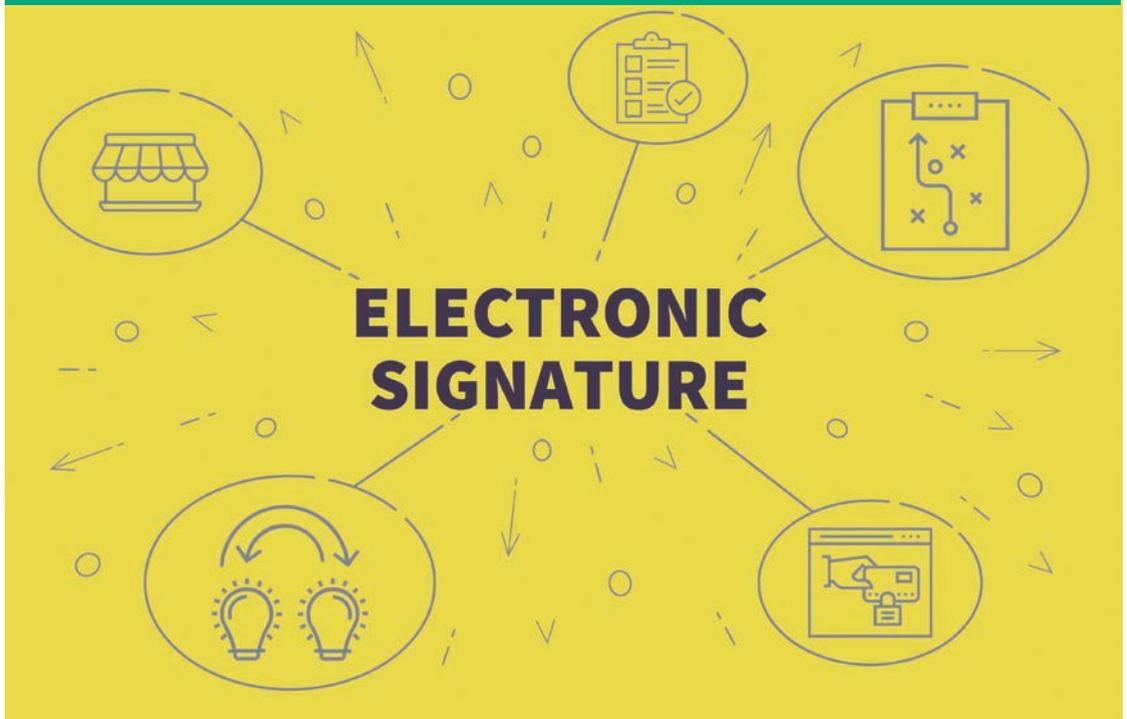




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Is the Pen Still Mightier than the e-Sword? Adoption of e-Signature and Related Covid-19 Crisis Issues



Introduction

This article is intended to be read in conjunction with my article published in the September 2019 edition of *Irish Tax Review*, which sought to explain the grounds for the growing use of e-signature. That article, of course, was written

in a pre-Covid-19 environment, when there was a concern that e-signature had not been embraced as fully as expected by the market, given the practical benefits that it can bring to transactions.

¹ Gavin O'Flaherty, "The Pen Mightier than the Sword? Developments in e-Signature", *Irish Tax Review*, 32/3 (2019).

This has obviously been brought more into perspective by the Covid-19 crisis. We have been lucky to be involved in a number of substantial transactions that have been completed during the Covid-19 period, for which, without e-signature, there would have been significant time lags in respect of completion, as well as the risks that such delays create. Given the requirements of social distancing and the impracticalities of travel to attend a physical completion, virtual completion and e-signature have become something that parties to transactions are considering more and more.

I am also a member of the Business Law Committee of the Law Society of Ireland, and we are spearheading a dual-track approach to try to inform members as well as to engage with the Government on amending the existing legislation to reflect the learnings of our committee and the extensive feedback that we have received from practitioners on the use of e-signatures during the crisis.

In this article I bring some of these learnings together by summarising the current position, dealing with the anomalies that arise, setting out some solutions and looking at related issues regarding the virtual exchange of agreements given physical completion meetings are now more difficult to consider.

Reminder of Current Position

As per the Electronic Identification, Authentication and Trust Services Regulations (“eIDAS”) at EU level and the Electronic Commerce Act 2000 (“e-Commerce Act”) at domestic level, e-signature is very much embraced by and has been affirmed by our legislation as a method of execution of legal documentation. In addition, our closest common law jurisdiction neighbour, the UK, has again reaffirmed, through its Law Commission, the usage of e-signature as a method to execute legal documentation.

As set out in my earlier article, the fundamentals of contract law – such as consent and intention to create legal relations – still

need to be complied with in respect of any transaction. A very important additional factor where the execution of documents is by e-signature is that both parties need to consent to the use of e-signature. In addition, a further layer of consent is needed if a public body is executing a document with e-signature.

