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Submitted to Law Commission consultation on the electronic execution of documents
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About you

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Electronic signatures and other preliminary questions (Consultation Questions 1 to 6)

Consultation Question 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?(See paragraph 3.87 of the consultation paper.)

Yes

Please expand on your answer. :

We agree. However (and see further our response on question 5) we believe that if further clarifying legislation is to be published in any event, it would be helpful for there to be a very clear statement of this fact to avoid possible future uncertainty and argument.

Consultation Question 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? (See paragraph 4.57 of the consultation paper.)

Yes

Please expand on your answer. :

The wording “in the presence of a witness” does seem to require the physical presence of that witness and we would not be confident that a court would always accept that attendance by video link etc would satisfy the requirement for “presence”. Even for looser concepts, such as board “meetings”, where meetings can easily occur by telephone, we are naturally cautious and will inspect articles of association etc to check that meetings have specifically been authorised to be held other than in person. So with something as formal as witnessing a document, we believe this does require physical presence unless the law very clearly says otherwise.

Consultation Question 3: We welcome consultees’ views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution. (See paragraph 6.19 of the consultation paper.)

Please share your views below. :

Besides the EU and the US, plenty of other jurisdictions in our experience are reluctant to accept electronic execution so it would be helpful for English law to be as clear as possible on this. Where the governing law of an agreement is English law, generally lawyers in other jurisdictions are more comfortable that electronic execution will be recognised and enforced.

Consultation Question 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? (See paragraph 6.41 of the consultation paper.)

Yes

Please expand on your answer. :

Provisions relating to areas that, for various reasons, need a particular specialist approach, should not impact on the general way we approach how documents should be executed.

Consultation Question 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? (See paragraph 7.20 of the consultation paper.)

Other

Please expand on your answer. :

Whilst we agree that legislative reform is not strictly necessary, we think that it can only be helpful to facilitate the uptake of electronic signatures and the simplification of transactions for there to be a clear statement to this effect. Additional legislation will be required for certain of the other elements (electronic acknowledgement etc) and so this could easily include a simple confirmatory statement to this effect.

Consultation Question 6: We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree? (See paragraph 7.28 of the consultation paper.)

Yes

Please expand on your answer.:

Electronic signatures have long been the subject of discussion amongst a variety of industry groups, for example PSL network groups who meet regularly to discuss legal developments of relevance to their practice areas. To establish a central industry working group to look at such issues, inviting wide participation, could only be helpful. However, establishing such a group to develop guidance and standards on practical and technical issues should not delay legislative reform.

Deeds (Consultation Questions 7 to 14)

Consultation Question 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? (See paragraph 8.32 of the consultation paper.)

Yes

Please expand on your answer.:

We feel that the key elements of witnessing require both visual and audible confirmation that something is being done. Both these elements can be achieved by using video link. Inclusion of sound makes it harder for a situation to be manipulated, eg for possible duress on the signatory to be concealed. Quality and speed of video technology will only improve over time which makes the argument for permitting attendance by video stronger. Video can potentially be saved and so from an evidentiary perspective potentially gives the witness more connection to the document being witnessed than is currently the case with wet ink signing. However we would not propose that video should be required to be stored as this could become cumbersome and expensive in terms of storage.

However, whilst video should be an option we anticipate that having the witness physically present with the signatory and signing as a witness either on the witness' own device or on the signatory's device will be more common and more user-friendly.

Consultation Question 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?(See paragraph 8.33 of the consultation paper.)

Signing platform, Receiving the document by email

Please expand on your answer.:

We would suggest that both options should be permitted.

Electronic signatures would lose part of their general utility and flexibility if all users were required to have access to a signing platform. This might have the (unintentional) effect of restricting access to electronic signatures by ruling out other possible technologies such as Skype and other video call mediums.

Option 2 suggests that the witness' signature at some point needs to appear on the "same" document as that signed by the initial signatory ie the witness would add his/her signature onto a scanned copy the original signed page so that both signatures appear on a single page. This is what we would expect to see with hard copy execution following Mercury guidance. The evidential value of the witness' attestation is reduced if the witness' signature is entirely detached from that of the principal signatory.

