

Guidance Note: Electronic Signature of Deeds and Contracts

1. Introduction

The following explains various practical means of creating, executing and using documents electronically, taking account of the Law Society's and Law Commission's guidance and legal opinion on the subject.

2. Wet ink signatures on paper and alternatives to wet ink signatures

The classical means of agreeing the terms of contract and entering into a contract is for the terms be set out in two identical written documents, and for each party to sign (by hand, using a "wet ink" signature) and date both copies. These two documents would both be originals, and each party would keep one of them. Sometimes, each party would instead only sign one original, the other would sign the other original, and they would then date and exchange the two originals. Either method provided each with evidence both that the parties had made an agreement and the terms of the agreement.

3. Exceptions: Land Registry and other documents

As an exception to the following guidance about electronic documents, in relation to land and property, certain documents required to be filed with the Land Registry do need to contain wet ink signatures. An option for electronic execution of documents does exist, but only where all parties have legal representation. In response to the Covid-19 pandemic, HM Land Registry has announced that it will (until further notice) accept a deed for registration that has been executed electronically in accordance with their specific requirements set out in their practice guide. In the majority of cases, all parties to the deed must be represented by a conveyancer in order for HM Land Registry to accept email signatures.

This guidance also does not cover any non-commercial or consumer documents.

4. Terminology.

Please see the Glossary below as to what is meant by the following terms used in this note: "signature", "writing", "electronic signature", and "under hand".

5. Effect of an electronic signature

English case law recognises that if the purpose of an electronic signature is to render a party bound by the document, (and any execution formalities have been satisfied) it has the same legal status as a wet-ink signature.

6. Contracts: what if a document is instead of a type that must be in writing and/or signed for it to be valid?

Case law establishes that a document in electronic form containing visible words is still a document in "writing" and that an electronic signature is still a "signature" (see the Glossary below). By way of a typical example, it is possible to validly form a contract by exchange of emails. A recent court case found that a chain of emails between solicitors amounted to a legally binding contract for a property transaction. An exchange of emails can also amount to a binding contract for other types of transaction.

Note that since a contract can be validly created in that informal way, it is all too easy to inadvertently enter into a binding contract when in fact you intend not to do so in that way or at that time. This might be because you have not yet reached agreement on all terms or have not set out all of the terms in the emails. Alternatively, it might be because you intend to use a more formal document (which deals definitively with the subject matter of the exchanges of

emails) to be the binding contract. Correct use of appropriate wording as a header in all emails - whether the emails are between the parties themselves or their solicitors - can prevent an exchange of emails amounting to a binding contract. Wording such as “**subject to contract**” might be used for this purpose but you should ensure whether in the particular circumstances this or any other wording will be adequate to prevent a binding contract inadvertently arising.

7. **Deeds (e.g. an EMI option agreement)**

A contract which is not in the form of a deed can be created and executed as explained in the paragraphs above, e.g. by email.

A contract or other document intended or legally required to be in the form of a deed to be valid must be:

- in writing.
- Executed by an individual in the presence of a witness, or if by a company it must be executed by a director in the presence of a witness, OR by two directors, OR by a director and the company secretary.

The Law Commission confirmed in its report that whilst deeds must be set out in writing and signed and witnessed, they will be valid if in, and executed in, electronic form, and so the signature of the person executing a deed or witnessing that signature may be in electronic form. (See “Witnessing of documents” below.).

8. **Witnessing of documents**

A witness to an electronic signature can validly attest to it if physically present when the electronic signature is applied. The witness must apply their own signature (electronic or otherwise) when the party to the document inserts their electronic signature.

It is not sufficient to be observing a party’s signature on a deed by video conference or similar means - for a witness’ signature to be legally valid, their physical presence is needed.

9. **Miscellaneous**

- What if the validity of a document in electronic form signed electronically is challenged in court? The Law Commission’s view is that it is likely that the electronic signature of the document would be accepted by the court as authentic unless evidence is given to the contrary. In other words, a court would apply the same principles as it would apply to a wet-ink signature whose authenticity were challenged: the court would not be likely to reject the signature solely because it is in electronic form.
- There is no legal need for an additional version of a document to be executed as a wet-ink version in addition to the initial electronic version. However, it is sometimes useful to have a wet ink version as well (for reasons beyond the scope of this note) relating to the signatory’s capacity, authority identity and security of the information in the document.
- If electronic signatures are used in a document, there is no need to include in it any specific reference to the fact that electronic signatures may be or are being used.

Glossary

“Signature”

Something is a “signature” in English law if it is a mark attached to or inserted in a document in order to give, and with the intention of giving, authenticity to it, i.e., the intention of being bound by it. A signature may be any mark, not just a name; it might be initials, a mark or stamp or even a description of the person if it identifies the person. It might be a click on a website. It need not be tangible, and so need not be in hard copy or otherwise tangible: it may therefore be in electronic form.

“Writing”

Under English law (by virtue of the Interpretation Act 1978), ‘writing’ includes ‘typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form’. In short, words in any visible form are ‘writing’. The words need not be handwritten in ink, or in print, in hard copy or otherwise tangible.

This means that a contract represented on a screen (e.g., a desktop, laptop, tablet, or smartphone screen) such that it can be read properly, will be ‘in writing’ at that point. It need not be a single document: an exchange of a number of emails amounting to an agreement would be an agreement ‘in writing’, so for example a valid guarantee could come into existence in this way, although it comprises more than one item.

“Electronic signature”

This can take one of several forms. For example, a party to a proposed document might:

- type their name into a contract or into an email containing the contract terms;
- paste a scan (i.e., an image) of their signature into a soft copy contract in the signature block;
- use a web-based e-signature platform and click to have their name in a typed or handwriting font inserted into the contract in next to their signature block; or
- use a finger or e-pen to write their name on a tablet in the contract.

“Electronic signature” means “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”. This will usually be a signature in one of the above forms.

Any method may be used to insert the electronic signature into the document. It may be in any form (e.g., scanned image of handwritten signature, a generic handwriting font, typed font, etc.).

“Under hand”

To be valid, some documents may or must be executed “under hand”. This means they have been executed otherwise than by deed. They need not be in hard copy or otherwise tangible, so use of an electronic signature intended to authenticate the document means that it has nevertheless been executed under hand.