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ISOLATION: the Knock on effects to business

In the height of the Covid-19 pandemic, people are trying their utmost to mitigate disruption in order to continue with the ordinary course of business as far as possible. While technology allows remote working through these difficult circumstances, the need for isolation will inevitably have a knock on effect on the ability to transact and complete deals that require multiple party signatures.

Here, we consider the use of electronic signatures and circumstances where the law allows documents to be signed remotely.

Remote executions and electronic signatures are now well established in law and are commonly used for virtual completions, even in a world without Covid-19. However, the restrictions imposed by many countries due to this pandemic makes it even more important as the world is forced to interact solely via technological channels. It is important that businesses understand the formalities for remote execution and the proper uses of electronic signatures. In particular, the parameters within which documents can be signed remotely or electronically in order to ensure the validity of their contractual arrangements.

Remote executions and the principles established following the Mercury Case

Remote executions are typically used in circumstances where it may not be possible for parties to be physically present to sign a document, and where the use of a power of attorney is not practical or desirable. It should be noted that remote executions may involve wet ink signatures or the use of electronic signatures (separately considered below), both of which can be used to give effect to a virtual completion.

Further to the issues raised in the in the Mercury case^[1] (where the High Court held that a signature affixed to a draft agreement cannot be transferred to validly sign and complete the final execution version of the same agreement), the industry recognised

that the practice around remote executions and legally effective virtual completions required further clarification. Following a period of consultation, the Law Society issued a guidance note on the Execution of documents by virtual means, which helpfully set out various options for performing a Mercury compliant remote execution and virtual completion using wet ink signatures. Although the chosen option will depend on the nature of the document being signed (e.g. a simple agreement, deed, guarantee etc.), we've set out below an example of a Mercury compliant remote execution process that can be used for a simple agreement to be signed in wet ink:

1. Lawyer circulates the agreed final version of the document in pdf format.
2. Each party prints off and physically signs the signature page (the whole document does not need to be printed off).
3. A scanned copy of the signed signature page is returned to the lawyer by email. In that same email, the relevant party should also: (a) insert a note authorising the lawyer to attach their signature page to the final version of the document: and (b) attach the final version of the document sent by the lawyer.
4. On completion, the lawyer dates the document and circulates a consolidated version of the final document that includes all signature pages.

The steps highlighted above may vary slightly if the document is to be signed as a deed or is subject to specific formalities under applicable law. Understanding the nature of the document is therefore crucial, as it will dictate the procedure that needs to be followed in the circumstances.

Gibraltar's position in relation to electronic signatures

When considering the validity of electronic signatures, Gibraltar follows the principles of English law, which is principally derived

from the Electronic Identification and Trust Services Regulation (EU/910/2014) (eIDAS regulation) and applicable case law. The law generally allows for electronic signatures, but there are certain types of documents (whether or not to be executed as a deed) which may require specific formalities as to the type of signature used. It is therefore necessary to check whether the document in question has any particular signing requirements (under statute, a company's articles or association, case law or by way of contractual agreement) or whether the document will be subject to the general legal principles which allow for electronic signatures.

Documents that cannot be signed via e-signature

There are various scenarios where e-signing is not acceptable regardless of the nature of the document. In order to determine whether an e-signature is valid in a particular transaction, it is necessary to consider the nature of the transaction that is being entered into and whether there are any overriding factors that may have an impact on whether the document should be signed electronically or in wet ink. Such factors will include considerations as to whether the document must be signed in any one particular jurisdiction for legal, tax or substance purposes. Similarly, when a transaction is cross-border, it is necessary to determine whether the laws of any relevant jurisdiction allow for electronic signatures.

An example of where e-signatures are not acceptable would be the case of documents that have to be signed and witnessed in the presence of a Notary. A Notary will generally not accept an electronic signature when notarising a document, instead requiring the individual/s to sign in wet ink in his/her presence.

In Gibraltar, conveyancing transactions or any other transactions which require documentation to be registered at the Land Registry should also be completed with wet ink signatures on the relevant documentation.

E-signing and commercial contracts

As a general rule, a simple contract (which is not signed as a deed) shall be considered valid if signed by an electronic signature. This includes the signing of different counterparts by various electronic means, whether by ticking a box on a website that indicates acceptance, typing your name, using an e-signature facility such as DocuSign, or signing a document directly on a smart phone or tablet (amongst others).

When signing electronically, people should factor in any relevant counterpart provisions that have been included in the document and in particular, regard should be had to the delivery mechanism relating to that particular counterpart.

E-signing and deeds

The validity of signing a deed by way of electronic signature is not as clear cut as e-signing a simple contract. In fact, over the years, there have been conflicting views in relation to the same, particularly with regards to the use of e-signing mechanisms such as DocuSign. The general rule is that where a document is to be signed as a deed, this must be done so in the physical presence of a witness.

