] For example, we want to avoid creating the potential for unnecessary disputes over compliance with new requirements. Moreover, we do not wish to set overly stringent standards for electronic execution without justification, where the same standards are not applied to traditional execution.

6.15 Therefore, when formulating our options for reform, we have tried as far as possible to take a facilitative approach. We acknowledge that there may be several reasons why parties choose not to execute a document electronically. However, we want to ensure that, to the extent that the current law allows for electronic execution, parties are not hindered by concerns about legal uncertainty. Furthermore, we want to identify any situations where the law is acting as an unjustifiable obstacle to the use of electronic means to execute documents where reform could be beneficial.

Considering the cross-border dimension

6.16 Stakeholders such as The Company Law Committee of the Law Society and The Notaries Society have brought cross-border issues to our attention. In the context of the execution of documents which may need to be enforced internationally, it is clearly not appropriate to consider the domestic landscape in isolation.

6.17 With international transactions, parties will want to ensure that their documents are executed in such a way as to enable their recognition, registration or enforcement in other jurisdictions. These issues will also arise when a document executed in this country needs to be notarised and used in another jurisdiction outside a transactional context.[5]

6.18 The general position is that parties to a document are free to execute it in accordance with the formal requirements of the law of the place of execution.[6] However, the formal requirements of the place of enforcement remain relevant.[7] In particular, there are certain differences between a deed in this jurisdiction, and documents which are issued in "Authentic" or "Public" form in civil law jurisdictions.[8] We have been told by The Notaries Society that to bridge those differences, it is important to observe the greatest degree of formality when executing documents which may require cross-border enforcement. Therefore, we have been conscious that we should be careful not to change the formality requirements here in such a way as to risk the recognition and enforceability of the documents in other jurisdictions.

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4 See G Smith "Legislating for electronic transactions" (2002) *Computer and Telecommunications Law Review* 58 and C Reed "How to make bad law: lessons from the computing and communications sector" (2010) *Queen Mary University of London, School of Law Legal Studies Research Paper No 40/2010*.

5 For example, where an individual sells goods or property in this jurisdiction and needs to provide evidence in another jurisdiction of that disposal having taken place.

6 N P Ready, *Brooke's Notary* (14th ed 2013), paras 8-51, 11-04, 11-31.

7 N P Ready, *Brooke's Notary* (14th ed 2013), para 11-04 and Request for a preliminary ruling from the Oberster Gerichtshof (Austria), Case C342/15 *Leopoldine Gertraud Piringer* [2017] 3 CMLR 587.

8 N P Ready *Brooke's Notary* (14th ed 2013), para 11-04.

> **Consultation Question 3.**
>
> 6.19 We welcome consultees' views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.

Consumers and vulnerable parties

6.20 This project covers the execution of a wide range of documents, from a contract for the sale of land between individuals to multi-million-pound transactions between commercial parties. As set out in Chapter 1, it also covers the execution of trust deeds, documents signed by consumers and lasting powers of attorney.

Concerns about consumer agreements and trust deeds

6.21 Some stakeholders have raised concerns about the inclusion of consumer agreements within our project. For example, it has been suggested that consumers are more likely to enter into agreements in haste or error if they use electronic signatures. It was suggested that clicking a button or ticking a box does not have the same cautionary effect as a handwritten signature. Consumers may be more likely to sign electronically without having read and understood the document or the commitment they may be taking on.[9]

6.22 There are also concerns that consumers may be tricked into authorising payments to fraudsters using their electronic signatures (commonly called "authorised push payment scams"). UK Finance estimates that in 2017 there were 43,875 cases of authorised push payment scams with total losses of £236 million.[10]

6.23 There are similar concerns in relation to trusts. Although trusts may be created in different ways (for example, by statute or operation of law), this project relates only to "express trusts". An express trust is created intentionally by a person who wishes to put property into a trust for identified beneficiaries or charitable purposes.[11]

6.24 The formalities required for the creation of a trust will depend on the subject matter of the trust. For example, trusts involving land must be evidenced in writing[12] and trusts which grant a power of attorney must be made by deed.[13] Although there is no general

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9 See Financial Conduct Authority, *Review of retained provisions of the Consumer Credit Act: Interim report* (August 2018) Discussion Paper DP18/7, Annex 6, para 156.

10 UK Finance, *2017 Annual Fraud Update: Payment cards, remote banking, cheque and authorised push payment scams* (March 2018), pp 3, 13 and 14 https://www.ukfinance.org.uk/wp-content/uploads/2018/03/UKFinance_2017-annual-fraud-update-FINAL.pdf (last visited 10 August 2018). This total figure comprises 38,596 cases relating to personal accounts (£107.5 million) and 5,279 cases relating to business or non-personal accounts (£128.6 million).

11 G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010) para 1.18.

12 Law of Property Act 1925, s 53(1)(b); G Thomas and A Hudson, *The Law of Trusts* (2nd ed 2010) paras 5.09 to 5.10; 5.30 to 5.42.

13 Powers of Attorney Act 1971, s 1.

requirement that a trust must comply with formalities, in practice, trusts are usually created by deed.

6.25 Trusts are widely used for a variety of purposes in both the commercial and the private spheres. For example, in commercial financing transactions a "security trustee" may hold property provided by a borrower as security collateral on behalf of a group of banks making a loan. Similarly, a trustee may act on behalf of a group of bondholders to represent their interests in relation to complex issuances of bonds.

6.26 Trusts are also used by individuals for estate planning purposes. For example, an individual may, while he or she is still alive, transfer assets to be held on trust for their beneficiaries. Stakeholders have noted that the individual creating such a trust may be at risk of duress or undue influence.

Our views on the inclusion of consumer agreements and trust deeds

6.27 There are arguments both for and against the inclusion of documents executed by consumers and individuals within the scope of our review.

6.28 On the one hand, the principal reason for excluding these types of documents is that consumers and vulnerable individuals need extra protection from risks of fraud, undue influence and duress. This consideration must be given significant weight.

6.29 On the other hand, this project deals with general formalities of documents executed electronically, namely signing, witnessing and attestation and delivery. As set out above, a deed may be executed in a commercial context or by a consumer or individual, and the same general rules apply. It would not be desirable to carve out exceptions in the general legislative provision for documents executed by consumers or individuals.

6.30 Where individuals may be particularly vulnerable, specific statutes already provide additional layers of formality. For example, there are special requirements that apply to agreements which are regulated under the Consumer Credit Act 1974. These prescribe the form and content of the agreement, and that it must be signed by the debtor or hirer (and by or on behalf of the creditor or owner) in the manner prescribed in regulations.[14] Regulations also prescribe that the consumer's signature must be in a space indicated in the document for that purpose and dated.[15]

6.31 Our project does not remove or otherwise affect these protections. If there are special considerations in relation to unilateral documents such as trust deeds, it is for specific legislation to deal with those considerations. In relation to authorised push payment scams, we note that the Payment Systems Regulator is working with industry bodies to

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14 Consumer Credit (Agreements) Regulations 1983, SI 1983 No 1553 and Consumer Credit (Agreements) Regulations 2010, SI 2010 No 1014. The FCA has recently published an Interim Report into the Consumer Credit Act 1974 in which it notes that stakeholders have asked for greater clarity in relation to the use of electronic signatures. See Financial Conduct Authority, *Review of retained provisions of the Consumer Credit Act: Interim report* (August 2018) Discussion Paper DP18/7, Annex 6, paras 154 to 158.

15 Consumer Credit (Agreements) Regulations 2010, SI 2010 No 1014, reg 4(3)(a).

develop and implement measures to prevent such frauds, alleviate the problems they cause and return money to victims.[16]

Concerns about lasting powers of attorney

6.32 In Chapter 4, we explained that a lasting power of attorney is used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs, in circumstances where the donor has lost the capacity to do so. It is therefore a very important document, which can have a significant impact on the life and finances of an individual.

6.33 This is reflected in the statutory formalities for a valid lasting power of attorney, which go beyond what is needed for a standard deed. In Chapter 4, we set out both the general requirements for a deed and the additional requirements for lasting powers of attorney.[17] In summary, a lasting power of attorney must be executed as a deed under section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") (that is, signed, witnessed, delivered). A lasting power of attorney must also meet stringent requirements in the Mental Capacity Act 2005 and regulations made under that Act. It must be executed in a prescribed form. It must include a statement by the donor that they have read the prescribed information. It must also be accompanied by a certificate by a third party confirming that the donor understands the purpose of the document and that the donor is not being induced to execute the document by undue pressure or fraud.[18] These documents must be executed and then registered with the Office of the Public Guardian ("OPG").

6.34 The potential impact of a lasting power of attorney on an individual raises concerns about financial abuse of older or vulnerable people. The question of financial abuse includes situations where a lasting power of attorney has been validly granted, but the attorney fails to act in the best interests of the donor.[19] This scenario is outside of the scope of this project. However, the ability to execute a lasting power of attorney electronically raises questions about whether it creates additional opportunities for fraud and financial abuse.[20]

6.35 Some stakeholders have, understandably, raised concerns about including lasting powers of attorney within the scope of our project. In 2014 the OPG consulted on

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16 Payment Systems Regulator, *Report and Consultation Authorised push payment scams* (November 2017), ch 4, https://www.psr.org.uk/psr-publications/consultations/APP-scams-report-and-consultation-Nov-2017 (last visited 10 August 2018); *Outcome of consultation on the development of a contingent reimbursement model* (February 2018), https://www.psr.org.uk/psr-publications/policy-statements/Outcome-of-CRM-consultation (last visited 10 August 2018).

17 See paras 4.14 to 4.25 above. See also G Shindler and S E Sherry, *Aldridge: Powers of Attorney* (11th ed 2016) para 6-07.

18 Mental Capacity Act 2005, sch 1. See also the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253.

19 The Court of Protection may revoke a lasting power of attorney: Mental Capacity Act 2005, s 22. See, eg, *Re OB (Application to revoke Lasting Power of Attorney); Public Guardian v AW* [2014] EWCOP 28.

20 *Finance and Law for the Older Client* (loose leaf ed, May 2018) para H1.7. See also *Re JL (Application to revoke Lasting Power of Attorney); Public Guardian v AS* [2014] EWCOP 36 (application for revocation of lasting power of attorney which had been created online by the donor's daughter, who was appointed her sole attorney).

implementing a fully digital process for making and registering a lasting power of attorney, removing the need for paper forms.[21] The majority of consultees were not in favour of these proposals, arguing that the use of electronic documents for granting lasting powers of attorney increased the opportunity for fraud, duress and abuse.[22]

Our views on lasting powers of attorney

6.36 As discussed above, enabling the electronic execution of lasting powers of attorney gives rise to questions of fraud and financial abuse of individuals when they may be at their most vulnerable. We have considered these questions seriously and discussed them with the OPG and the Ministry of Justice.

6.37 The current system for the execution of lasting powers of attorney is partly digital. The donor of a lasting power of attorney may fill the details out online but is then required to print the document and sign it in wet ink, before it can be registered and take effect. Given our provisional conclusion in Chapter 3, a lasting power of attorney could in theory be executed with an electronic signature but we have been told by the OPG that this is not currently possible in practice. The document must be printed and executed in wet ink. The OPG has also confirmed that it has no plans to move quickly to a system of simple electronic signatures, without additional safeguards.

6.38 Notwithstanding our general provisional conclusion in Chapter 3, we are of the view that there are specific considerations in relation to lasting powers of attorney which should be taken into account. Nothing in this consultation paper should be taken to suggest that an individual authority, such as the OPG, cannot set its own specific additional requirements for documents to be registered with it.

6.39 In Chapter 2, we discussed some of the security and reliability concerns in relation to electronic signatures, saying that these are questions to be determined by the parties. We also noted that a simple typed electronic signature is extremely easy to forge.[23] In the case of lasting powers of attorney, the OPG should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures.

Provisional views on the inclusion of documents executed by consumers and individuals

6.40 As discussed above, the protection of consumers and vulnerable individuals against risks of fraud, undue influence and duress is extremely important. However, on balance, our provisional view is that where additional protection is necessary, that is a matter for specific legislation which can target the particular risks. In reaching this view, we have considered the existing laws and systems in place. We agree that there are special

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[21] Office of the Public Guardian, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default* (2013), https://consult.justice.gov.uk/digital-communications/opg-enabling-digital-default/supporting_documents/Transforming%20the%20Services%20of%20the%20Office%20of%20the%20Public%20Guardian.pdf (last visited 10 August 2018).

[22] Office of the Public Guardian, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default – Response to Consultation CP(R) 26/11/2013* (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/346357/digital-by-default-response.pdf_-_Adobe_Acrobat_Pro.pdf (last visited 10 August 2018). See also S Brodbeck, "Fears over power of attorney safeguards as fraud claims rocket" *The Daily Telegraph* (16 June 2018).

[23] See para 2.48 above.

factors in relation to lasting powers of attorney and we emphasise that any move by the OPG towards allowing electronic signatures should involve an analysis of what is sufficiently secure and reliable for donors.

Consultation Question 4.

6.41 We believe that where specific provision is necessary in relation to certain types of documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney), that is a matter for specific legislation or regulation, and not for the general law of execution of documents. Do consultees agree?

Should there be a single "Formalities Act"?

6.42 We saw in Chapter 3 and Chapter 4 that the provisions on the execution of documents are scattered across several statutes, including the LPMPA 1989, the Companies Act 2006 (and the various statutory instruments which modify those provisions) and the Electronic Communications Act 2000.

