COVID-19: Electronic Signatures

This is a simple guide to help with basic queries. It is not intended to be legal advice. This is a complex area of law and each specific transaction will need to be considered carefully. Please speak to your usual CMS contact for more information.

In light of Government advice on COVID-19 and social distancing/working from home, how can companies continue to sign or execute documents remotely? Many agreements are entered into by electronic means on a day to day basis, through signing documents in wet ink and exchanging pdfs/photographs by email (using Mercury protocols). However not everyone has access to a printer at home. CMS is making DocuSign, an electronic signature platform, available to all lawyers in the UK to assist clients with signing documents remotely.

Are electronic signatures valid? Yes. The position is slightly different in England and Wales and in Scotland.

England and Wales: There is no legislation in England and Wales that specifically authorises the method of electronic signature used by DocuSign (in particular in relation to deeds), but the Law Commission for England and Wales has confirmed that electronic signatures (eSignatures) are valid and can be used to execute documents, including when there is a statutory requirement for a signature and including deeds (see below), save for certain documents highlighted below. The Law Commission statement has broad application and is not restricted to commercial and consumer documents. Northern Irelands falls under the same regulations as for England and Wales. For more information, please see:

- Law Society practice note on electronic signatures
- Law commission report on the electronic execution of documents

Scotland: Under Scots law, electronic signatures are valid for execution of all documents (other than wills/testamentary writings). However, there are some practical, as well as legal, restrictions on their use.

At present it is not possible to register electronic documents in certain registers in Scotland, including the Land Register; therefore certain documents still require wet ink signatures to allow for their registration (this applies to almost all Real Estate documents). Statute requires that a special form of electronic signature – an ‘advanced electronic signature’ – must be used for the valid execution of those documents that require to be in writing under section 1(2) of the Requirements of Writing (Scotland) Act 1995 (“ROWA”) (mainly rights in relation to land, gratuitous unilateral obligations and some trusts).

For non-section 1(2) ROWA documents, a simple electronic signature, such as DocuSign, is valid, but this doesn’t currently meet the Scottish statutory tests as a probative (ie: self-proving) method of electronic execution. An assessment will have to be made in each case to decide if non probative execution is acceptable. The Law Society of Scotland has issued draft guidance for Scottish solicitors to help them to assess whether electronic signatures such as DocuSign should be used to sign different types of document: https://www.lawscot.org.uk/members/business-support/electronic-signatures-guide/
What is CMS’s position on DocuSign? CMS has reviewed the Law Commission report and other material and we are comfortable with the validity of electronic signatures and in using DocuSign for documents being executed in accordance with English law, except as set out below. See the notes above in relation to Scotland.

What about English/Scots law documents that need to be signed by non-UK parties? When a non-UK company proposes to sign an English or Scots law document electronically, the advice of local counsel should be sought to determine whether the relevant signatory has authority (under local law and the company’s constitutional documents) to sign using DocuSign. Where the non-UK signatory is a natural person, it is unlikely that there will be laws preventing such persons from signing documents electronically, but local advice should be sought in any event.

What about documents governed by the law of a foreign jurisdiction or English/Scottish law documents that come before overseas courts that do not recognise the choice of English/Scottish law? Many countries have adopted an electronic signature law. However, the advice of local counsel should be sought in each case before using DocuSign, as the laws for each jurisdiction vary.

What documents can I use DocuSign for? With a small number of exceptions, you can use DocuSign for any agreements or other documents governed by English Law. The exceptions are that electronic signatures cannot be used for:

- Registered dispositions under the Land Registration Act 2002 requiring registration at HM Land Registry (not because they are not valid, but because HMLR will not yet accept them);
- Please note: Stock transfer forms that need to be stamped and declarations of trusts are usually not accepted in electronic form. Whilst the stamp office will usually not accept electronically signed stock transfer forms or declarations of trust, in the current Covid-19 circumstances, HMRC has confirmed that they will accept electronically signed stock transfer forms and declarations of trusts. This information is correct as on 18 April 2020. If you need to execute one of these documents, your lawyer at CMS will check with the CMS tax team before executing these documents electronically after this date to ensure this is still acceptable to HMRC;
- Lasting powers of attorney;
- Some private client matters such as wills or probate;
- Promissory notes or other documents where there is a risk that obligations could be multiplied by the duplication of originals.

For Scots law please note that at present it is not possible to register electronic documents in certain registers in Scotland, including the Land Register, and as such certain documents still require wet ink signatures to allow for their registration (this applies to almost all Real Estate documents).

Can I use DocuSign to have deeds executed? Yes – but care should be exercised where a deed is to be witnessed. In England, the witness should be physically present with the signatory when the signatory signs the document electronically (i.e., the witness needs to be physically present and watch the signatory sign using DocuSign) before they sign themselves as a witness. Given the difficulty in checking this, we cannot opine on execution by a witness in a legal opinion, if the witness is included as a signatory to the document through DocuSign they will be able to view the entire document and the witness will automatically receive a copy of the signed document by email, which may not be appropriate.

An alternative method that should be used by companies so far as possible to address some of the issues with witnessing is for two directors or a director and a secretary to sign the document instead.
In Scotland, there is no equivalent to the English form of deed and in the case of an electronic signature, the equivalent of a witness is the use of an enhanced form of electronic signature incorporating a third-party certificate, a ‘qualified electronic signature’. DocuSign in the UK doesn’t currently offer qualified signatures.

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.