

COVID-19: closing finance transactions in the days of social distancing

Examining the extent to which, under both Scots and English law, companies and their funders are able to operate and enter into contracts remotely

The protective measures now in force as a result of COVID-19 will have a significant impact on how business is effected and how transactions are concluded. Signing meetings at advisers' offices are not possible for now and so the need to conduct business and execute legal documentation remotely is crucial. This article examines the extent to which, under both Scots and English law, companies are able to do so.

How can I hold board meetings or shareholder meetings if we cannot meet face-to-face?

Board meetings

Under Scots and English company law, there are no restrictions on where or how a board or shareholder meeting can take place. Instead, the process for meetings is dictated by the articles of association of each individual company.

The current model (standard) articles for a private company limited by shares states the following:

- *In determining whether directors are participating in a directors' meeting, it is irrelevant where any director is or how they communicate with each other.*
- *If all the directors participating in a meeting are not in the same place, they may decide that the meeting is to be treated as taking place wherever any of them is.*

If the company has adopted the model articles, or their own articles contain similar wording, then board meetings may be held via a call, video call or in any other way in which each director can communicate to the others any

information or opinions. There's no need for each director to be physically present in one room together.

However, some companies will have amended the model articles, adopted bespoke articles or rely on older versions of the model articles which may not contain equivalent provisions. It is therefore essential that the articles are checked before proceeding with a remote board meeting.

Shareholder meetings

In much the same way as is set out for a board meeting, the current model articles for a private company limited by shares allow shareholder meetings to be held by way of a call or video call or other remote means. As before, you should check the articles before proceeding with a remote shareholder meeting.

If I am working from home and I cannot get to a signing meeting, how can I execute transaction documents?



Provided that each signatory has access to a printer and a scanner, there should be no change to usual transaction protocol. The majority of finance transactions take place as remote completions with documentation being emailed, printed, signed and scanned remotely instead of being signed around a completion table. While it is always preferable to have signatures in the hands of solicitors at completion, we expect most parties to look to take a pragmatic approach in the current circumstances.

As a general rule, we would recommend that, wherever possible, security documentation is signed in "wet ink". However, there may be transactions where the length of documents or volume of documents to be signed means that other methods of signing, for example electronic signatures, need to be considered.

English law - Position on signing contracts

In respect of signing, the common law in England and Wales has always been

flexible in recognising a range of types of signature, including signing with an 'X', initials only or a printed name. In addition, "Mercury" principles allow for a more streamlined and efficient method of delivery of signatures.

Last year, the Law Commission for England and Wales (*Electronic execution of documents report, Law Com No 386, September 2019*) confirmed that electronic signatures are also capable of being used to validly execute documents, including deeds where there is a statutory requirement for signing. A ministerial statement endorsed this view in March 2020.

Scots law - Position on signing contracts

In Scotland, where a contract requires to be constituted in writing it must be subscribed by the parties in order to be valid. In 2014, legislation (*The Electronic Documents (Scotland) Regulations 2014*) was introduced to allow for electronic signature of certain contracts and documents. This permission would apply to the vast majority of finance and security documents, subject to the exclusions highlighted below.

English law - Validity of electronic signatures

Do electronic signatures have to take a particular form?

According to the Law Commission for England and Wales, electronic signatures do not need to take a particular form or type unless required by law or contractual arrangements. Electronic signatures will even be effective for the purposes of executing a deed. Examples of electronic signatures previously accepted by Courts include a name typed at the bottom of an e-mail or clicking an "I accept" tick box on website.

However, the safety and reliability of the signatures has to be considered in each case.

Certain types of electronic signatures are preferable for commercial transactions as they carry a greater level of security (see for example below on using an e-signing platform). This is important as if a dispute arises and the document is to be relied upon then the security around the signing is likely to carry evidential weight. For example, a typed name at the end of a document is very easy to forge, and may render the document itself subject to challenge as it would be evidentially difficult to prove the authenticity of the signature.

What is appropriate will depend on the nature and import of the contract

or document, the risk of a challenge to the validity of the signature and the consequences of a successful challenge.

Are there any circumstances where electronic signatures should not be used?

Notwithstanding the validity of electronic signatures under English law, it may not be possible to use them in every case, for example:

- lodging the documents with a registry which requires "wet-ink" signatures, for example HMRC or Land Registry (we do, however, understand that this is currently under consideration by the various Registries and have expanded on this further below);
- restrictions in the constitutional documents of a corporate entity;
- restrictions in legislation or case law that may apply to the relevant document; and
- where the place of execution of document is important, for example if there are any tax or stamp duty consequences.

Scots law - Validity of electronic signatures

Do electronic signatures have to take a particular form?

The definition of 'electronic signature' in the Requirements of Writing (Scotland) Act 1995 is a wide definition which captures both very basic signatures and also those affixed via dedicated e-signing platforms.

In 2014, the Electronic Documents (Scotland) Regulations were enacted, allowing the electronic authentication of various transaction documents which Scots law requires to be "in writing". These documents would be those dealing with rights in relation to land, gratuitous unilateral obligations (such as certain kinds of guarantees) and some trusts. In order to be validly 'e-signed', these documents require to be authenticated by an 'advanced electronic signature'. This type of signature is a more advanced and secure form of electronic signature.