6.43 One option we have considered is whether we should propose legislative reform which consolidates formality requirements into one statute.

6.44 This would be akin to the approach in Scotland, which has the Requirements of Writing (Scotland) Act 1995, discussed in Chapter 5.

6.45 A consolidated and updated Act dealing with formalities in this jurisdiction might be an attractive option. However, we have not heard from stakeholders that such consolidation is necessary or desirable. Practitioners are accustomed to the formality requirements appearing in context-specific legislation, such as the LPMPA 1989 and the Companies Act 2006. We are also loath to propose unnecessary legislation when there are currently unprecedented demands on Parliamentary time. Therefore, although we see its appeal, we do not offer this as an option for reform. Instead, as discussed below, where we make proposals for reform, they build on pre-existing legislation.

The Law Commission's 2001 Advice

6.46 During our initial discussions with stakeholders and the formulation of our proposals, we have borne in mind the Law Commission's 2001 Advice.[24] This warned against a broad legislative approach for several reasons, saying that "legislation is not only unnecessary but risky". In particular, the 2001 Advice concluded that legislation should be context-specific and "framed in such a manner that it does not cast doubt upon the ability of electronic communications to satisfy statutory form requirements in other contexts not covered".

[24] Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) para 3.43, https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/ (last visited 10 August 2018) ("2001 Advice").

6.47 As discussed above, the 2001 Advice focused on commercial transactions.[25] It did not consider consumer transactions or the use of deeds. However, the 2001 Advice pointed out that certain transactions may have formalities which are justified by specific policy considerations, particularly where an individual is taking on an obligation such as a guarantee.[26] The Law Commission considered that global reform may inadvertently remove those protections.

6.48 We agree that this is an important consideration, even more so given our consideration of documents executed by consumers and individuals. As set out above, to the extent that we propose legislative reform, we do not intend for it to affect any formalities or measures already in place to protect vulnerable parties.

6.49 With these considerations in mind, we now move to discuss whether reform is warranted.

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25 2001 Advice, para 1.8.

26 2001 Advice, para 3.43.

Chapter 7: Provisional proposals – electronic signatures

7.1 In previous chapters we have set out the current law and our comparative research. We have also considered the case for reform. In this chapter we discuss how the current law accommodates the use of electronic signatures to execute documents, and consider potential options for reform.

7.2 For electronic signatures this is comparatively straightforward as they are dealt with expressly by a combination of legislation and case law. This is not the case for the electronic execution of deeds and we assess how deeds may be validly executed by electronic means in Chapter 8. We also consider whether the situation can be left as it is or whether reform is necessary and, if so, by what means. We ask consultees for their views.

7.3 Finally, we consider the potential impacts of our proposals and invite consultees' views.

THE CURRENT LAW

7.4 In Chapter 3, we set out the current law around electronic signatures, including EU and domestic legislation and recent case law. As noted in our analysis, the current legislation sets out that electronic signatures are admissible in evidence in legal proceedings under eIDAS and the Electronic Communications Act 2000 ("ECA 2000"). eIDAS also provides that electronic signatures cannot be denied legal effectiveness solely because of their electronic nature and that qualified electronic signatures satisfy any legal requirements in the same way as handwritten signatures.[1]

7.5 Moreover, judgments of the Court of Appeal and the High Court which have decided that electronic methods of signing, such as a typed name in an email and clicking on an "I Accept" button, have satisfied a statutory requirement for a signature.

7.6 Our provisional view is that the combination of EU law, statute and case law means that, under the current law, an electronic signature is capable of meeting a statutory requirement for a signature if an authenticating intention can be demonstrated.[2] This is not limited to a particular type of electronic signature. Furthermore, it is our view that an electronic signature inserted with the intention of authenticating a document would be sufficient to satisfy a statutory requirement that the document must be executed "under hand".[3]

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1 See paras 3.32 to 3.37 above.

2 See para 3.87 above.

3 We discuss documents executed "under hand" at paras 3.81 and 3.82 above. Our view is consistent with the conclusion reached by the 2016 note.

7.7 Our conclusion does not extend to the few situations where the law expressly provides that a signature must be in ink or handwritten.[4] Nor does it apply to the signing of wills under the Wills Act 1837, as set out in Chapter 1.[5]

IS THE CURRENT LAW SUFFICIENTLY CLEAR?

7.8 In Chapter 3 we have provisionally concluded that the current law of England and Wales is sufficiently flexible to allow the use of electronic signatures where statute requires that a document must be "signed". However, that is not the end of the matter.

7.9 We set out in Chapter 6 the case for reform. In summary, although some stakeholders are using electronic signatures, we have heard from others that there is concern about the legal validity of such signatures. This perceived lack of clarity is preventing some businesses from using electronic signatures and may disproportionately affect small businesses, due to a lack of access to legal advice.

7.10 It is unfortunate that the ECA 2000 did not take the opportunity to include a declaratory statement that an electronic signature is capable of satisfying a statutory requirement that a document must be "signed". However, as discussed in Chapter 3, we consider that this was because such a statement was not considered necessary.

7.11 Below, we ask whether, and what, action should now be taken to clarify the law around the use of electronic signatures.

SHOULD THERE BE LEGISLATIVE REFORM?

7.12 The obvious advantage to legislative reform would be clarity and certainty. An individual or business would be able to point with confidence to a statutory statement that an electronic signature is as valid as a handwritten signature. This may be particularly useful for those stakeholders who are not already using electronic signatures for complex legal transactions and who would like to do so.

7.13 This would also be consistent with the position in other jurisdictions, discussed in Chapter 5, which address when an electronic signature may be used instead of a handwritten signature. Being able to point to a provision in legislation about the validity of electronic signatures may therefore also be helpful in the context of cross-border transactions.

7.14 We have discussed in Chapter 6 the risks of overly prescriptive or detailed legislation dealing with technology. Furthermore, some businesses are already using electronic signatures extensively. We would not wish to disrupt their practices by, for example, requiring a particular type of technology to be used for electronic signatures. Therefore, any legislative statement would need to be general.

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[4] See eg Misuse of Drugs Regulations 2001, SI 2001 No 3998, reg 15, and the Social Security (Medical Evidence) Regulations 1976, SI 1976 No 615, reg 1 in relation to evidence of incapacity for work.

[5] See Making a Will (2017) Law Commission Consultation Paper No 231, chs 5 and 6.

7.15 For example, legislation could provide that an electronic signature must not be denied legal effect or validity solely because it is in electronic form. This wording would be consistent with the current position under eIDAS, discussed in Chapter 3.

7.16 The legal effect of an electronic signature could still be challenged on grounds such as undue influence, fraud or forgery, in the same way that a wet ink signature may be challenged. It would also remain subject to the additional formalities required by statute to protect vulnerable parties, as discussed above.[6]

7.17 Although there are clearly benefits to a legislative statement of validity, we are not persuaded that it is required for the sake of clarity and certainty. Our review of eIDAS, the ECA 2000 and recent case law leads to the conclusion that the current law is already sufficiently flexible to accommodate electronic signatures.

7.18 We have said that a legislative statement could provide that an electronic signature must not be denied legal effect or validity solely because it is in electronic form. However, this would simply repeat what is already part of the law of England and Wales: eIDAS provides this expressly.[7] Any such legislative reform would, therefore, be "for the avoidance of doubt". We are reluctant to propose legislation where it does not appear to be necessary. We also mindful of the current unprecedented demands on Parliamentary time.

7.19 Therefore, we are not persuaded that proposing the introduction of a legislative statement confirming the validity of electronic signatures would be the right solution. However, this is a finely balanced question. We welcome the views of stakeholders.

Consultation Question 5.

7.20 We consider that legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature. Do consultees agree?

A TEST CASE?

7.21 Although we do not consider that legislative reform is necessary, we are aware that some stakeholders may remain concerned about the legal validity of electronic signatures in certain situations.

7.22 One option which stakeholders may wish to consider is whether a claim could be brought using the test case procedure under the Financial List, which is set out in Practice Direction 51M of the Civil Procedure Rules.[8] The purpose of the procedure is to facilitate the resolution of issues of general importance in relation to which

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6 See paras 6.30 and 6.31 above.

7 See para 3.34 above.

8 Civil Procedure Rules 1998, SI 1998 No 3132.

authoritative guidance is needed, without the need for a present cause of action between the parties to the proceedings.[9]

7.23 This procedure could be used to seek an authoritative ruling on the use of an electronic signature in particular circumstances. There would need to be a set of facts against which the decision is to be made and the court will need to be satisfied that all sides of the argument will be fully and properly put.[10] Any such claim would have to be a "financial list claim".[11]

A SET OF INDUSTRY STANDARDS?

7.24 In Chapter 2 we said that there are factors other than questions of legal validity which influence a party's decision to execute a document electronically.[12] These may include the security and reliability of electronic signatures, as well as questions of trust and identity, the interoperability of electronic signature systems, and the archiving of information.

7.25 We do not consider it would be appropriate for the Law Commission to provide guidance on these non-legal, technical issues. However, these are significant issues and we have heard from stakeholders that they would welcome a standard authoritative approach.

7.26 We noted in Chapter 1 that the joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees have published two notes on the electronic execution of documents. These documents deal only with legal questions. We consider that similar guidance, from a technological and practical perspective, would be extremely valuable.

7.27 We suggest that such guidance should be prepared by an interdisciplinary working group, including lawyers, technology experts, insurers, and businesses, coordinated by Government. The purpose of the working group would be to provide guidance which sets out best practice in relation to the practical issues around electronic execution of documents.

Consultation Question 6.

7.28 We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree?

9 Practice Direction 51M, paras 2.1 and 2.2.

10 Guide to the Financial List (2015), para 9.2.

11 Practice Direction 51M, para 2.1; CPR, r 63A.1(2).

12 See from para 2.37 above.

Chapter 8: Provisional proposals – electronic execution of deeds

8.1 In this chapter we discuss the electronic execution of deeds. As we outlined in Chapter 4, certain documents must, by statute, be executed as deeds, which means they must be signed, witnessed and attested, and delivered. We have already discussed electronic signatures in Chapter 7. We now turn to consider how the requirements that a deed must be witnessed and attested and delivered may be met electronically. We also consider the implications of *Mercury*[1] for the electronic execution of documents. We set out potential options for reform and ask for consultees' views.

8.2 As a preliminary point, our project has a limited scope, dealing only with the electronic execution, and not the traditional execution, of deeds. We do not therefore suggest a change to the types of documents which must be executed as deeds, or consider whether deeds should be abolished altogether. Any potential options for reform which we suggest could only affect the electronic execution of deeds. However, we are aware that some stakeholders consider that deeds should be abolished or the requirement for execution as a deed limited to certain categories of documents. We therefore ask whether it is time for a general review of the law of deeds.

8.3 Finally, we ask consultees for information about the potential impact of our proposals for reform.

WITNESSING AND ATTESTATION

8.4 We have explained in Chapter 4 that for a deed to be executed validly, the signature of the person making the deed must be witnessed and attested. By "witnessed" we mean that the witness observes the signature. Attestation is the act of recording, on the document itself, that the witness has in fact observed the execution of that document.[2]

8.5 In this section we consider whether, and by what means, these requirements may be met electronically under the current law. We then discuss whether there should be reform to further facilitate the electronic execution of deeds.

Should witnessing and attestation be removed as a requirement for deeds?

8.6 Some stakeholders have suggested that the witnessing and attestation requirement should be removed, without replacement, for deeds executed electronically. We have been told that the witnessing requirement causes delay and provides only limited benefits because, apart from certain exceptions,[3] the law allows anyone to witness a document so offers limited checks or protection.

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1 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

2 See para 4.30 above. For a discussion of attestation see M Dray, "Deeds speak louder than words. Attesting time for deeds?" [2013] *The Conveyancer and Property Lawyer* 298.

3 See paras 4.48 to 4.51 above.

8.7 As set out above, we consider that witnessing fulfils an important evidential function. This may be particularly important for individuals and consumers who may wish to enforce their document. Even a witness who is a stranger to the signatory can provide valuable evidence that "I saw that person sign that document and that is my signature and attestation". Further, we do not think there is any justification for a significant inconsistency between electronic and hard copy documents in this regard. Therefore, we consider that the witnessing and attestation requirement should be retained.

How can the requirements of witnessing and attestation be satisfied currently where there is an electronic signature?

Physical presence

8.8 As discussed in Chapter 4, section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") and section 44 of the Companies Act 2006 require that the document must be signed "in the presence of a witness who attests the signature".

8.9 The simplest way to witness an electronic signature is by the witness being physically present when the signature is applied. We have concluded above that an electronic signature is capable of fulfilling a statutory requirement for a document to be "signed".[4] Given this conclusion, it is logical that the requirement for witnessing may be satisfied by the witness watching the signatory apply their electronic signature in the same location.

8.10 The witness can observe the signing in person, and can attest to this fact by affixing their own electronic signature to the same document. Subsequently, the presence of the witness may be evidenced in several ways. For example, if the signatory and witness have used the same device, a signing platform could show that the signatures of both the signatory and the witness issued from the same IP address.[5] Depending on the devices used, there may also be geolocation evidence which places the witness in the vicinity of the signatory.

8.11 The 2016 note refers to the physical presence of the witness when the signatory signs as "best practice". We agree. We consider that this is the clearest way to satisfy the requirement for a signature "in the presence of a witness". We have been told that some stakeholders already use this method to execute their deeds with electronic signatures.