What Is Electronic Signature?

The Law Society of England and Wales, in its recently released updated practice note on e-signature, provides an interesting summary of what electronic signature is. It includes:

- a person typing their name into a contract or into an email containing the terms of a contract;
- a person electronically pasting their signature (for example, in the form of an image) into an electronic (soft copy) version of the contract in the appropriate place (for example, next to the relevant party’s signature block);
- a person accessing a contract through a web-based e-signature platform and clicking to have their name in a typed or handwriting font automatically inserted into the contract in the appropriate place (for example, next to the relevant party’s signature block); and
- a person using a finger, light pen or stylus and a touch screen to write their name electronically in the appropriate place (for example, next to the relevant party’s signature block) in the contract.

What Are the Issues?

I refer you to my previous article, where I set through the various forms of documents and their manner of execution. The issues that arise can be broadly broken down into the following:

e-Commerce Act s14

As mentioned in my earlier article, the prescribed manner of e-signature under the e-Commerce Act for documents that must be executed as a deed is an “advanced electronic signature with a qualified certificate”. Currently, there is not an identifiable provider of this form

of e-signature in the Irish market. Some of the existing providers are confident that they provide the means to execute documents using the level of security that is required to achieve this threshold but this threshold of signature is indicative of a signature created from a secure signature generation device, which provides for a unique signature together with a qualified certificate issued by a qualified trust service provider. That being the case, this manner of execution would be cumbersome where, for example, a large volume of documents needed to be executed by the signing party.

It has become apparent during the Covid-19 crisis that a strict reading of s14 of the e-Commerce Act is that it prescribes the **only** way to execute deeds using e-signature. The effect of this is that certain practitioners and firms are, at times, defaulting to requiring wet-ink signatures to evidence the execution of deeds, particularly in banking transactions, where most documents are deeds, and also where legal opinions may be required in respect of the execution of same.

As per my earlier article, an alternative reading of s14 is that it simply sets out **one** manner of executing a deed and the parties can, alternatively, elect to execute the document and have it witnessed in as secure a manner as possible, such as through an existing online portal that allows witnesses to record their witnessing on the same portal through which the signing party affixes their e-signature. This position has been adopted in a number of substantial transactions with the possible additional safeguard that the parties affirm e-signature as the chosen manner of execution in the underlying agreement(s) and confirm specifically in the agreement that they would not use their execution of the document by e-signature to avoid any of their obligations thereunder.

e-Commerce Act s16

There is also the issue that our Companies Act 2014 retained the concept of corporate seals for Irish corporates, which is not the case for companies incorporated under the laws of England and Wales. The work-

around suggested in my earlier article comes up against the above issue regarding s14 if the attorney so appointed is executing the document as a deed and the above conservative position on s14 is adopted.

e-Commerce Act s10

One of the more material issues is that the e-Commerce Act prescribes at s10 a specific list of documents that cannot be executed through e-signature and, due to the breadth of the wording, it theoretically precludes a wide swathe of transactions from the benefit of e-signature. Ultimately, this section was prepared in vastly different times. Some of the issues that s10 has given rise to are the entry into wills, the taking of affidavits and the entry into trusts – which could cause problems where trusts created in respect of personality, such as aircraft assets, need to be wet-ink signed, leading to concerns in respect of the continued importance of Ireland as a jurisdiction for aircraft leasing and financing transactions.

Social distancing

Issues have arisen in respect of the witnessing of documents in the context of social distancing obligations. Current legislation does not specifically permit remote witnessing through Zoom or other portals. Physical witnessing remains the sole recommended form, notwithstanding that the witnessing party can record their witnessing through an online portal such as DocuSign, which should happen only after they physically witness signing, whether through e-signature or otherwise.

It is also notable that the UK Law Commission has recently affirmed that the UK's current legislation also does not permit remote witnessing, and it has asked that the issue be reviewed on an ongoing basis, given the problems that have arisen.

Affidavits

From a litigation perspective, the taking of affidavits has also been unnecessarily difficult as they are also s10 documents, but it is likely this issue will be dealt with as a priority.

Lack of court decisions

There is also the wider, overall point, which the UK Law Society draws out in its updated practice note, that there is no definitive statement from a court in either jurisdiction upholding electronic signatures. In the absence of a court decision or updated legislation, there remains a somewhat inconsistent approach to the use of electronic signatures, which leads to the absolutely understandable reversion to the “safest” form of execution, which is wet-ink signature.

Improvements to and Anomalies in the Current Legislation

There are various anomalies in the legislation that, if corrected, could lead to greater adoption of e-signature:

- Section 10 of the e-Commerce Act, which sets out the five limbs of documentation that cannot be executed using e-signature, could be deleted in its entirety or, less preferably, be amended to prescribe only wills and certain real estate transfers as not being capable of e-signature.
- Section 14 of the e-Commerce Act, which refers to documents that must be witnessed, such as deeds, could be amended to deal more effectively with the practicality of witnessing a document.
- The current legislative lacuna in respect of remote witnessing through Zoom or other portals could be closed off.