In a recent report, the Law Commission in the UK arrived at the conclusion that where certain requirements are met, an electronic signature may be considered valid even in the case of a deed. The caveat is that in order to be acceptable, a deed signed electronically must be done in the physical presence of the person who is attesting the signature as a witness. This means that where a witness is sent an electronic signature for attestation purposes via email, post or otherwise, the document will not be considered validly executed.

In the case of Gibraltar companies, assuming no specific formalities apply as to the type of signature required, it follows that there is legal authority to suggest that a deed may be legally executed through the use of electronic signatures (such as DocuSign) in the following ways:

- (i) Electronically signed by two authorised signatories. In this case, regard should be had to any specific delivery mechanism contained in the document.
- (ii) Electronically signed by a director in the presence of a witness who is physically present and attests the director's signature by affixing his/her own electronic signature. The electronic signature's time stamp should support the position that the witness was physically present when the document was signed by the director. The delivery requirement would apply equally as described in above.

“This therefore creates a degree of uncertainty as to the validity of the execution. In the absence of greater legislative clarity”

It should be noted however, that the Law Commission guidance has not been transposed into statute and there does not appear to be any case law that specifically addresses the technicalities related to the evidencing and witnessing of electronic signatures in relation to deeds. This therefore creates a degree of uncertainty as to the validity of the execution. In the absence of greater legislative clarity, it would be prudent to adopt a more conservative approach, particularly in the case of deeds, so that there is no question as to the validity of their execution.

E-signing and corporate authorisations

Board minutes and board resolutions signed electronically are generally considered acceptable. A company may therefore sign minutes or arrange for the signature of resolutions via electronic signature. Where a resolution is being signed from various locations, a counterparts clause should be included allowing for that document to be signed in various different counterparts.

In a similar way, any notices that need to be provided as part of a corporate process, may also be signed electronically but regard should be had to the delivery mechanisms of those notices and any further formalities that need to be considered in order to make them valid.

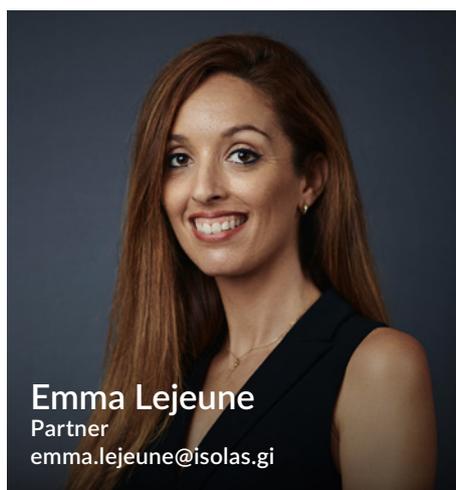
If you have any doubts or would like some guidance on this, do not hesitate to contact Emma Lejeune or Karan Aswani.

Key takeaway

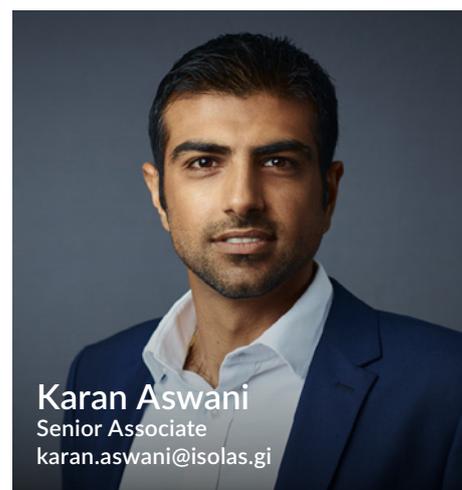
By way of summary, the following should be considered when considering the best method of signature:

- Are there any legal considerations, restrictions or formalities that need to be observed in any particular jurisdiction for the signing of the document.
- Are there any legal or tax reasons why it is important that the document is signed in a particular location.
- Is there a requirement that the document be signed in wet ink due to the nature of the transaction.
- Is the document being signed as a simple contract or is this being signed as a deed.
- If the document is a simple contract an electronic signature is ok.
- If the document is to be signed as a deed, what means of electronic signature is being utilised and is the witness physically present at the signing in order to allow it to attest the individual's signature.
- When utilising e-signing mechanisms such as DocuSign consider whether this is the best method of e-signing in light of the above.
- Generally, corporate authorisations such as board minutes, resolutions, notices etc are able to be signed by way of electronic signature. Regard should be had to any specific formalities that need to be followed under the constitutional documents of the company or the Companies Act.

It is important at these difficult times that businesses should be able to continue operating as normally as possible and that transactions should be allowed to complete successfully. Remote working facilitates this, however, the rules related to proper execution must be followed in order to ensure validity in contractual arrangements.



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