8.12 It has been suggested that even a witness who is physically present may not be able to witness an electronic signature because what is being signed is hidden inside the computer and cannot be seen.[6] We do not agree. In Chapter 3 we discuss the "dual form" of electronic communications, that is, a display on a screen and their form as digital information. Although a witness may not be able to see the digital information, what they can see is the signatory purporting to add their signature to a document on

4 See para 3.87 above.

5 IP address is defined in the Glossary.

6 HM Land Registry, "Executing a document using an electronic signature" (8 February 2017), https://hmlandregistry.blog.gov.uk/2017/02/08/executing-document-electronic-signature/ (last visited 10 August 2018).

the screen.[7] If a subsequent dispute arises, then the issues of evidence, security and reliability, which we address in Chapter 2 will need to be considered. However, we do not consider that this means that an electronic signature cannot be witnessed.

Does "presence" mean physical presence?

8.13 Even where the witness is in the same room as the signatory, there are clear practical benefits to signing electronically: it removes the need to print out the document, sign it and scan/post it to another party. As discussed above, the IP address or geolocation may provide valuable evidence about the time and place of the signing ceremony.

8.14 However, we have been told that parties in some circumstances would find it convenient to execute a document without the need for the witness to be in the same room. We have therefore considered whether "presence" means "physical presence", or whether any form of presence, such as by video link, is sufficient to satisfy the current witnessing and attestation requirements. In the case of a video link, a witness could observe the signing on a screen and attest to execution by affixing their electronic signature to the same document. This could be more or less simultaneous, if both parties are, for example, logged into the same signing platform, or shortly afterwards, if the signed electronic document is emailed to the witness to add their own signature.[8]

8.15 We are not persuaded that parties could be confident that the current law would allow for the witness viewing the signing on a screen, without being physically present. We think that a court might find that a video link did not satisfy the existing requirement in section 1 of the LPMPA 1989 that a deed must be signed "in the presence of a witness". We considered in Chapter 4 that the physical presence of the witness is required.[9] However, we can see there is an argument that the law should be more flexible to allow for updated signing procedures in the modern world, while retaining the basic functions of execution formalities. Below, we consider some options and ask for consultees' views.

Potential options for reform

8.16 When the statutory requirement for witnessing was introduced for deeds in 1989, wet ink signatures were the predominant method of signing. The inclusion of a requirement that a deed must be signed "in the presence of a witness who attests the signature" was consistent with that practice.

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7 In Chapter 3 at paras 3.9 and 3.10 we discuss the "dual form" of electronic communications, which was considered by the Law Commission in the 2001 Advice.

8 Notarisation by video link has been implemented through legislation in US States including the Virginia (Electronic Notaries Act 2011) and Michigan (Act 330 of 2018, amending the Michigan Notary Public Act and coming into force on 30 September 2018). In the context of Virginia's Electronic Notaries Act 2011, Reiniger and Marston argue that the video link is functionally equivalent to physical presence: T Reiniger and P Marston, "The deed is done: on-line notarization becomes a reality" (2013) 10 *Digital Evidence and Electronic Signature Law* 144, 145.

9 See paras 4.52 to 4.57 above.

8.17 Since that time, various alternative methods of signing a document electronically have emerged.[10] It is, therefore, appropriate to consider whether corresponding alternatives should also be developed to signing in the presence of a witness.

8.18 As we discuss above, the physical presence of a witness at an electronic execution has the same effect as traditional witnessing and attestation – the only difference being that both the signatory and witness apply electronic signatures. Below, we consider options which move away from this notion of physical presence, while still fulfilling the functions of witnessing. We set out various scenarios and ask consultees for their views as to what the law should permit.

8.19 We divide the potential options for reform into two categories:

(1) options for reform which maintain the requirement for witnessing and attestation; and

(2) options for reform which would require a departure from the requirement for witnessing and attestation.

8.20 These scenarios relate only to the electronic execution of documents. It is beyond the scope of our project to make changes to the witnessing and attestation requirements for handwritten signatures, although Parliament could choose to do so.

The protective function of witnessing and attestation

8.21 We make one preliminary point about moving away from physical presence, which applies to each of the scenarios outlined below. We agree that there is a risk that the protective function is diminished if the witness is not physically present at execution. However, our discussions with stakeholders have suggested that protection against vitiating factors such duress, undue influence and fraud is not the only or the principal aim of witnessing. The evidential and cautionary functions are equally significant.

8.22 It is also important to be realistic and practical about the level of protection a witness may provide. Undue influence and duress are more likely to take the form of a sustained campaign, which the witnessing requirement cannot protect against, rather than a one-off "gun to the head" scenario. Even in that extreme situation, the requirement for a coerced signature to be witnessed presents only a minimal impediment to the person holding the gun. Indeed, depending on the transaction, that person may act as the witness themselves. Similarly, in general, witnessing will not provide complete protection against fraud and forgery because there is no legal requirement that a witness must be independent.[11] Nor is there a requirement that the witness must know or be able to identify the signatory.

8.23 We note that HM Land Registry's solution, which involves a digital signature in combination with an authentication gateway, and which we describe below,[12] has moved away from a third-party witness entirely.

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[10] We list some of the types of electronic signature from para 2.10 above.

[11] Cf the position for lasting powers of attorney: see para 4.48 above.

[12] See paras 8.45 and 8.46 below.

Options for reform which maintain the requirement for witnessing and attestation: using a video link

8.24 We turn first to discuss whether it would be appropriate for a person to witness and attest an electronic signature over a video link. Although this option would require legislative reform, the basic requirements for valid execution of a deed (that is, signing, witnessing and attestation and delivery) would remain the same.[13]

8.25 The use of a video link is the most obvious move away from physical presence while still retaining the key elements of witnessing. The witness could observe the signing ceremony via the video link and attest to execution by affixing their own electronic signature to the same document. The witness then attests to the fact of having seen the document being signed, though not in the physical presence of the signatory.

8.26 The use of a video link would have the same effect as witnessing in the physical presence of the signatory. The functions of formalities could be satisfied to the same or similar extent as by traditional witnessing and attestation:

(1) Evidential function. Witnessing by video link may provide additional evidential benefits compared with in-person witnessing if, for example, either or both of the parties archive the audio-visual footage of the signing ceremony. To the extent that the video signal is intermittent, or the picture unclear, the evidential value of witnessing may be diminished. Of course, if a link is so poor that the witness cannot tell what is happening then they could not attest to having seen the signature. We do not consider that this proposal should allow for pre-recorded footage to be used to show the signatory applying a signature – the witness should see this happening live.

(2) Protective function. We do not consider that significant protection is lost over video link, though it is arguably more difficult to observe fully the situation in the signing room (for example, someone else may be off-camera or have left the room just before the video link is established). However, as we say above, it is not clear how far even a witness in the physical presence of the signatory can identify duress, undue influence or forgery.

(3) Cautionary function. We consider that this procedure satisfies the cautionary function of formalities. The signatory must go through the process of establishing a video link and finding a witness. It is even possible that the degree of planning required to establish a video link results in an enhanced cautionary effect.

8.27 Our provisional view is that witnessing via video link is sufficiently similar to witnessing in the physical presence of the signatory that it should be permitted. Such a solution would be technology neutral in terms of what type of electronic signature would be required, avoiding the risks of legislating for technology we have previously discussed.[14]

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[13] See also Making a Will (2017) Law Commission Consultation Paper No 231, para 6.41.

[14] See from para 6.12 above.

8.28 We have considered some of the practical aspects of this possibility and, in particular, when and how the witness would apply their own electronic signature to the document. We consider two scenarios below.

8.29 In addition to the video link, the signatory and witness could each be logged into the same signing platform from their respective locations. This would mean that the witness would see the signatory's electronic signature on the document on the screen, and could then attest to the execution by applying their own electronic signature.

Example (1)

Alice (the signatory) and Bob (the witness) set up a video link. Bob can see both Alice and her computer screen. Alice signs a deed on the signing platform using her electronic signature.

Bob watches Alice apply her electronic signature by video link, and then receives a link to access the deed on the signing platform. (Alternatively, it may be possible that Alice and Bob could be on the signing platform at the same time, so that as Bob sees Alice sign the deed on her computer screen, her signature appears on the document on Bob's screen.) Bob can see the deed on the system, including Alice's signature. Bob signs the deed with his electronic signature and attests the document.

8.30 In the absence of a shared signing platform, the witness could watch the signing via video link, and then the signatory could email the document, with their electronic signature, to the witness. The witness could then apply their own electronic signature and email it back to the signatory or such other party as would be appropriate.

Example (2)

Alice and Bob set up a video link. Bob can see both Alice and her computer screen. Alice signs a deed using her electronic signature. Bob witnesses the signature by video link.

Alice emails the document to Bob as an attachment, and Bob sees the document with Alice's signature. Bob signs the document with his electronic signature and attests the document.

8.31 As we have said above, our provisional view is that witnessing via video link is sufficiently similar to witnessing in the physical presence that it should be permitted. We welcome the views of consultees as to whether this should be permitted and, if so, how attestation should operate.

Consultation Question 7.

8.32 We provisionally propose that it should be possible to witness an electronic signature via video link and then attest the document. Do consultees agree?

Consultation Question 8.

8.33 If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation:

(1) Via a signing platform which the signatory and witness both log into?

(2) With the document being emailed to the witness by the signatory immediately after signing?

Options for reform which do not maintain the requirement for witnessing and attestation

8.34 We turn now to consider potential options for reform which would involve a departure from the current statutory requirement that a signature must be witnessed and attested. Below, we consider various scenarios in which the witness does not actually see the signatory applying the electronic signature, but has other evidence to suggest that it was in fact the signatory who did so. These are:

(1) use of a signing platform (without a video link);

(2) digital signatures; and

(3) a new concept of acknowledgement of electronic signatures.

8.35 Any of these options would be a significant departure from the current requirements for a deed and would require a move away from traditional witnessing and attestation.[15] However, given our initial discussions with stakeholders, we believe that is worth exploring these options and seeking consultees' views.

8.36 As has been our general approach in this document, we have sought to maintain a technology-neutral perspective when considering the different options. It would be for the relevant parties, acting on advice of technical experts where appropriate, to ensure that they were satisfied with the relevant arrangements for, for example, verifying identities.

Signing platform

8.37 As we touch on above, a signatory and a witness may be logged onto the same signing platform but from different locations, having authenticated themselves through the use

15 All of the options canvassed in relation to witnessing and attestation would require legislative reform.

of a password or, for example, a PIN sent to their respective mobile phones, or even scanning identification such as a driving licence.

8.38 The signatory applies their electronic signature to the document. The witness can see the signatory's signature on the document (and may even have been able to see it being applied in real time) and applies their own signature to the same document on the signing platform to attest the signature.

8.39 This being the case, we have considered whether, if a witness can see a signature being applied in real time through the signing platform, it is necessary for the witness also to observe by video link.

Example (3)

Both Alice and Bob log into a document signing platform. Alice signs a deed on the platform using her electronic signature. Bob sees the signature appear on his own screen.

Once Alice's signature is applied, the system allows Bob, as witness, to sign the deed with his electronic signature and attest the document.

8.40 This process envisages a type of digital presence, in that both parties would be in the same online space. However, the witness would not actually see the signatory go through the physical act of applying their signature so could not attest to this. Instead, the witness would see the signature appear on the document and could be reasonably satisfied that the signature was applied by the signatory, given the login procedure.

8.41 We consider that the functions of formalities would be satisfied, although to a lesser extent than with the use of a video link.

(1) Evidential function. There would be technical evidence linking the signatures of the signatory and witness to specific login details and IP addresses. Depending on the technology used, there may also be other data such as the exact time that each signature is applied and, in some cases, the location. However, there could still be doubt as to whether it was in fact the signatory who applied their signature, because there is no direct communication between the signatory and the witness (although, of course, documents are not signed in isolation and there would likely be evidence from meetings and previous conversations).

(2) Protective function. In this scenario, it would not be possible for the witness to tell if there was another person in the room with the signatory, forcing them to sign. Again, as discussed above, we consider that it is important not to overstate the protective function.

(3) Cautionary function. This solution still requires the signatory to find a third-party witness, and ensure that the witness is able to log onto the signing platform. However, we expect that this would be administratively convenient and would not require the arguably more onerous process of establishing a video link.

Therefore, we consider that the cautionary function is retained, but to a lesser extent than if a video link was used.

Consultation Question 9.

8.42 Do consultees consider that it should be possible to "witness" an electronic signature through an online signing platform in real time, without a video link or any direct communication between the signatory and the witness?

Digital signatures

8.43 In Chapter 5, we explained that there is a divergence in approaches to witnessing electronic signatures in other jurisdictions. One way in which the witnessing requirement has been dealt with is to replace it with a requirement for a particular type of electronic signature, such as a digital signature.[16]

8.44 We have considered whether we should adopt a similar approach, replacing witnessing and attestation for electronic signatures with a requirement that a deed must be signed using, for example, a digital signature using Public Key Infrastructure.

8.45 Replacing the witnessing requirement with a technological solution would be similar to the policy of HM Land Registry outlined in the recent Consultation on Proposals to amend the Land Registration Rules 2003[17] and the Government Response to that consultation.[18] However, the two approaches are not directly comparable. HM Land Registry is dealing with a particular type of document (registrable instruments[19]) which must be entered onto the register of title. Rules may be made about how the register is to be kept and how electronic documents may be registered.[20] This provides HM Land Registry with control over a self-contained system of documents. That level of control is appropriate in the context of land registration because title is guaranteed. HM Land Registry stands as insurer as first resort and may be liable to indemnify for loss caused by mistakes on the register.[21]

8.46 Under the proposed system, HM Land Registry will be a "trust service provider", providing advanced electronic signatures. It will also adopt a process under which an

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16 We describe digital signatures from para 2.18 above.