There should not in our view be any unnecessary divergence between the rules for electronic and hard copy execution.

Consultation Question 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? (See paragraph 8.42 of the consultation paper.)

No

Please expand on your answer. :

Whilst this is what currently happens with witnessing of documents using platforms such as DocuSign, in our view this does not represent true witnessing. It is too great a dilution of the concept as generally understood.

Without a video or audio link or other direct communication between signatory and witness, it is not possible for the witness to ascertain whether any duress is being applied to the signatory – one of the primary practical benefits of using a witness. As such, in our view this is a step too far away from the true purpose of witnessing.

Consultation Question 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? (See paragraph 8.50 of the consultation paper.)

Yes

Please expand on your answer.:

We agree that a digital signature alone is not sufficient if we think that the law should retain a requirement for witnessing. Public Key Infrastructure or other digital methods of ascertaining identity of persons acting online (including services such as Gov.UK Verify) only satisfy the evidentiary functions of witnessing and not the cautionary or protective functions. So this should not be a replacement or even an alternative for witnessing.

Consultation Question 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? (See paragraph 8.60 of the consultation paper.)

Yes

Please expand on your answer.:

We think the law should allow for electronic signatures to be later acknowledged. However, we do not believe that there should be any divergence in the rules just because a document has been signed electronically. Any change in the law should therefore treat physically and electronically signed documents in the same way.

It is not currently possible for a signatory to acknowledge a document that he or she has previously signed using a wet ink signature, other than a will. If electronic signatures are to be permitted to be acknowledged rather than witnessed, the same should apply for traditional, wet-ink signatures.

The purpose of an acknowledgement is to verify a signature. Witnessing plays a similar role – the witness verifies that he or she has seen a signature physically applied to a document. But acknowledgement would avoid the need for signature and verification to occur concurrently. This would be a relaxation of the current rules around executing deeds without losing all the benefits of the witnessing process.

Allowing electronic signatures to be later acknowledged would avoid signing being frustrated, for example by a broken video link preventing a remote witness from witnessing the original signature and so would have practical application in the context of modern business transactions.

How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?:

Electronic acknowledgement would be best effected in person or using video or photographic or recorded audio so that there is an actual connection between the signatory and the document being signed. Text message or email could in our view too easily be manipulated.

The implementing legislation should refer to requirements in principle rather than trying to specify any particular technology as that will change too quickly over time. The requirement should be for evidence that can be heard and/or seen.

Do you 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?:

We do not think that there should be a prescribed time limit for acknowledging signature. This would introduce unnecessary complication and provide additional options for a signatory to later deny whether his or her signature had been acknowledged within the relevant time.

If the rules stated that the document would not take effect until such time as the signature was acknowledged there is no reason to have a time limit.

There is no current time limit on acknowledging wills and so there is no reason, if acknowledgement is to be permitted, to have a different approach for documents other than wills.

How should the witness record the signatory's acknowledgement?:

We should be wary of creating too distinct a process around acknowledgement. As with witnessing, this should just be a question of there being 2 signatures on same document, underlining the fact that acknowledgement is just an alternative to contemporaneous witnessing. In both instances, this is a combination of one person signing and someone else doing something else alongside to validate that act of signature.

The witness could record the signatory's acknowledgement in a similar way to how a witness currently signs. The attestation clause could contain options that could be deleted as appropriate allowing either for contemporaneous witnessing or subsequent acknowledgment to a witness. This would have the advantage of giving more information to future enquirers about which option was used.

For documents signed online, there could be choice in a drop down menu ie either (i) signatory signed in my presence or (ii) signatory acknowledged his/her signature in my presence.

Consultation Question 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? (See paragraph 8.70 of the consultation paper.)

Yes

Please expand on your answer.:

We agree that the requirement for deeds to be delivered as well as executed is not impeded by electronic execution. Provisions around delivery are usually dealt with in the body of the document anyway (ie the document will contain a statement along the lines of "executed as a deed and delivered on the date set out above"). As such, delivery is achieved at the point when the date is inserted.