In order to constitute an 'advanced electronic signature' (a European-wide definition, contained in *the Electronic Identification and Trust Services Regulation EU/910/2014*) the signature must be:

- uniquely linked to the signatory;
- capable of identifying the signatory;
- created using electronic signature creation data that the signatory can, with a high level of confidence use under their sole control; and

- linked to the date signed therewith in such a way that any subsequent change in the data is detectable.

It is usual for Scots law finance and security documents to be signed in a self-proving manner (akin to documents being signed as a deed in England and Wales). In order for an 'e-signed' document to be self-proving, the document must also be certified by a 'qualified certificate'. A 'qualified certificate' is one which meets an extensive list of requirements set out in The Electronic Signatures Regulations 2002. Example of just some of the requirements are:

- the identity code of the certificate; and
- the identification of the certification-service-provider and the State in which it is established (for example, Scottish solicitors are able to provide a "qualification certificate" in this way).

English and Scots Law – witnessing of electronic signatures

The use of electronic signatures does not derogate from the signing rules prescribed by each jurisdiction. In particular, the same witness requirements must be complied with as if it were a 'wet-ink' signing, and is likely to require physical proximity of signatory and witness. We expect this to give rise to practical issues in a number of cases, and solutions to address this should be discussed on a case by case basis to ensure that legally competent solutions are also commercially acceptable to all parties.

English and Scots Law - E-signing platforms

The use of dedicated electronic signing platforms (such as DocuSign) may mitigate concerns over authenticity and reliability of electronic signatures.

Such platforms collect meta data on the signing process, including information around the date and time of signing, the email address to which the request to sign was sent, and the IP address of the device. Some platforms also provide the option of using two-factor authentication (such as needing both your password and a token which generates a new password every time you enter the platform).

Some practical considerations to note when using e-signing platforms:

- protocols and procedures have to be agreed in advance of a completion as there will be only one party co-ordinating the signing-process and issuing invitations - consider who will do this, and if lawyers are involved who will co-ordinate the process;
- the party co-ordinating the process must obtain a licence to use the platform which may involve considerable costs;

- in terms of timescales, identification and verification of signatories as well as training the signatories on how to use the platform may be time-consuming especially in transactions involving multiple parties;
- some platforms have the functionality to deal with witnessing but this must still meet the requirements under the governing law of the document;
- most of the platforms are cloud-based, therefore some parties may not be comfortable using them for cyber-security reasons; and
- most of the standard signature functionality of e-signing platforms won't meet the particular requirements of 'advanced electronic signature' or 'qualified electronic signature' under Scots law, so may not be able to be used for the full transaction documentation suite.

Cross-border transactions

In international transactions, local advice should always be sought if:

- signatories are signing documents where the governing law is not English or Scots law; or
- there are any non-English or non-Scottish signatories, as the party's jurisdiction of incorporation or own laws may not permit electronic signatures.

Will there be any impact on being able to register or submit transaction documents?

Registers of Scotland

Provided that registrable deed relating to land are electronically signed in such a way as to be self-proving, these will be capable of registration in the Land Register. While use of properly authenticated e-signed

documents is becoming more common, usual commercial practice is still to have hard copies of deeds relating to land signed in ink.

However, in light of the most recent restrictions announced by the UK Government on 23 March, Registers of Scotland announced that they are temporarily suspending the applications register in Scotland and won't accept or process paper applications (received after 24 March) for the time being. While at present, the Registers of Scotland do not have wide e-capability, they have indicated that this is being reviewed. Until a solution is found the ability to register transaction documents will be impacted (e.g. no dispositions or standard securities will be able to be registered or recorded). Registers of Scotland cannot commit to when the application record will reopen but have agreed a process with certain lenders which will allow transactions to settle in the immediate short term where an advance notice is in place. Registers are examining various options which would allow settlements in the medium / longer term, including amending the existing statutory framework by way of emergency legislation. This remains open and ongoing, we will provide a further update once Registers of Scotland confirm the new process, and requirements.

Land Registry of England and Wales

At present, unlike Registers of Scotland, the Land Registry of England and Wales remains open and accepting applications although their press release on Wednesday 25 March anticipates disruption and delay for those services which are not delivered electronically. The Registry will not accept PDF signed copies as the original document, if you certify a

document as a true copy of the original the Land Registry of England and Wales expects that you had the 'wet ink' copy in your possession. Representations have been made jointly on behalf of many firms asking the Land Registry of England and Wales to relax their position in the present unusual circumstances and a response is anticipated soon. The Land Registry of England and Wales is considering but has made no substantive response nor indicated any change to standard protocol as yet.

Companies House

Provided it has been signed in accordance with the governing law of the document then Companies House have indicated that they will accept a certified copy of the electronic original of the document for registration. It then falls to the party submitting the document for registration to be comfortable on this approach. However, in relation to Companies House forms (i.e. AP1, MR01 etc), Companies House have confirmed that whilst they are happy to accept electronic signatures on Companies House forms, this signature must not be "typed" in the signature field, it must contain a manuscript or an automatically generated signature.

HMRC

On 25 March, HM Revenue & Customs announced that it is accepting e-signatures on stock transfer forms while COVID-19 measures are in place.

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If you would like further guidance or information mentioned above, we would be happy to help.

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