17 HM Land Registry, *Consultation on Proposals to amend the Land Registration Rules 2003* (2017), paras 21 to 37.

18 HM Land Registry, *Proposals to amend the Land Registration Rules 2003 Government Response* (2018), ch 4. See also para 1.11 above and the accompanying footnotes; and Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, paras 13.11 to 13.33.

19 Land Registration Act 2002, ss 27, 91.

20 Land Registration Act 2002, ss 1, 91.

21 See the discussion in Updating the Land Registration Act 2002 (2018) Law Com No 380, paras 14.1 and 14.5.

additional authentication process will be carried out through the GOV.UK Verify system.[22]

8.47 In contrast to HM Land Registry, the range of documents dealt with in our project is not limited to one type of transaction, nor to a particular system of registration. The same level of standardisation would be difficult to achieve across all types of documents and may also be undesirable.[23] Although digital signatures may be appropriate for a disposition of an interest in land, they may not be as appropriate for other transactions, such as those between commercial parties or a gift by an individual.

8.48 In Chapter 6 we referred to the risks of legislating for technology in an overly prescriptive or detailed manner.[24] As we have said above, this project is technology neutral and facilitative.[25] We have also had regard to the initial views of stakeholders. They have told us that they would be extremely reluctant to adopt only one type of technology with which to execute transactions, when the current legal position is one of flexibility.[26] Moreover, there does not appear to be evidence, outside the HM Land Registry system, that stakeholders want to use digital signatures. Although parties would still have the option to witness an electronic signature by physical presence, we are hesitant to propose an option for reform which we have been told would not resolve the problem of witnessing a deed electronically.

8.49 Therefore, on balance we are not convinced that the witnessing and attestation requirement for electronic signature on deeds should be replaced with a requirement for a particular type of technology.

Consultation Question 10.

8.50 Our view is that the witnessing and attestation requirement for electronic signatures on deeds should not be replaced with a requirement for a particular type of technology, such as a digital signature using Public Key Infrastructure. Do consultees agree?

A new concept of acknowledgement for electronic signatures

8.51 Digital signatures and signing platforms, discussed above, are potential options for reform which involve the use of specific technology. For our final potential option for reform, we have approached the question from a different angle. We now consider whether witnessing and attestation should be replaced with a legal concept which would

[22] HM Land Registry, *Proposals to amend the Land Registration Rules 2003 Government Response* (2018), paras 4.16 to 4.25.

[23] The same level of control is also unnecessary when no single party is guaranteeing the validity of all such transactions: see para 8.45 above.

[24] See paras 6.12 to 6.15 above.

[25] See paras 2.9 and 6.15 above.

[26] This is consistent with the fact that qualified electronic signatures are not commonly used in England and Wales: see para 2.35 above.

accommodate different types of technology. We refer to this concept as "electronic acknowledgement".

Example (4)

Alice signs a deed with her electronic signature. Alice phones or emails Bob to tell him that she has signed the document, then sends the document to Bob. Bob sees the document with Alice's signature. Bob signs the document with his electronic signature and includes a statement on the document that Alice has acknowledged her signature to him.

8.52 This could be achieved by a statutory amendment allowing a witness to state that a signatory has "acknowledged" their electronic signature to the witness. This would provide a link between the signatory, the document and the witness. In principle, an acknowledgement of a signature could take place in writing, in person, by video link (after the event) or by telephone. However, in order to establish the necessary link, the witness must see the signatory's signature on the document and also receive an explicit acknowledgement from the signatory. This would be most easily satisfied where the document is held on a central signing platform. Where that is not the case, the signatory would need to send the signed document to the witness (for example by email).

8.53 We consider that introducing a new concept of electronic acknowledgement could increase transactional efficiency, whilst fulfilling the functions of witnessing to a similar degree as traditional witnessing and attestation.

(1) Evidential function. Signing in the physical presence of the witness who actually sees the signature being applied provides good quality evidence in some respects: it means that the witness can point to an individual and confirm that that individual was the signatory. However, it does not necessarily ensure that the signatory is who they say they are (since there is no requirement that the witness knows the signatory or checks their identity).[27] Nor does it necessarily provide any documentary evidence of the occasion beyond what is captured in the attestation clause (usually nothing beyond the date).

If the signatory acknowledges their signature to the witness in person, this is not very different in evidential terms from witnessing the signature in real time – the witness can say "that is the person who acknowledged their signature to me".

If the acknowledgement is by email, telephone, or text, for example, the witness is far less likely to be a stranger to the signatory. This may increase the evidential weight of the process, because the witness may be able to link the signatory to a particular identity. Any doubt about who made the telephone call or sent the email could be dealt with by evidence, as to the witness's familiarity with the signatory's voice, or the fact that the email was received from the signatory's email. There

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27 A stakeholder gave us the example of signing a document in a restaurant and asking a member of staff to witness her signature.

may also be technical evidence, including the IP address of the computer from which the email was sent, or an audit trail from an online signing platform.

(2) Protective function. This scenario would still require the involvement of a third party in the execution of the document, which may provide some protection. However, that person would not see what is going on in the room at the point of signing.

(3) Cautionary function. The involvement of a third party would mean that the cautionary function is fulfilled. The signatory would need to contact the third party to send an acknowledgement of their signature. The requirement to take these proactive steps would emphasise the significance of the document, although it would be less onerous than organising for the third party to witness the signing in person.

How would electronic acknowledgement work in practice?

8.54 We have given thought to whether a method or form for electronic acknowledgement, such as writing, should be prescribed. This would provide an evidentiary benefit to the parties. On balance, we consider that this restriction is unnecessary. The requirement that a witness must include a statement on the document would provide the necessary evidence. Moreover, parties will, as set out in Chapter 2, need to balance convenience against the evidential weight which may be accorded to a document if a dispute was to arise.

8.55 We would envisage that the signatory could acknowledge the fact of signing to the witness in a variety of ways, including by email, phone or other methods such as text message (or, indeed, in person at a later point).

8.56 We think that the acknowledgement and witnessing must take place reasonably soon after the signing, perhaps within 24 hours. We do not think it should be possible to complete the witnessing procedure weeks or months after the signing. Similarly, we think that the acts of acknowledgement and witnessing should take place within a reasonably short time period of each other.

8.57 Finally, we envisage that, as referred to above, the record of the acknowledgement would appear on the document itself, along with the witness's electronic signature. This may be in a form similar to an attestation clause.

Example statement

Signed by: {Signature and name of signatory}
Signature acknowledged by {email/telephone/text message} on {date}
Witness: {Signature and name of witness}

8.58 In the event that further evidence would be required, it may be possible for the witness/signatory to produce the acknowledgement (if in writing) or to trace the telephone records.

8.59 This option would require a significant legislative amendment as it envisages a fundamental change to the elements of a deed, for deeds executed electronically. It is not something which we would recommend lightly and we seek consultees' views.

Consultation Question 11.

8.60 Do consultees think that there is a case for moving away from the traditional concepts of witnessing and attestation in the context of deeds executed electronically, allowing for electronic acknowledgement? If so:

(1) How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?

(2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which:

(a) acknowledgement must occur after signing; and

(b) acknowledgement and witnessing must take place?

(3) How should the witness record the signatory's acknowledgement?

DELIVERY

The current law

8.61 In Chapter 4 we considered the delivery of deeds. The purpose of delivery is to signify that the maker of the deed intends it to become effective and that he or she is bound by it. A deed may therefore be "delivered" without the maker of the deed losing possession of it.[28]

8.62 In practice, parties satisfy the requirement that a deed must be "delivered" in various ways.[29] For example, the document may state the date of delivery[30] or there may be "delayed" delivery, through escrow or provision of the deed to a third party to "hold to order". There are also statutory presumptions which deem a deed to have been delivered upon signature.

8.63 All digital signatures produce metadata which identifies the time and date of the signature. This gives rise to the possibility that a document may have competing dates: the date in the metadata and the date on the face of the document. We have considered whether this affects delivery, particularly for documents which are intended to be executed undated, and come into effect at a later time. We consider that where such

[28] See, in contrast, the position in Scotland: Review of Contract Law Report on Formation of Contract: Execution in Counterpart (2013) Scot Law Com No 231, para 2.23 onwards.

[29] We discuss the different forms of delivery in Chapter 4.

[30] For example, "In witness whereof this [document name] has been executed by the parties as a deed, and is delivered on the date first above written".

an inconsistency exists, it would be up to the parties to provide evidence as to the date on which the document was intended to take effect, such as an express statement on the face of the document. It is clear that term "delivery" is outdated and misdescribes a concept which does not require the deed maker to relinquish possession of the document. This was acknowledged by the Law Commission in our 1985 working paper:[31]

> Laymen might well think the word "delivery" here to be a dangerous misnomer as it does not accord with their understanding of the word. This may lead them to believe that until the deed is handed over to "the other side" it is still capable of recall.

Should there be legislative reform?

8.64 One of the aims of the Law Commission is to ensure that the law is "modern". Therefore, it is apt that we consider whether the concept of delivery of deeds should be replaced with a concept which better reflects the function to be performed.

8.65 An example of a provision which has dealt with the question of delivery is section 91 of the Land Registration Act 2002. That provision sets out the formalities for electronic documents under that Act. If a document in electronic form meets certain requirements, it is "to be regarded for the purposes of any enactment as a deed".[32] Instead of a requirement for "delivery", section 91 requires that the document must "make provision for the time and date when it takes effect".

8.66 At first glance this is an attractive and practical option for reform, however, we are minded not to pursue it. The Law Commission has previously said that the concept of delivery still appears to perform a useful function.[33] We agree. Parties to a deed, whether executed electronically or on paper, require a way of knowing when it will take effect. If we were to propose the removal of the requirement of delivery, that function would still need to be performed.

8.67 Although we would like to see the name of "delivery" changed to reflect modern practices, this is not a sufficient reason by itself to justify a legislative amendment. Any proposal for reform we suggest in this project, in any event, can only affect deeds executed electronically. This could result in two different requirements for "electronic" deeds and "traditional" deeds, each performing the same function of setting out when a deed takes effect, but under different names. However, if deeds are to be considered in a future project, the change could be made for deeds in general, regardless of how they are executed.

8.68 We have not heard from stakeholders that the requirement of delivery prevents lawyers and businesses from executing deeds electronically. Indeed, parties are already able to fulfil the requirement of delivery through electronic means as discussed above.

8.69 For these reasons, we have decided not to propose options for reform for the requirement of delivery. However, we would like to hear from consultees whether they

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31 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, para 4.4.

32 Land Registration Act 2002, s 91(5).

33 The execution of deeds and documents by or on behalf of bodies corporate (1998) Law Com No 253, para 6.18.

think that the requirement that a deed must be “delivered” is preventing the electronic execution of these documents.

Consultation Question 12.

8.70 Our view is that the requirement that deeds must be delivered does not impede the electronic execution of deeds in practice. Do consultees agree?

THE MERCURY DECISION

The 2009 note

8.71 In Chapter 4, we discussed *Mercury*,[34] explaining that it had given rise to concerns among lawyers dealing with the execution of documents and deeds. In summary, Mr Justice Underhill, as he then was, referred to a document as “a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing”. This raised concerns among lawyers about the use of pre-signed signature pages and signings or closings where signature pages are sent by email or by fax. Similarly, Mr Justice Underhill said that section 1 of the LPMPA 1989 had the effect that (in the case of deed) “the signature and attestation must form part of the same physical document”.[35]

8.72 As discussed in Chapter 4, these comments were obiter – that is, incidental and not part of the main decision. They are not binding authority.[36]

8.73 However, they caused sufficient concern to warrant the publication of the 2009 note by the joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees.[37] The purpose of this note was to facilitate virtual signings and closings for documents governed by English law in the light of *Mercury*. A “virtual signing”, in the context of the note, is a signing or completion meeting at which not all, or none, of the signatories were present. As will be seen below, the 2009 note deals with wet ink signatures which are then scanned.

8.74 The 2009 note emphasised the importance of ensuring that all parties’ lawyers have agreed to the proposed arrangements for the virtual signing. It suggested three options for a virtual signing, with various levels of formality. Which option is used depends on

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[34] *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

[35] *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743 at [39] to [40].

[36] See discussion in Chapter 4 above, particularly at para 4.86.

[37] The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, “Note on execution of documents at a virtual signing or closing” (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf (last visited 10 August 2018).

whether the document was a deed, a real estate contract under section 2 of the LPMPA 1989, a guarantee under the Statute of Frauds 1677, or a simple contract.

(1) Option 1. Final execution copies of documents are emailed to all parties. Each party prints and signs the signature page only and then sends a single email, to which is attached the final version of the document and a PDF[38] copy of the signed signature page.

The 2009 note's view is that the pdf (or Word) final version of the document and the pdf of the signed signature page (both attached to the same email) will constitute an original signed document and will equate to the "same physical document" referred to in *Mercury*.

(2) Option 2. Final execution copies of documents are emailed to all parties. Each party prints and signs the signature page only and then sends an email, to which is attached a PDF copy of the signed signature page.

The 2009 note view is that a print-out of the execution version of the document with the attached signed signature pages will constitute an original signed document.

