

THE MISSING PIECE



Welcome....

to the latest issue of *The Missing Piece*, the monthly legal bulletin from *In House Lawyer*. In House Lawyer is my individual and exclusive legal service with strong ideals and a bespoke approach.

This bulletin gives details of a recent Law Society practice note on the execution of documents using electronic signatures.

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When parties to a transaction are not physically at the same meeting to sign the transaction documents, it is common for the lawyers to arrange signing via email. Such a signing typically involves a hard-copy document being signed in wet-ink, the document and signature being converted into electronic form (for example by scanning or photocopying it) and it being sent by email. As market practice and technology evolve, the use of electronic signatures is becoming increasingly common in a range of commercial transactions and the trend is likely to continue.

The Law Society recently published a new practice note on the execution of documents using electronic signatures. The note is concerned with contracts entered into (and certain other documents signed) in a business context, rather than those to which consumers or other individuals are party. It sets out the position under English law and represents The Law Society's view of good practice and is not legal advice. It does not focus on any one method of electronic signature and lists the following as examples of the form that an electronic signature can take:

- a person typing his or her name into a contract or email containing the terms of the contract;
- a person electronically pasting his or her signature (for example in the form of an image) into an electronic version of the contract in the appropriate place;
- a person accessing a contract through a web-based e-signature platform and clicking to have his or her name in a typed or handwriting font automatically inserted in the contract in the appropriate place;
- a person using a finger, light pen or stylus and a touchscreen to write his or her name electronically in the appropriate place in the contract.

Types of documents

The practice note advises that an electronic signature can be used to execute the following commercial contracts:

- **Simple contracts;**
- **Documents subject to a statutory requirement to be in writing and/or signed and/or under hand;**
- **Deeds.** The opinion of the leading counsel, was that where a suitable signatory signs a deed using an electronic signature and another individual genuinely observes the signing he or she will be a witness for these purposes. If that witness subsequently signs the adjacent attestation clause (using an electronic signature or otherwise), that deed will have been validly executed. To minimise any evidentiary risk as to whether the person genuinely witnessed the signing it is best practice for the witness to be physically present when the signatory signs, rather than witnessing through a live televisual medium;
- **Companies incorporated under the Companies Act 2006:** minutes and resolutions.

Evidential weight

Leading counsel has advised that, if the authenticity of a document signed using an electronic signature were to be challenged, an English court would apply the same principles as it would in relation to wet-ink signatures. The document bearing the electronic signature would be accepted as *prima facie* evidence that the document was authentic and, unless there was evidence to the contrary, that would be sufficient to deal with the challenge. The note sets out a list of evidence that may be possible to be used to prove the authenticity of a particular signature, such as evidence that the purported signatory or witness accessed the electronic document via his or her email account or computer or that he or she used a password, PIN or encryption key to access the document.

Originals and counterparts

In relation to originals and counterparts, leading counsel has advised that:

- It is possible, depending on the facts, to have multiple originals of a document in both electronic and hard copy form. This would not be appropriate if it would conflict with other legal requirements (such as in the case of promissory notes);
- Where a document has been executed electronically with each signatory applying his or her signature to the same file uploaded to the relevant electronic signature platform, the signatories will be deemed to have signed the same counterpart;
- Where a document has been executed electronically, there is no need as a matter of English law for an additional wet-ink version to be executed (although there may be practical reasons to do so);
- Where a document has been executed using a combination of electronic and wet-ink signatures, the parties or their legal advisers may wish to create a composite document and, if required to be produced in evidence, an English court would accept the composite document;
- If an original of a document executed electronically is required to be produced in evidence, an English court would accept an electronic version of that executed document or a hard-copy print out;
- Where an undated document is executed electronically, it may be validly dated with the authority of the parties by inserting the date electronically or by printing it out and inserting the date by hand;
- After a document has been executed electronically, amendments may be made to it (electronically or in manuscript) to the same extent as amendments may be made in manuscript to a document executed in wet-ink.

Other considerations

Other practical matters to consider when one or more parties are contemplating using an electronic signature include:

- Is there sufficient certainty that the person purporting to sign using an electronic signature is in fact that person or acting under the authority of that person?
- Is the document to be distributed, signed and held electronically in a manner which is sufficiently secure?
- Where the document needs to be filed with an authority or registry, will that authority or registry accept electronic signatures? For example:
 - the Land Registry and the Land Charges Registry require a wet-ink signature on a paper version of any document submitted to them for registration (although the Land Registry has announced plans to launch an electronic mortgage service); and
 - where stamp duty is payable on a document, HMRC would normally expect to stamp a version of the document with a wet-ink signature.
- If the place of signature or the location of the document has particular legal consequences (such as in relation to the payment of stamp duty), where will a document executed using an electronic signature be treated as having been executed or located? Relevant factors may include where the signatory is physically located when signing and where the server on which the document is stored is located. In such circumstances, a physical signing may be preferable.

THAT'S ALL FOR THIS MONTH...

If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.



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