There is also the rebuttable presumption under the terms of the Companies Act that a deed executed by a company is delivered upon execution.

Consultation Question 13: We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree? (See paragraph 8.83 of the consultation paper.)

Other

Please expand on your answer.:

Arguably legislative reform is unnecessary and English lawyers and businesses have proceeded post the Mercury decision on the basis of case law alone. Nevertheless, we believe that it would assist the seamless transacting of modern and frequently cross-border commerce for there to be a clear and unambiguous consolidating statement confirming that documents can take a number of different forms and that electronic copies of documents will be treated the same as physical, printed and wet-ink signed versions.

This would be preferential than relying on multiple different statements, opinions, case reports etc. A general update to the 2009 note that covered emerging technology would definitely be appreciated by our clients. And guidance that originates from the UK Government rather than counsel's opinions procured by the Law Society would provide the best possible degree of clarity.

Consultation Question 14: Do consultees think that a review of the law of deeds should be a future Law Commission project? (See paragraph 8.88 of the consultation paper.)

Yes

Please expand on your answer. :

Our response to the question around permitting acknowledgement both for electronic and hard copy documents already would require reforms to be made to the law of deeds. So yes, we think this is worthy of further and more detailed consideration. Other jurisdictions manage without the concept of deeds which can appear dated, even though there are good and contemporary reasons for having a "more serious" category of legal obligation that entails more safeguards and this is a function that deeds do fulfil.

In our view, it would be more appropriate to delay any more general review of the law of deeds until any proposed reforms around electronic execution have settled in.

Impact of reform (Consultation Questions 15 to 18)

Consultation Question 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? (See paragraph 8.93 of the consultation paper.)

Other

Please expand on your answer. :

A number of our clients are still cautious about e-signatures. This is a relatively new technology. It would assist lawyers and clients alike to be able to point to a section in a piece of UK legislation that definitively confirms that deeds can be signed electronically.

See further our answer to Question 5.

Consultation Question 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%? (See paragraph 8.94 of the consultation paper.)

Please provide your answer below.:

Increased confidence would have an impact for example in reducing legal time spent discussing and advising client on electronic signatures, providing legal opinions and other legal confirmations. It would also potentially avoid costly disbursements currently incurred on matters, for example international courier costs to transport signed pension scheme documents from one jurisdiction to another to complete a matter.

It is very hard to quantify these savings. We think this is more likely to be a per matter issue rather than a percentage of the overall transaction size.

Consultation Question 17: Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would do any of the following? (See paragraph 8.95 of the consultation paper.)

(1) Provide benefits such as reduced transaction costs? If so, how much?:

Yes, we agree that an industry working group to establish guidance and standards around electronic signatures would be helpful. As with question 16 we think it would be very difficult to quantify any monetary benefits.

(2) Provide non-monetary benefits? If so, what benefits?:

Anything to bring consistency to law and practice in this area can only be positive.

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Consultation Question 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 the following. (See paragraph 8.96 of the consultation paper.)

(1) The capacity to execute deeds electronically without the physical presence of a witness.:

We have come across numerous instances where failure to properly follow execution instructions and/or Mercury guidelines has resulted in additional transaction cost and delay.

Example 1

We were sent a scanned copy of a document containing the signature of a director apparently witnessed. When we were sent the original, it did not contain the witness' signature and it turned out that the witness had been sent a scanned copy of the page signed by the director to which he then added his signature – he had not been present or witnessed the signature at all. The entire transaction had to be re-executed.

Example 2

At a director's instruction, a PA added a scanned copy of the director's signature to a document and sent it to us. The scan we received of an electronic signature looked like an actual signature. When this came to light the document had to be re-executed. Had e-signatures been more widely accepted, the director in this instance would have e-signed the document and avoided the issues.

In a modern business world we should make it as easy as possible for people to sign documents. Either signatory or witness will not always have access to printers or scanners to enable Mercury style completions to be undertaken. Electronic execution without needing a witness to be physically present will smooth transacting and make the UK a more attractive place to do business.

(2) Any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement. :

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