(3) Option 3. The signature pages relating to the documents still being negotiated are circulated to parties. The signature page is executed by each signatory and returned to be held to the order of the signatory (or the signatory's lawyers) until authority is given for it to be attached to the document to be signed. Once each document has been finalised, the law firm co-ordinating the signing/closing emails the final version of the document to each absent party (and/or its lawyers) and obtains confirmation that the final version of the document is agreed and authority to attach the pre-signed signature page to the final version and to date and release the document.

The 2009 note view is that the final approved version of the document with the pre-signed signature pages that have been attached with the prior approval of the parties (or their lawyers) will constitute an original signed document.

8.75 As to which option should be used for each type of document, the 2009 note included a table which summarised its conclusions, which we reproduce with permission:

Type of document	**Option 1 – Return PDF/Word document plus signature page**	**Option 2 – Return signature page only**	**Option 3 – Advance pre-signed signature pages**
Deeds	Yes	No	No

38 A PDF file, while ostensibly "locked", can be edited using certain software. Conversely, a Word document can be locked for editing in the same way as a PDF. We do not consider that the type of file used in these examples is determinative of the validity of a given virtual signing procedure. However, as set out in Chapter 2, parties may wish to consider the evidential value of the system used.

Real estate contracts	Yes	No	No
Guarantees (stand-alone or contained in simple contracts)	Yes	Yes	Yes
Simple contracts (not incorporating any of the above)	Yes	Yes	Yes

8.76 We agree with, and endorse, the conclusions of the 2009 note, which provides a practical way of dealing with the concerns raised by *Mercury* and which, we understand, is being followed by the market.

Should there be legislative reform?

8.77 In these circumstances we do not propose options for reform to address the concerns raised by *Mercury*. Legislative reform is unnecessary. It would also require a disproportionate level of detail that would be far more prescriptive than current requirements for signing or the validity of deeds.

8.78 However, as we have said above, the 2009 note deals with handwritten signatures which are then scanned. Some stakeholders have asked for guidance on how electronic signatures, as set out in Chapter 2, may satisfy a requirement that the document is a "discrete physical entity at the moment of signing". Therefore, we make the following comments in relation to the use of electronic signatures. Regardless of the approach applied, parties should not lose sight of the principle that there must be an agreement between the parties to all the terms of the alleged agreement.

8.79 Where an electronic signature is applied to an electronic document, the question of whether this document is a "discrete physical entity at the moment of signing" should not arise. This is because the signature can be applied to the document without removal of the signature pages. However, if the signature page is removed, the options outlined by the 2009 note should be followed.

8.80 The situation where a document is executed over an online signing platform is different. Such platforms allow a signatory to open a link delivered electronically (for example, by email) by the coordinator to access a common controlled version of a document in which they can add their electronic signature. The link may be protected by various authentication processes, including a password. The signatory does not have to print, sign by hand, scan, email or fax the signed page. The system records which signatories have executed the document (including the time, date of signing and IP address of the computer plus any additional authentication on which the document has been signed). The coordinator may be authorised to insert a date or counter sign after all the parties have executed. Once the document is executed, the system delivers electronically a link or a pdf of the signed document.

8.81 Our view is that this process is analogous to Option 1, described above. When the party signs the document on an online system, they have the entire document before them. If the document is a deed, and the application of an electronic signature is witnessed and attested in the physical presence of the witness, who then applies their own electronic signature, then the signature and attestation will "form part of the same physical document".

8.82 Accordingly, the document sent by the system, comprising the final version of the document signed by an electronic signature, will constitute an original signed document and will equate to the "same physical document" referred to in *Mercury*.

Consultation Question 13.

8.83 We consider that legislative reform is unnecessary and inappropriate to address the implications of the *Mercury* decision. Do consultees agree?

SUMMARY OF PROPOSALS FOR REFORM

8.84 In Chapter 7 and this chapter we have set out our provisional conclusions and proposals for reform. In summary, for electronic signatures, our provisional conclusion is that an electronic signature is capable in general of meeting a statutory requirement for a signature. We do not consider that legislative reform is necessary. However, we provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues.

8.85 From our discussions with stakeholders, it appears that the main difficulty in relation to deeds is the requirement that a deed must be signed in the presence of a witness who attests the signature. Therefore, we have provisionally proposed that it should be possible to witness an electronic signature by a video link and then attest the document. We have also outlined some other potential options for reform, such as electronic acknowledgement, recognising that these would require more significant changes to legislation and the requirements for a validly executed deed.

A WIDER REVIEW OF DEEDS?

8.86 We set out in Chapter 4 the formalities which must be complied with to execute a document as a deed. In this chapter we have discussed the issues which arise when these formalities are applied to electronic documents. There is a separate question, however, as to whether these formalities, and the concept of deeds in general, are still fit for purpose in the twenty-first century. Some stakeholders have told us that deeds should be abolished, either entirely or for certain types of transactions.

8.87 In order to address these questions, we consider that there may need to be a wider review of the law of deeds, incorporating both deeds executed electronically and those in traditional, paper form. We would welcome consultees' views on whether this should be a separate Law Commission project.

Consultation Question 14.

8.88 Do consultees think that a review of the law of deeds should be a future Law Commission project?

THE IMPACT OF OUR PROPOSALS

8.89 We explained in Chapter 6 that a move to increase the number of electronic transactions has the potential to reap significant benefits for business and individuals. Increasingly efficient transactions could deliver substantial savings in costs and time and allow resources to be directed to other activities.

8.90 The benefits of execution processes which are quick and convenient go beyond reduced transaction costs. We have been told that an uptake in the use of electronic execution in complex legal transactions may enable businesses to grow, as businesses can better meet customer demand for digital products and services. The facilitation of electronic commerce also has advantages internationally. Additional procedural layers caused by legal uncertainty may adversely impact the competitiveness of England and Wales as a place in which to do business or adjudicate disputes.

8.91 The transitional costs of our proposals for reform are likely to be slender. It is possible that, if electronic execution of complex legal documents becomes more widespread, firms will have to implement revised procedures or IT systems. The cost of professional indemnity insurance might increase if insurers form the view that electronic execution of these types of documents is vulnerable to fraud. We have also been told that there may initially be additional legal costs, unless the practical questions of security, reliability and interoperability are settled through guidance or codes of practice. However, our discussions with stakeholders have suggested that the benefits outlined above are likely to outweigh these costs. There are unlikely to be on-going costs associated with our proposals.

8.92 Despite our discussions with stakeholders, it has been difficult to put a figure on the benefits or costs associated with our proposed reforms. Therefore, we ask consultees for quantitative and qualitative evidence as to what they believe to be the consequences of our proposals. The information which we receive from consultees in response to the questions below will form the basis of an impact assessment to be published with our final report.

Consultation Question 15.

8.93 We provisionally conclude that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document. Do consultees believe that this will result in increased confidence in the legality of electronic execution in England and Wales? Is any more needed?

Consultation Question 16.

8.94 What do consultees believe would be the financial value of increased confidence in the legality of electronic execution in England and Wales? For example, do consultees think there could be a reduction in transaction costs by as much as 10% to 30%?

Consultation Question 17.

8.95 Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would:

(1) provide benefits such as reduced transaction costs? If so, how much?

(2) provide non-monetary benefits? If so, what benefits?

Consultation Question 18.

8.96 We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from:

(1) the capacity to execute deeds electronically without the physical presence of a witness; or

(2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.

Chapter 9: Consultation Questions

Consultation Question 1.

9.1 Our provisional conclusion is that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document. Do consultees agree?

Paragraph 3.87

Consultation Question 2.

9.2 Our provisional conclusion 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. Do consultees agree?

Paragraph 4.57

Consultation Question 3.

9.3 We welcome consultees' views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.

Paragraph 6.19

Consultation Question 4.

9.4 We believe that where specific provision is necessary in relation to certain types of documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney), that is a matter for specific legislation or regulation, and not for the general law of execution of documents. Do consultees agree?

Paragraph 6.41

Consultation Question 5.

9.5 We consider that legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature. Do consultees agree?

Paragraph 7.20

Consultation Question 6.

9.6 We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree?

Paragraph 7.28

Consultation Question 7.

9.7 We provisionally propose that it should be possible to witness an electronic signature via video link and then attest the document. Do consultees agree?

Paragraph 8.32

Consultation Question 8.

9.8 If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation:

(1) Via a signing platform which the signatory and witness both log into?

(2) With the document being emailed to the witness by the signatory immediately after signing?

Paragraph 8.33

Consultation Question 9.

9.9 Do consultees consider that it should be possible to "witness" an electronic signature through an online signing platform in real time, without a video link or any direct communication between the signatory and the witness?

Paragraph 8.42

Consultation Question 10.

9.10 Our view is that the witnessing and attestation requirement for electronic signatures on deeds should not be replaced with a requirement for a particular type of technology, such as a digital signature using Public Key Infrastructure. Do consultees agree?

Paragraph 8.50

Consultation Question 11.

9.11 Do consultees think that there is a case for moving away from the traditional concepts of witnessing and attestation in the context of deeds executed electronically, allowing for electronic acknowledgement? If so:

(1) How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?

(2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which:

(a) acknowledgement must occur after signing; and

(b) acknowledgement and witnessing must take place?

(3) How should the witness record the signatory's acknowledgement?

Paragraph 8.60

Consultation Question 12.

9.12 Our view is that the requirement that deeds must be delivered does not impede the electronic execution of deeds in practice. Do consultees agree?

Paragraph 8.70

Consultation Question 13.

9.13 We consider that legislative reform is unnecessary and inappropriate to address the implications of the *Mercury* decision. Do consultees agree?

Paragraph 8.83

Consultation Question 14.

9.14 Do consultees think that a review of the law of deeds should be a future Law Commission project?

Paragraph 8.88

Consultation Question 15.

9.15 We provisionally conclude that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document. Do consultees believe that this will result in increased confidence in the legality of electronic execution in England and Wales? Is any more needed?

Paragraph 8.93

Consultation Question 16.

9.16 What do consultees believe would be the financial value of increased confidence in the legality of electronic execution in England and Wales? For example, do consultees think there could be a reduction in transaction costs by as much as 10% to 30%?

Paragraph 8.94

Consultation Question 17.

9.17 Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would:

(1) provide benefits such as reduced transaction costs? If so, how much?

(2) provide non-monetary benefits? If so, what benefits?

Paragraph 8.95

Consultation Question 18.

9.18 We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from:

(1) the capacity to execute deeds electronically without the physical presence of a witness; or

(2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.

Paragraph 8.96

Appendix 1: Acknowledgements

In preparing this consultation paper, the Law Commission met or corresponded with the following people and organisations with respect to this project. We are extremely grateful for their time and for the information they have provided.

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Appendix 2: Overseas legislative schemes

NEW YORK

Electronic signatures

Federal law

2.1 There are two important instruments relating to electronic signatures at the federal level. The first is the Electronic Signatures in Global and National Commerce Act ("ESIGN Act"),[1] which is a federal statute enacted in 2000 to provide for the use and validity of electronic signatures. The ESIGN Act applies to all US states.[2] The second is the Uniform Electronic Transactions Act ("UETA"), a model law developed by the Uniform Law Commission and recommended to US states. While most states have adopted UETA, New York has not done so.[3] To the extent of any inconsistency between the ESIGN Act and New York law, the ESIGN Act will prevail.[4]

2.2 Due to federal constitutional limitations, the scope of the ESIGN Act is confined to interstate or foreign trade and commerce.[5] The ESIGN Act also does not extend to transactions with government.[6] The scope of UETA is not so restricted.[7] The definitions of electronic signature, and the corresponding statements of validity, are similar, though not identical, as between the ESIGN Act and UETA. Electronic signatures are defined in §7006(5) of the ESIGN Act as:[8]

> an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

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1 Electronic Signatures in Global and National Commerce Act, 15 USC §7001 ("ESIGN Act").

2 See eg New York State Office for Technology, *Report to the Governor and Legislature on New York State's Electronic Signatures and Records Act* (2004), pp 9, 30 to 32.

3 The Uniform Electronic Transactions Act does not have statutory status. See L Brazell, *Electronic Signatures and Identities: Law and Regulation* (2nd ed 2008), para 6-169 and S Curry, "Washington's Electronic Signature Act: An Anachronism in the New Millennium" (2013) 88 *Washington Law Review* 559, 571 to 572.

4 However, the ESIGN Act will not override state laws which amount to an enactment or adoption of the Uniform Electronic Transactions Act: ESIGN Act, 15 USC §7002(a)(1).

5 ESIGN Act, 15 USC §7001(a)(1).

6 Unless government is acting in a commercial capacity. See L Brazell, *Electronic Signatures and Identities: Law and Regulation* (2nd ed 2008) para 6-170.

7 The Uniform Electronic Transactions Act applies to electronic records and signatures "relating to a transaction". A "transaction" is defined as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs": §2(16).

8 See also Uniform Electronic Transactions Act, §2(8): "'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record".

2.3 The ESIGN Act (§7001(a)(1)) provides for the validity of electronic signatures. It states:[9]

> Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II), with respect to any transaction in or affecting interstate or foreign commerce—
>
> > (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
> >
> > (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

2.4 As discussed in Chapter 5, UETA also contains a second, positive statement of validity regarding electronic signatures. Section 7(d) provides that "If a law requires a signature, an electronic signature satisfies the law".