Section 16 of the e-Commerce Act, which provides for the affixing of the corporate seal, creates probably the greatest restriction on the operation of e-signature in the Irish market, given that a corporate seal does not have an exact comparator under e-signature. Although there is a work-around as regards powers of attorney, as highlighted in my earlier article, given the conservative position being adopted on s14, in particular for banking documentation, parties are still seeking that wet-ink signatures be applied. The suggestion here is that a qualifying electronic signature, as defined in the eIDAS, could be applied instead of a corporate seal, or the corporate seal could be dispensed

with, as in England and Wales, or a lower level of documentation of lesser material importance could be prescribed, which would require a qualified electronic signature.

Factors to Consider When Using e-Signature

Notwithstanding the above, there remains an understandable desire to use e-signature insofar as possible. That being the case, we need to be cognisant that the law in respect of the entry into contractual arrangements has not substantially changed during the Covid-19 crisis. In addition, any virtual exchange process needs to comply with best practice and, more particularly, reflect the *Mercury* [2008] EWHC 2721 case (which I deal with in more depth below). The two issues of virtual exchange and e-signature are independent, but they also need to be looked at as a whole to ensure that contractual relations are created between the parties as a result of the contemplated transaction.

Ultimately, there are a few best-practice positions that should be considered in respect of how to approach transactions when e-signature and virtual execution are to be used.

Seek an agreed position with your counter-party

All parties to the contemplated transaction at its outset should confirm the basis on which the transaction will be managed and be entered into. This avoids the issue being approached at the cusp of completion. In addition, it is very important to identify whether, due to filing requirements, any taxation authority requirements or other authority requirement would require wet-ink signature in any event. In this regard, you should also consider whether any foreign registrations are required regarding any of the documents and, in particular, when the execution of any documents set out under s10 of the e-Commerce Act would be anticipated under the contemplated transaction.

Verify who is signing

In the context of e-signature it is important to continue to affirm the same processes

regarding the authority of the signatory and the authenticity of their execution. Given that the signature will not be occurring in front of any of the parties as part of the composite completion board meeting, if there is any doubt about authenticity, then it is possible, as per the English Law Society recommendation, for video or photographic evidence to be used to give people comfort as regards the actual signature of the document using e-signature.

Look to evidence the execution insofar as possible

This is of paramount importance and relates to the retention of the one original executed form on an online portal, to be held on permanent systems of each of the counterparties. See my earlier article in this regard.

Understand the requirements

All of the parties need to be aware of the requirements of virtual exchange and e-signature in the context of the changing legislative climate.

Witnessing

As mentioned above, the current law both in Ireland and in England and Wales is that the witness must be physically present when a deed is executed by or on behalf of the signing party. In the context of the Covid-19 crisis, and in particular in respect of the witnessing of wills, parties should examine whether it is possible to demonstrate physical presence while maintaining social distancing, such as through a glass screen, but there will be practical challenges. The parties may wish to explore the extremities of the current position as regards what can be considered to constitute presence, but this would be taking place in a legislative vacuum, and it is important that the parties collate as much clear evidence of presence as possible.

Virtual Exchange

E-signature is the means by which legal agreements are executed while virtual exchange refers to the manner in which parties exchange their executed legal agreements

virtually. The case of *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 (*Mercury*) led to a substantive change to the process of taking pre-signed signature pages and the process of virtual exchanges whereby signature pages are exchanged by email. Although the decision in *Mercury* is to some extent viewed as transaction specific, it gave rise to a change to the basis on which virtual and closings occurred. The ultimate effect of the case is that the parties should be fully aware of the final version of the document to which their signature page is being appended to prevent the scenario arising, as in *Mercury*, that the ultimate transaction document had advanced to a great extent from the document that was in place when the signature page was originally provided by the client. This means that the whole form of the agreement should be provided to the client, and they should give a specific consent to the affixing of their signature page to the final form of the agreement.

The position is identical whether the client has provided a wet-ink signature or an e-signed execution page, so neither the current Covid-19 climate nor e-signature has changed it. That being the case, it is quite important that all parties to a transaction continue to abide by the two separate limbs of protocols regarding virtual exchange and e-signature.

Conclusion

As is evident from the above, e-signature has been an area, no less than never-ending Zoom calls(!), which have been increasingly adopted during the Covid-19 crisis. However, there are legislative anomalies that are restricting greater adoption of e-signature. One would hope that it would be a positive side effect of the Covid-19 crisis that the Government will prioritise the review of the legislation to allow for the more precise adoption of some of the e-signature platforms that exist at present.

Read more on **taxfind** From Irish Tax Institute The Pen Mightier than the Sword? Developments in e-Signature, *Irish Tax Review*, Issue 3, 2019.