2.5 The use of "may not be denied legal effect" recalls article 25(1) of eIDAS, which we discuss in Chapter 3.[10] Unlike eIDAS, however, the ESIGN Act and UETA are technology neutral. Indeed, the ESIGN Act stipulates that its provisions override state laws which give enhanced legal status or effect to electronic signatures created or authenticated with specific technology.[11] In cases of inconsistency between the ESIGN Act and state laws, the provisions of the federal statute which provide for the validity of electronic signatures prevail.[12]

New York law

2.6 Instead of adopting UETA,[13] New York enacted a bespoke electronic signatures statute in 1999: the Electronic Signatures and Records Act ("ESRA").[14] According to the New York Office of Information Technology Services, the legislation's purpose is to give validity and effect to electronic signatures and electronic records.[15]

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9 See also Uniform Electronic Transactions Act, §7(a): "A record or signature may not be denied legal effect or enforceability solely because it is in electronic form."

10 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 ("eIDAS").

11 ESIGN Act, 15 USC §7002(a)(2)(A)(ii).

12 However, a state law based on the Uniform Electronic Transactions Act may supersede the application of the ESIGN Act: see ESIGN Act, 15 USC §7002(a)(1).

13 At least as of 2017: see http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act (last visited 10 August 2018).

14 The Electronic Signatures and Records Act is contained in the New York State Technology Law, art III. It is available at https://its.ny.gov/nys-technology-law#ArticleIII (last visited 10 August 2018).

15 New York Office of Information Technology Services, *IT Guideline: Electronic Signatures and Records Act* NYS-G04-001 (9 June 2017), para 4.1, https://its.ny.gov/sites/default/files/documents/nys-g04-001_electronic_signatures_and_records_act_ersa_guidelines.pdf (last visited 10 August 2018).

2.7 ESRA's definition of electronic signature is identical to that in the ESIGN Act.[16] It is a flexible, technologically neutral definition.[17] Lorna Brazell observes that the definition is broad enough to cover asymmetric cryptography, typing a name at the end of an email, the "click" of a click wrap agreement and even the pressing of a telephone keypad in response to voice prompts.[18]

2.8 ESRA provides in section 304 that electronic signatures have equivalent validity and legal effect to wet ink signatures:

> an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.[19]

2.9 There are, however, several exceptions to this position, including wills, trusts and powers of attorney.[20] Nor does ESRA apply to negotiable instruments, unless the electronic version of such an instrument allows for the creation of one unique, identifiable and unalterable version.[21] This means that there is a large set of documents which cannot be executed electronically.

Deeds

2.10 Although the distinction between deeds and simple contracts is retained under New York law, only interests in land must be conveyed by deed or similar instrument.[22] While there is no requirement for deeds to be "sealed" and "delivered", they must satisfy several formalities. For conveyances of real property – whether in the form of a template deed or not – instruments must be:

(1) acknowledged or proved;[23]

(2) signed;[24]

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16 Electronic Signatures and Records Act, §302.

17 In contrast to New York, legislation enacted in states such as Washington and Utah validated digital signatures only, at least before the promulgation of the Uniform Electronic Transactions Act: see S Curry "Washington's Electronic Signature Act: An Anachronism in the New Millennium" (2013) 88 *Washington Law Review* 559, 560. Curry argues at 584 that even in its current form, the Washington Electronic Authentication Act privileges digital signatures to an extent which is inconsistent with the ESIGN Act and the Uniform Electronic Transactions Act.

18 L Brazell, *Electronic Signatures and Identities: Law and Regulation* (2nd ed 2008) para 6-190; see also S Curry "Washington's Electronic Signature Act: An Anachronism in the New Millennium" (2013) 88 *Washington Law Review* 559, 570.

19 Electronic Signatures and Records Act, §304. The legislation does not mandate that a specific technology must be used: see §303 and New York Codes, Rules and Regulations, part 540.

20 Electronic Signatures and Records Act, §307(1).

21 Electronic Signatures and Records Act, §307(1).

22 General Obligations Law, §§5-703(1), 5-705.

23 Real Property Law, §291.

24 General Obligations Law, §5-701.

(3) if the deed was proved – witnessed;[25] and

(4) certified by a public official.[26]

2.11 For a deed to be acknowledged, the grantor must affirm that they "executed the deed voluntarily for the purposes stated in the deed".[27] For a deed to be proved, a witness must sign the deed and give a sworn statement to the effect that they saw the grantor execute it.[28] The acknowledgement or proof must be made before a public official,[29] who is then required to "certify the fact of acknowledgement or proof under his hand and official seal".[30] This is in order to establish the authenticity of the deed and enable it to be recorded or registered.[31]

2.12 Section 258 of the New York Real Property Law includes template deeds which parties can use instead of drafting their own bespoke documents. However, there is no requirement to use these templates, and instruments which depart from these templates are not invalid (so long as the formalities are met).

Electronic deeds

2.13 We noted above that interests in land must be conveyed by a "deed or conveyance in writing".[32] Section 291-i of the Real Property Law provides for the circumstances in which "recording officers" at land registries can accept electronically signed instruments. It provides that where an instrument affecting real property is required to be signed, this requirement is satisfied:[33]

(1) if the instrument is a "digitized paper document" – a "digitized image of a wet signature of the person executing such instrument" appears on that document; or

(2) if the instrument is an "electronic record" – the instrument is signed by use of an electronic signature.

2.14 A "digitized paper document" refers to a digital image which "accurately depicts the information on the paper document".[34] Presumably, a PDF file created from a scanned

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25 Real Property Law, §292. See also D Harvey, *Real Estate Law and Title Closing: Deeds, Contracts, Mortgages, with Forms* (1956), citing *People v Snyder* 41 NY 397; *Biglow v Biglow* 56 NYS 794; *Freyer v Rockefeller* 63 NY 268.

26 Real Property Law, §291.

27 N P Ready, *Brooke's Notary* (14th ed 2013) para 11-32.

28 N P Ready, *Brooke's Notary* (14th ed 2013) para 11-32.

29 The types of public official empowered to certify acknowledgements or proofs are set out in Real Property Law, §298.

30 N P Ready, *Brooke's Notary* (14th ed 2013) para 11-32.

31 N P Ready, *Brooke's Notary* (14th ed 2013) para 11-32.

32 General Obligations Law, §5-703(1).

33 Real Property Law, §291-i(b).

34 Real Property Law, §290(10).

image of a signed document would meet this criterion. An "electronic record" means "information evidencing any act … stored by electronic means and capable of being accurately reproduced".[35] Such documents have never existed in paper form. An electronic signature is required for an instrument of this type to be accepted by a recording officer.

2.15 Section 291-i(c) of the Real Property Law deals with witnessing. This provision does not cover the way in which witnessing may be achieved electronically. Rather, it provides that where a law requires a signature to be witnessed as a condition of recording, the requirement is satisfied if a digitised image of the wet ink signature of the witness appears on the "digitized paper document". Alternatively, the requirement is satisfied if the electronic signature of the witness is attached to the instrument along with that of the relevant party.

NEW SOUTH WALES, AUSTRALIA

2.16 Like New York, New South Wales (NSW) exists within a federal legal system. There are both national and state laws which deal with electronic signatures and execution. The Electronic Transactions Act 1999 (Cth) governs the way in which formality requirements imposed by federal laws can be satisfied electronically. The Electronic Transactions Act 2000 (NSW) ("ETA 2000") does the same for the laws of NSW. The ETA 2000 largely replicates its federal counterpart, and similar legislation exists in Australia's other states and territories.[36] The legislation is based on the UNCITRAL Model Law on Electronic Commerce.[37]

2.17 At common law, the validity of electronic signatures is uncontroversial. In the Supreme Court of NSW case of *Stuart v Hishon*,[38] Harrison J explained that:

> Electronic signatures are a fact of modern commercial life. No more suspicion should attend the assessment of Mr Stuart's 'signed' email than if he had chosen to communicate with Ms Hishon in identical terms written on paper and signed by him in ink … Mr Stuart typed his name on the foot of the email. He signed it by doing so. It would be an almost lethal assault on common sense to take any other view.

Electronic signatures

Electronic Transactions Act 2000

2.18 The object of the ETA 2000 is to "provide a regulatory framework" that (among other things) facilitates the use of electronic transactions and "promotes business and

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35 Real Property Law, §290(7).

36 The state and territory statutes "generally mirror" the federal law: Australian Government – Attorney-General's Department, "E-Commerce", https://www.ag.gov.au/RightsAndProtections/ECommerce/Pages/default.aspx (last visited 10 August 2018).

37 See the Electronic Transactions Bill 1999 (Cth), Revised Explanatory Memorandum, https://www.legislation.gov.au/Details/C2004B00505/Revised%20Explanatory%20Memorandum/Text (last visited 10 August 2018).

38 *Stuart v Hishon* [2013] NSWSC 766 at [34].

community confidence in the use of electronic transactions".[39] The ETA 2000 contains a general rule of validity for electronic transactions, as well as specific provisions relating to electronic signatures. The general rule is contained in subsection 7(1), which provides:

> For the purposes of a law of this jurisdiction, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

2.19 The ETA 2000 provides that where a NSW law requires a person to give information in writing, provide a handwritten signature, or produce, record or retain a document, such a requirement may be satisfied by electronic means.[40]

2.20 The ETA 2000 does not contain a definition of electronic signatures. However, it provides that electronic signatures must be related to an "electronic communication", which is defined as:

> a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both.[41]

Validity of electronic signatures

2.21 Subsection 9(1) of the ETA 2000 stipulates that electronic signatures which fulfil three criteria will satisfy signing requirements under NSW law. The first is purposive: the method of signing must be used to identify the person and indicate their intention in relation to the relevant information.[42] The second is technical in nature: it stipulates that the signature must be appropriately reliable, given the purpose of the communication to which the signature is attached.[43] Alternatively, if the signature in fact identifies the person and indicates their intention to sign, then the reliability standard does not apply.[44] The third requirement is the consent of the person in receipt of the signed communication to the method of signing.[45]

2.22 The identification element was considered by the Supreme Court of the Northern Territory in *Faulks v Cameron*.[46] The Northern Territory's electronic transactions legislation contains a provision in terms identical to subsection 9(1)(a) of the ETA 2000. An email regarding the division of property following the termination of the parties' relationship concluded "Regards, Angus". The court held that the printed signature

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39 Electronic Transactions Act 2000 (NSW), s 3.

40 Electronic Transactions Act 2000 (NSW), ss 8 to 11.

41 Electronic Transactions Act 2000 (NSW), s 5(1). There is another limb of the definition relating to communication of information in the form of sound, which is not relevant to this chapter.

42 Electronic Transactions Act 2000 (NSW), s 9(1)(a).

43 Electronic Transactions Act 2000 (NSW), s 9(1)(b)(i).

44 Electronic Transactions Act 2000 (NSW), s 9(1)(b)(ii). This is a departure from the UNCITRAL Model Law on Electronic Commerce, art 7 of which applies the "as reliable as appropriate" standard even when the signing method in fact identifies the person and indicates their intention.

45 Electronic Transactions Act 2000 (NSW), s 9(1)(c).

46 *Faulks v Cameron* [2004] NTSC 61.

on the email was sufficient to identify the defendant and to indicate his approval of the information in the email.[47]

2.23 The second element (the "as reliable as appropriate" standard) was considered by the Federal Court of Australia in *GetUp Ltd v Electoral Commissioner*.[48] This case concerned an electoral enrolment application which had been rejected by the Electoral Commissioner on the basis that applicant's electronic signature, created by a digital pen, was insufficient. The court observed the provision is "pitched at a very high level of generality" and held that it did not require the person to whom the document was sent to hold a subjective opinion as to the reliability of the electronic signature.[49] While the court noted that the use of a digital pen carries with it a risk of fraud, it held that the magnitude of that risk was not such as to render the signature insufficiently reliable.[50] The court therefore concluded that the signature met the legislative standard.[51]

2.24 Recent cases indicate that Australian courts have continued to take an accommodating approach towards the reliability standard. In *Bullhead Pty Ltd v Brickmakers Place*,[52] the Supreme Court of Victoria held that the name "Brett" typed at the end of an email represented a valid electronic signature. The email formed part of an agreement under which one of the parties bought the other's interest in a property development scheme. Sifris J simply noted that the "electronic signature 'Brett' when combined with his email address 'brett6858@gmail.com' … was as reliable as appropriate for the [relevant] purpose".[53]

2.25 The consent requirement has also been interpreted broadly. In *Stellard Pty Ltd v North Queensland Fuel Pty Ltd*,[54] the Supreme Court of Queensland held that a person's consent to an electronic signing method does not need to be given explicitly. Martin J stated that:[55]

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47 *Faulks v Cameron* [2004] NTSC 61 at [64] per Young AM. Young AM did not expand on the reason for concluding that the identification and approval element was met in this case. He simply stated that "I am satisfied that the printed signature on the defendant's e-mails identifies him and indicates his approval of the information communicated, that the method was as reliable as was appropriate and that the plaintiff consented to the method".

48 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869. This case considered the Electronic Transactions Act 1999 (Cth) before its 2011 amendment, however the previous s 10(1)(b) still employed the "as reliable as was appropriate" standard.

49 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 at [14].

50 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 at [20].

51 *GetUp Ltd v Electoral Commissioner* [2010] FCA 869 at [22].

52 *Bullhead Pty Ltd v Brickmakers Place* [2017] VSC 206.

53 *Bullhead Pty Ltd v Brickmakers Place* [2017] VSC 206 at [170] per Sifris J. See also *Russells v McCardel* [2014] VSC 287 and *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015] WASC 220.

54 [2015] QSC 119 at [67].

55 *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 at [68].

> In circumstances where parties have engaged in negotiation by email and, in particular, where an offer is made by email, then it is open to the court to infer that consent has been given by conduct of the other party.

Exceptions to the use of electronic signatures

2.26 The capacity for electronic signatures to satisfy statutory signing requirements is subject to certain exceptions. First, subsection 9(1) does not affect the operation of any NSW law which makes provision for an electronic communication to contain an electronic signature.[56] The effect of this exception is that section 9(1) will only apply to laws which require signatures in general, rather than laws which specifically require electronic signatures.

2.27 Secondly, a requirement for a document to be attested cannot be satisfied by the electronic signature of a witness.[57] This provision precludes the use of electronic signatures for deeds. Regulations made under the ETA 2000 also provide that electronic signatures will not satisfy requirements for a person to sign a document to be lodged or filed with a judicial body.[58]

Deeds

2.28 Deeds are recognised in NSW. Subsection 38(1) of the Conveyancing Act 1919 (NSW) provides that deeds must be:

(1) signed;

(2) sealed; and

(3) attested by at least one witness who is not a party to the deed, although no particular form of words is required for the attestation.[59]

2.29 Section 127 of the Corporations Act 2001 (Cth) provides for the execution of documents by corporations. A company may execute a document as a deed if it is expressed to be a deed and is executed in accordance with the general requirements for the corporate execution of documents.[60] Since the Corporations Act 2001 (Cth) is intended to operate concurrently with state legislation,[61] a deed executed by a company must also comply with section 38 of the Conveyancing Act 1919 (NSW).

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56 Electronic Transactions Act 2000 (NSW), s 9(2).

57 Electronic Transactions Regulation 2017 (NSW), reg 5(f). Certain laws are also excluded from the provisions of the Act which deal with the use of electronic signatures: see Electronic Transactions Regulation 2017 (NSW), reg 7.

58 Electronic Transactions Regulation 2017 (NSW), reg 5(b).

59 Conveyancing Act 1919 (NSW), s 38(3).

60 Corporations Act 2001 (Cth), s 127(3). A company may execute a document without a common seal if the document is signed by two directors, a director and company secretary, or (for a proprietary company with a sole director and company secretary) the director: s 127(1).

61 Corporations Act 2001 (Cth), s 5E(1).

2.30 While the ETA 2000 provides for the use of electronic signatures, it does little to facilitate the electronic execution of deeds. This is because section 9(1)(a) does not apply to requirements that a document must be attested or witnessed.[62] The NSW government is currently considering reform of this provision. It has noted that:

> secure digital signature tools arguably perform similar functions [to witnessing] in reducing scope for fraud and may be seen to perform the traditional role of an attesting witness, albeit in an electronic format.[63]

SCOTLAND

2.31 In 2012, Scotland amended the Requirements of Writing (Scotland) Act 1995 ("RWA 1995") to provide for the execution of electronic documents.[64] The amended RWA 1995 does not contain an express statement of validity for electronic signatures, however it gives legal effect to electronically signed documents which comply with certain requirements.

2.32 While some Scottish legislation refers to deeds,[65] the term does not have a technical meaning in Scots law.[66]

Electronic signatures

Validity

2.33 The RWA 1995 provides that writing is not required for the constitution of a contract, unilateral obligation or trust,[67] except in specified cases. These include:[68]

(1) contracts or unilateral obligations for the creation, transfer, variation or extinction of a real right in land;[69]

(2) gratuitous unilateral obligations, except those undertaken in the course of business;

(3) the constitution of trusts in which a person declares himself to be sole trustee of his own property (or any property which he may acquire); and

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62 Electronic Transactions Regulations 2017 (NSW), regs 5(f) and 6(f).

63 New South Wales Government, Office of the Registrar General, "Removing barriers to electronic land contracts – Discussion Paper" (Dec 2017), p 18, https://static.nsw.gov.au/nsw-gov-au/1513721459/Discussion-Paper-Removing-barriers-to-electronic-land-contracts-.pdf (last visited 10 August 2018).

64 These amendments were made by s 97 of the Land Registration etc. (Scotland) Act 2012.

65 See eg Land Registration etc. (Scotland) Act 2012.

66 W McBryde, *The Law of Contract in Scotland* (3rd ed 2007) para 4-01.

67 Requirements of Writing (Scotland) Act 1995, s 1(1).

68 Requirements of Writing (Scotland) Act 1995, s 1(2).

69 Writing is also required for the direct creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law: Requirements of Writing (Scotland) Act 1995, s 1(2)(b).

(4) wills.

2.34 Such arrangements or obligations must either be contained in a "traditional document" which complies with section 2 of the RWA 1995, or an "electronic document" complying with section 9B of the RWA 1995.[70] As we explain below, electronic documents which are required to be in writing must be signed with an advanced electronic signature in order to have legal effect.

2.35 Subsection 9B(1) provides that an electronic document required to be in writing is not valid unless:

> (a) it is authenticated[71] by the granter … in accordance with subsection (2), and
>
> (b) it meets such other requirements (if any) as may be prescribed by the [Electronic Documents (Scotland) Regulations 2014].[72]

2.36 Pursuant to subsection 9B(2), a person authenticates an electronic document if their electronic signature:[73]

> (a) is incorporated into, or logically associated with, the electronic document,
>
> (b) was created by the person by whom it purports to have been created, and
>
> (c) is of such type, and satisfies such requirements (if any), as may be prescribed by the Scottish Ministers in regulations.

2.37 The Electronic Documents (Scotland) Regulations 2014 require that the granter's electronic signature must be an "advanced electronic signature".[74] This term is defined in accordance with article 3(11) of eIDAS.[75] Therefore, if an electronic document required to be in writing is authenticated using an advanced electronic signature, it will be valid.

Probative status

2.38 That an electronic signature is valid, however, is not the end of the story. The RWA 1995 draws a distinction between documents which are valid, and those which are "probative",[76] that is, presumed to be validly executed based on their appearance.[77]

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[70] Requirements of Writing (Scotland) Act 1995, s 1(2).

[71] Requirements of Writing (Scotland) Act 1995, s 12(4) provides that references to authenticity "(i) are references to whether the document has been electronically signed by a particular person, and (ii) may include references to whether the document is accurately timed or dated".

[72] SSI 2014 No 83, made under the Requirements of Writing (Scotland) Act 1995, ss 9B(2)(c), 9C(2) and 9E(1)(d).

[73] Requirements of Writing (Scotland) Act 1995, s 9B(2)(c).

[74] Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 2.

[75] Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 1(2).

[76] The Requirements of Writing (Scotland) Act 1995, ss 3 and 9C.

[77] G Gretton and K Reid, *Conveyancing* (4th ed 2011) para 17-02. The Requirements of Writing (Scotland) Act 1995 does not use the term "probative", however Gretton and Reid observe that in explaining the legislation,

Documents do not need to be probative to be validly executed. However, the presumption is important for two reasons. First, it may be relied on in a contractual dispute as to whether a document was validly executed.[78] Second, certain registries require a document to be probative for registration, including the Land Register of Scotland.[79]

2.39 For a traditional document to be probative, it must be witnessed. There is no requirement for an electronic document to be witnessed for it to have probative status. Instead it must fulfil the requirements of section 9C of the RWA 1995:

(1) it must "bear" (that is, appear) to have been authenticated by the granter, and nothing in the document indicates that it was not so authenticated; and

(2) it must conform with the Electronic Documents (Scotland) Regulations 2014, which provides that probative electronic documents must contain an advanced electronic signature which is certified by a qualified certificate for electronic signature as defined by article 3(15) of eIDAS.[80]

HONG KONG

2.40 Hong Kong introduced legislation to govern electronic transactions in 2000. The Electronic Transactions Ordinance (Cap 553) ("ETO 2000") confers the same legal status on electronic records and signatures as their paper version.[81] One of its objects is to facilitate the use of electronic transactions for commercial and other purposes.[82] Deeds affecting land are excluded from the scope of the ETO 2000.[83]

Electronic signatures

2.41 The ETO 2000 distinguishes between electronic signatures and digital signatures. An electronic signature is defined in section 2 of the ETO 2000 as:

> a record generated in digital form by an information system, which can be (a) transmitted within an information system or from one information system to another; and (b) stored in an information system or other medium.

2.42 A digital signature is:[84]

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the word is "too convenient to abandon": para 17-02. For traditional paper documents, the presumption of validity is referred to as the "presumption as to granter's subscription". For electronic documents, it is referred to as the "presumption as to authentication": Requirements of Writing (Scotland) Act 1995, ss 3 and 9C.

78 See W McBryde, *The Law of Contract in Scotland* (3rd ed 2007) para 5-78.

79 Requirements of Writing (Scotland) Act 1995, s 9G(1).

80 Electronic Documents (Scotland) Regulations 2014, SSI 2014 No 83, reg 3.

81 The Government of the Hong Kong Special Administrative Region, Office of the Government Chief Information Officer, *Introduction to the Electronic Transactions Ordinance*, https://www.ogcio.gov.hk/en/our_work/regulation/eto/ordinance/introduction/ (last visited 10 August 2018).

82 Electronic Transactions Ordinance (Cap 553), Long Title.

83 Electronic Transactions Ordinance (Cap 553), sch 1, para 6.

84 Electronic Transactions Ordinance (Cap 553), s 2(1).

an electronic signature of the signer generated by the transformation of the electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can determine—

(a) whether the transformation was generated using the private key that corresponds to the signer's public key; and

(b) whether the initial electronic record has been altered since the transformation was generated.

2.43 The ETO 2000 draws a distinction between transactions involving government entities[85] and those that do not. In the former, a signature requirement under the law can be satisfied by digital, but not merely an electronic, signature.[86] In relation to transactions between private parties, any form of electronic signature may suffice so long as it is reliable, appropriate and agreed to by the recipient of the signature.[87]

Validity of electronic signatures

2.44 For an electronic signature to meet a requirement that a record be signed, it must be attached to or logically associated with the relevant electronic record.[88] The signatory must also have attached it "for the purpose of identifying himself and indicating his authentication or approval of the information contained in the document".[89] Further, the method used to attach the electronic signature must be "reliable, and … appropriate, for the purpose for which the information contained in the document is communicated".[90] Finally, the person to whom the document is communicated must consent to the method used to attach the signature.[91]

2.45 Section 6(1A) of the ETO 2000 governs the use of electronic signatures by government entities, or those acting on behalf of government. Where the law requires a signature, and either the signatory or the recipient of the electronic document is a government entity, then a digital signature will meet the requirement. The digital signature must be supported by a recognised certificate, generated within the validity of that certificate and

85 Including those involving entities acting on behalf of government: Electronic Transactions Ordinance (Cap 553), s 6(1). Hong Kong introduced the requirement for digital signatures in government transactions for reasons of clarity and cost efficiency: see Hong Kong Legislative Council, *Report on the Bills Committee on Electronic Transactions (Amendment) Bill 2003*, LC Paper No CB(1)2150/03-04, para 8, http://www.legco.gov.hk/yr02-03/english/bc/bc16/reports/bc160623cb1-rpt-e.pdf (last visited 10 August 2018).

86 Electronic Transactions Ordinance (Cap 553), s 6(1A).

87 Electronic Transactions Ordinance (Cap 553), s 6(1).

88 Electronic Transactions Ordinance (Cap 553), s 6(1)(c).

89 Electronic Transactions Ordinance (Cap 553), s 6(1)(c).

90 Electronic Transactions Ordinance (Cap 553), s 6(1)(d).

91 Electronic Transactions Ordinance (Cap 553), s 6(1).

used within that certificate's terms.[92] The Postmaster General in Hong Kong is a designated certification authority capable of issuing such certificates.[93]

2.46 The application of subsections 6(1) and (1A) of the ETO 2000 do not appear to have been the subject of detailed judicial consideration. In *Brettell v Erving*,[94] the court considered whether a signature contained in an electronic record in which the defendant acknowledged his debt to the plaintiff was signed. Registrar KW Lung accepted that the electronic signatures could be regarded as the plaintiff's signatures under section 6 of the ETO 2000.[95]

2.47 Various matters are excluded from the application of section 6, meaning that in these areas, electronic (or digital) signatures cannot be used to satisfy signing requirements. These include wills, trusts, powers of attorney, statutory declarations, oaths and affidavits, and contracts disposing of immovable property.[96] Importantly, section 6 also does not apply to "any deed, conveyance or other document or instrument in writing … by which any parcels of ground tenements or premises in Hong Kong may be affected".[97]

Deeds

General law

2.48 Deeds are used in Hong Kong for most conveyances of land or any interest in land.[98] A deed is defined as a document under seal.[99] The formal requirements for a deed are set out in sections 19 and 20 of the Conveyancing and Property Ordinance (Cap 219) ("CPO 1984").

2.49 Section 19 of the CPO 1984 provides for the execution of deed by individuals. A deed must be signed by the individual,[100] and will be presumed to be sealed if it describes itself as a deed, states that it has been sealed, or bears a mark intended to represent a seal.[101] Section 20 of the CPO 1984 provides for the execution of deeds by corporations. It provides that a deed is deemed to have been duly executed where it purports to bear

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92 Electronic Transactions Ordinance (Cap 553), s 6(1A).

93 Electronic Transactions Ordinance (Cap 553), s 34. Other certification authorities may apply to the Government Chief Information Officer to become a recognised certification authority: Electronic Transactions Ordinance (Cap 553), s 20.

94 *David Norman Brettell v Christopher Paul Erving* [2016] HKEC 9 English Judgment.

95 *David Norman Brettell v Christopher Paul Erving* [2016] HKEC 9 English Judgment at [23] per Registrar KW Lung.

96 Or an interest in immovable property.

97 Electronic Transactions Ordinance (Cap 553), sch 1, para 6. Electronic signatures also cannot be used in most types of legal proceedings: Electronic Transactions Ordinance (Cap 553), sch 2.

98 *Halsbury's Laws of Hong Kong* (2016) vol 115 *Contract* para 115.016.

99 *Annotated Ordinances of Hong Kong*, Conveyancing and Property Ordinance (Cap 219), para 19.05.

100 Conveyancing and Property Ordinance (Cap 219), s 19(1).

101 Conveyancing and Property Ordinance (Cap 219), s 19(2).

the seal of the corporation affixed in the presence of and attested by a secretary and director or two directors.[102]

2.50 There is no general requirement in Hong Kong for deeds to be witnessed. The attestation of deeds, however, is best practice, endorsed by both courts[103] and the Law Society of Hong Kong.[104]

Electronic execution of deeds

2.51 There is no statutory provision in the CPO 1984 dealing with the electronic execution of deeds. Our view is that deeds relating to land probably cannot be executed electronically under Hong Kong law. This is because the ETO 2000 expressly excludes from its application "any deed, conveyance or other document or instrument in writing … by which any parcels of ground tenements or premises in Hong Kong may be affected".[105]

2.52 As to deeds which do not involve land, the electronic signature provisions of sections 6 and 6A of the ETO 2000 presumably apply. Therefore, such deeds can be signed using an electronic signature which meets the relevant requirements of reliability, appropriateness and the intention to authenticate. Execution of deeds electronically is perhaps easier than in the other jurisdictions that we have considered, because witnessing and attestation are not required. On the other hand, as indicated above, deeds executed by corporations must still be attested, and even deeds executed by individuals are witnessed as a matter of best practice. Although there is a requirement of sealing, this formality does not pose a significant hurdle to electronic execution. This is because sealing is presumed if a particular form of words is used.[106]

ESTONIA

Electronic signatures

2.53 Electronic signatures in Estonia are regulated by eIDAS and its implementing legislation, the Electronic Identification and Trust Services for Electronic Transactions Act 2016 ("EITS 2016").[107] EITS 2016 only applies to electronic transactions to the extent that these are not already regulated by eIDAS.[108]

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102 Conveyancing and Property Ordinance (Cap 219), s 20(1).

103 *Champhon Industrial Ltd v Hight Projects Industrial Ltd* [1992] HKCU 328 at 3.

104 *Annotated Ordinances of Hong Kong*, Conveyancing and Property Ordinance (Cap 219), para 19.05.

105 Electronic Transactions Ordinance (Cap 553), sch 1, para 6.

106 Conveyancing and Property Ordinance (Cap 219), s 19(2). In the case of corporations, the deed simply needs to "purport to bear the seal of the corporation": s 20(1). A digital image of the corporation's seal on the electronic document would probably suffice for this purpose.

107 Available at https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/527102016001/consolide (last visited 10 August 2018).

108 Electronic Identification and Trust Services for Electronic Transactions Act 2016, s 1(1).

2.54 In accordance with eIDAS, qualified electronic signatures enjoy equivalent legal effect to handwritten signatures.[109] Further, an electronic signature cannot be denied legal effect and admissibility solely because of its electronic nature.[110]

2.55 The use of electronic signatures is widespread in Estonia. Estonians are issued with identification cards called ID-cards or Digi-IDs, which are used for electronic authentication and to create qualified electronic signatures.[111] These cards contain a chip with asymmetric encryption capability. On receiving an ID-card, an individual is granted two certificates: one for authentication and the other for creating qualified electronic signatures.[112] Accordingly, pursuant to eIDAS, signatures created with an ID-card have equivalent legal effect to handwritten signatures.[113]

Deeds

2.56 Deeds do not form part of the Estonian legal system, however certain types of transaction attract additional formalities. For example, gratuitous contracts are enforceable under the Law of Obligations Act 2001 so long as they are in writing.[114] Further, the Law of Property Act 1993 stipulates that certain transactions involving land must be “notarially authenticated” or “notarially certified”.[115]

2.57 Notarial certification means that a notary confirms that the formalities which apply to a document have been complied with. It does not involve certification of the legality of a document’s content.[116] Notarial authentication includes the extra step of the notary examining the content of the document to confirm its legality. For notarial authentication

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[109] eIDAS, art 25(2).

[110] eIDAS, art 25(1). Section 24 of the Electronic Identification and Trust Services for Electronic Transactions Act 2016 provides that a digital signature “shall be deemed to be an electronic signature that conforms to the requirements for a qualified electronic signature set out in article 3(12) of [eIDAS]”.

[111] E-Estonia, “e-identity”, https://e-estonia.com/solutions/e-identity/ (last visited 10 August 2018). A person can also digitally sign a document using Mobile-ID, which uses a special SIM card and a mobile application to sign; or a Smart-ID, issued by a private company, which is also a mobile application but does not require a SIM. See E-Estonia, “Mobile-ID”, https://e-estonia.com/solutions/e-identity/mobile-id (last visited 10 August 2018) and E-Estonia, “Smart-ID”, https://e-estonia.com/solutions/e-identity/smart-id (last visited 10 August 2018).

[112] Correspondence with Estonia Ministry of Economic Affairs and Communications, 19 July 2018.

[113] Correspondence with Estonia Ministry of Economic Affairs and Communications, 19 July 2018. The certification period is five years: see ID, “Electronic signatures” (2018), https://www.id.ee/?lang=en&id=31008 (last visited 10 August 2018). ID-cards or Digi-IDs are inserted into a card reader, which can be purchased from an electronics retailer or local bank branch. The user then inserts a PIN number to create a digital signature: ID, “ID-card and Digi-ID” (2018), https://www.id.ee/index.php?id=30500 (last visited 10 August 2018).

[114] Law of Obligations Act 2001, s 261(1), https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/510012018003/consolide (last visited 10 August 2018).

[115] Law of Property Act 1993, ss 64-1 and 64-2.

[116] For example, a will is notarially certified if the testator gives the notary the will in a sealed envelope, and the notary confirms that they hold the will. Similarly, if under the Law of Property Act the notary certifies an agreement, they do not check whether the document is unlawful; rather, they simply confirm that an agreement was reached. Correspondence with Estonia Ministry of Economic Affairs and Communications, 26 April 2018.

of instruments transferring interests in land under the Law of Property Act 1993, a notary must confirm that the transferor has the requisite power to transfer.[117]

2.58 A notary may certify an electronic document by adding their digital signature to it.[118] Where the purpose of the certification is to authenticate a person's electronic signature, then that signature must either be affixed or acknowledged in the notary's presence.[119] To acknowledge the signature, the signatory must add their "handwritten and signed notation" to a separate document.[120] A notary may also authenticate an electronic document.[121] To do so, the notary must prepare a "notarial instrument" which is read out to the parties and approved by them in the notary's presence.[122] The instrument must then be "signed by the parties and the notary in handwriting".[123]

2.59 Accordingly, while electronic documents can be notarially authenticated or certified, notarisation cannot take place remotely.

SINGAPORE

Electronic signatures

2.60 The electronic execution of documents in Singapore is governed by the Electronic Transactions Act 2010 ("ETA 2010").[124] Section 8 deals with the validity of electronic signatures. Where the law requires a signature (or provides for certain consequences if a document is not signed), that requirement can be satisfied in relation to an electronic record[125] where:

(a) a method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic record; and

(b) the method used is either —

(i) as reliable as appropriate for the purpose for which the electronic record was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

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117 Correspondence with Estonia Ministry of Economic Affairs and Communications, 26 April 2018.

118 Notarisation Act 2001, s 38(1-1).

119 Notarisation Act 2001, s 39(1).

120 Notarisation Act 2001, s 39(1).

121 Correspondence with Estonia Ministry of Economic Affairs and Communications, 19 July 2018.

122 Notarisation Act 2001, s 13(1).

123 Notarisation Act 2001, s 13(1).

124 W Yew and J Tan, "The Electronic Transactions Act 2010 – a boost to the e-marketplace" *Lexology* (21 September 2010), https://www.lexology.com/library/detail.aspx?g=5e20c761-4ccd-4de3-8c0d-5c6eb6a9f2e1 (last visited 10 August 2018).

125 The Electronic Transactions Act 2010, 2(1) defines an "electronic record" as "a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another".

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence.

2.61 This provision is based on article 7 of the UNCITRAL Model Law on Electronic Commerce.[126] Unlike the UNCITRAL Model Law, however, the ETA 2010 provides that the "as reliable as appropriate" standard does not need to be met in circumstances where the method of signing in fact identifies the person and their intention to be bound.[127] Further, the ETA 2010 distinguishes between simple electronic signatures and "secure electronic signatures", which enjoy the benefit of certain presumptions. Section 18 provides that:

> (1) If, through the application of a specified security procedure,[128] or a commercially reasonable security procedure agreed to by the parties involved, it can be verified that an electronic signature was, at the time it was made —
>
> (a) unique to the person using it;
>
> (b) capable of identifying such person;
>
> (c) created in a manner or using a means under the sole control of the person using it; and
>
> (d) linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated,
>
> such signature shall be treated as a secure electronic signature.

2.62 The elements to be verified under section 18 reflect the requirements for an advanced electronic signature under article 26 of eIDAS. Subsection 17(2) provides that, in determining whether a security procedure qualifies as being "commercially reasonable", the purposes of the procedure and the commercial circumstances at the time the procedure was used should be considered. This includes the nature of the transaction, the sophistication of the parties, the volume of similar transactions engaged in by the parties, the availability and cost of alternatives and the procedures in general use for similar types of transactions.[129]

2.63 Section 19 of the ETA 2010 sets out the presumptions that relate to secure electronic signatures. In any proceedings involving a secure electronic signature, it is presumed that the secure electronic signature is the signature of the person to whom it

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[126] See UNCITRAL, "Status: UNCITRAL Model Law on Electronic Commerce (1996)", http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html (last visited 10 August 2018). See also Singapore Infocomm Media Development Authority, "Electronic Transactions Act and Regulations" (3 November 2017).

[127] Electronic Transactions Act 2010, s 8(b)(ii).

[128] A "specified security procedure" is a procedure established by a Minister pursuant to s 21 of the Electronic Transactions Act 2010, which, among other things, "specifies the conditions under which any electronic signature may be treated as a secure electronic signature": s 21(3)(a).

[129] Electronic Transactions Act 2010, s 17(2)(a) to (f).

correlates.[130] It is also presumed that the secure electronic signature was affixed by that person with the intention of signing or approving the record.[131] In the absence of a secure electronic record or a secure electronic signature, there is no presumption relating to the authenticity and integrity of the electronic record or electronic signature.[132]

2.64 Schedule 3 to the ETA 2010 contains additional requirements for an electronic signature to be considered secure.[133] Put simply, a certified digital signature will be treated as a secure electronic signature, so long as certain requirements are met.[134] The digital signature must be certified by an accredited or recognised certification authority, including a public agency.[135]

2.65 Schedule 1 to the ETA 2010 lists the matters which are excluded from the statute's provisions regarding validity. Among the excluded areas are wills, negotiable instruments, declaration of trusts, powers of attorney, and contracts for the sale or other disposition of immovable property (or any interest in such property).[136] Even for matters excluded from the ETA 2010, courts have been willing to interpret statutory requirements for writing and signatures broadly. In *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*,[137] Prakash J, as she then was, held that a name typed into an email was a signature for the purposes of section 6(d) of the Civil Law Act 1994.[138] She also held that where the sender does not type their name into an email, the appearance of their name next to their email address in the email's header may constitute a signature.[139]

Deeds

2.66 The formal requirements of deeds in Singapore reflect English common law principles.[140]

2.67 The formalities for deeds made on behalf of incorporated entities were recently revised.[141] Following the amendments, there is no requirement for a company to have a common seal.[142] A company may execute a deed with the signature of a director and

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130 Electronic Transactions Act 2010, s 19(2)(a).

131 Electronic Transactions Act 2010, s 19(2)(b).

132 Electronic Transactions Act 2010, s 19(3).

133 Electronic Transactions Act 2010, s 21(3)(a).

134 Electronic Transactions Act 2010, sch 3, para 3.

135 Electronic Transactions Act 2010, sch 3, para 3(b).

136 Electronic Transactions Act 2010, s 4 and sch 1.

137 [2005] SGHC 58.

138 Prakash J described subsection 6(d) of the Civil Law Act 1994 as "the modern re-enactment of the UK Statute of Frauds 1677": *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58 at [70].

139 *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58 at [91] to [92].

140 See eg the Registration of Deeds Act 1988 and *Kuek Siew Chew v Kuek Siang Wei* [2014] SGHC 237 at [31].

141 Companies (Amendment) Act 2017.

142 Companies Act 1967, s 41A.

secretary, the signature of two directors, or the signature of a director in the presence of an attesting witness.[143] A document executed in such a manner will satisfy a requirement for a document to be executed under seal.[144] These changes do not affect the requirement for delivery of a deed.[145]

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143 Companies Act 1967, s 41B(1).

144 Companies Act 1967, s 41C.

145 Ministry of Finance, *Summary of Feedback and Ministry of Finance / Accounting and Corporate Regulatory Authority's Responses on Proposed Amendments on Annual General Meetings, Annual Returns and Common Seals*, annex 3, para 15, https://www.mof.gov.sg/Portals/0/newsroom/press%20releases/2017/Annex%203_%20Feedback%20and%20response%20on%20AGM%20AR%20and%20common%20seals%20(24%20Feb%202017).pdf (last visited 16 August 2018).