Electronic signatures are good news for finance transactions, as they potentially allow signatories to sign wherever they might be in the world, meaning no more unnecessary delays at completion. But, what’s the catch? In this insight, first published in Butterworths Journal of International Banking and Financial Law in January 2020, Stephan Smoktunowicz and Catherine Phillips, professional support lawyers in our Banking & Finance team, examine the issues that might arise in practice when assessing the use and impact of electronic signatures on finance transactions and conclude that it might not always be plain sailing.

**Key points**

- Even if an electronic signature is a valid means of executing a document, there may be other issues which determine whether it is appropriate for use in a particular transaction.
- The use of electronic signatures should be considered carefully during the maintenance of a facility, particularly as the use of email could inadvertently give rise to an unintended amendment, waiver, consent or release.
- Particular care should be taken when considering conditions precedent documents signed using an electronic signature, as they may conceal hidden issues.
- Careful consideration will be needed when assessing security, particularly over intangible assets where the contracts under which those assets arise are signed using electronic
Background

In September 2019, the Law Commission published its report on the electronic execution of documents.

One of its key findings was that an electronic signature (e-signature) is capable in law of being used to validly execute a document (including a deed), provided that:

- the person signing the document intends to authenticate it; and
- any formalities relating to the execution of that document are satisfied.

This clarification has been warmly welcomed, but as the world of finance moves towards adopting e-signatures as the norm, the question "is it ok to use an e-signature on this document?" is likely to come up in practice.

In examining this question, there is an important difference between an e-signature being "capable in law" of being used as a means of valid execution and it actually being valid when used. But furthermore, even if an e-signature is valid for the purposes of executing a document, could there be any hidden risks in using one?

To assess this, let's start with a bit of process.

Part one: It all starts with planning

Fail to plan, plan to fail. Any well-planned transaction will consider where the signatories will physically be for signing. Messing that up can have serious commercial ramifications (eg taking finance documents into India for signing could incur a hefty stamp duty hit).

As technology has changed over the years, the signing forum has moved from physical completion meetings to "virtual signings" and the now well-rehearsed "Mercury" signing process. E-signatures create new considerations.

What are the key considerations when processing transactions?

- Type of e-signature
- Type of document & restrictions on use
- Parties and location of signatories
Dating and timing the completion of documents
Signing confirmations
Governing law and jurisdiction
Statutory and filing requirements

Type of e-signature

E-signatures come in all shapes and sizes, from sophisticated signing software, to clicking on an "I accept" button, to typing a name into an email. The recent case of Neocleous v Rees [2019] EWHC 2462 (Ch) held that even an automatically generated signature block at the end of an email was sufficient to constitute a "signature" for the purposes of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Whilst the convenience of an e-signature in speeding up the completion process is very attractive, e-signatures are not all created equal from the perspective of security and reliability. Whilst a low level of security does not negate validity, it may be relevant to the question of whether the parties have the necessary levels of trust and evidence to satisfy themselves that the correct person has signed the correct document with the requisite authority and capacity (for more on which see Type of document and restrictions on use and Signing confirmations below), all of which form building blocks to the evidential weight that can be afforded to any type of signature.

Also, the absence of putting pen to paper means that it is potentially much easier to enter into an arrangement that you did not want to (just look at online shopping as a prime example).

Understanding this is equally important on finance transactions and even if care is taken with day one agreements, there are ongoing risks, particularly with the use of email. Care should be taken to avoid email correspondence unintentionally effecting an amendment, waiver, consent or release. Those involved regularly with finance transactions may wish to consider putting appropriate safeguards in place.

Type of document and restrictions on use

Whilst e-signatures are generally valid, this position comes with important caveats which depend on their context. First, the type of document being signed will have a bearing on what must be done in order to establish validity. Second, there could be other restrictions that make the use of e-signatures problematic, or which at the very least benefit from further thought. For example:
Type of document: the specific problem with deeds

One of the formalities applicable to deeds is the requirement for certain signatures to be witnessed. Where this is the case, the Law Commission has concluded that the current law requires the signature to be applied in the physical presence of the witness.

Documents for execution may arrive into a computer, tablet or mobile phone. A document might be opened and signed by the signatory, with the witness seeing the signature and countersigning on the same device. However, difficulties start to arise if the document is signed and witnessed on different devices and it is not possible to establish whether the witness was in the same physical location, or whether the document received by the witness for countersignature is the same one that they saw being signed.

Irrespective of how e-signatures are witnessed, practitioners should also not lose sight of current laws which restrict who can actually be a witness. After all, new ways of playing will still be subject to old rules.

Of course, other types of document may be subject to other formalities (for example, guarantees must be in writing (or evidenced by writing) and signed). Practitioners must ensure that these formalities are also satisfied as part of their transaction management.

Restrictions on the use of e-signatures

Considering contractual restrictions on the use of e-signature in other documents will be important for two reasons:

- does a signatory/party have the capacity and power to use e-signature?
- if not, what are the potential ramifications of that (ie who can bring a claim against who and how does that directly or indirectly affect a financing arrangement)?

For example, the review of a company's constitutional documents and shareholder agreements or a partnership agreement may disclose:

- restrictions on the way that documents and resolutions are signed;
- requirements that apply when a company, directors or partners provide confirmations to third parties (both in their own office holder capacity and on behalf of a body corporate); or
- provisions that dictate how/whether a body corporate can require evidence of one office holder, to act on behalf of a co-office holder.

When drafting documents, particular care should be taken with boilerplate language in all contracts to ensure that they are fit for purpose in the digital age and allow electronic
communications.

Parties and location of signatories

Perhaps more obvious considerations are the type of party (individual(s) or corporate entity) and their domicile. For example, a personal guarantor may be a UK national domiciled overseas and thought will need to be given as to how and where a guarantee claim might need to be pursued and whether the effectiveness of an e-signature would be recognised in each instance.

Ensuring that there are no bars to the use or effectiveness of e-signatures in overseas jurisdictions (or to the extent there are, that they can be overcome) is important and early engagement with overseas counsel will be important in ensuring that completion delays are avoided.

Dating and timing of documents

Recent developments in legal technology have included the advent of “transaction platforms” through which document management and document signing are managed. However, the process efficiencies which this type of technology brings can also include dangers for the unwary.

The potential benefits and dangers with e-signatures and platforms combined, is that they provide the opportunity to send and receive a huge amount of documentation. However, caution is needed to ensure that any automatic date and time stamps, either recorded in the system’s activity log or inserted into documents when signed, do not create evidential confusion around when documents actually came into force (or the capacity of signatories to execute on behalf of different parties if this changes during the course of a transaction). Those using technology of this nature will need to consider how the dating and timing process is managed, to ensure that documents are completed, signed, delivered, timed and dated in the correct order.

As previously identified, there may be issues with signing some documents electronically (for example deeds) and where signing and platform technology is used to facilitate the signing of both wet ink and e-signatures, extra thought will need to be given as to how the completion process is managed.

However, it is welcomed that the Law Commission has recommended that an industry working group should be established and convened by Government to consider these and other types of practical and technical issues.
Signing confirmations

Adapting "Mercury" wording

Remote signings have been around for a while and many practitioners use the now commonplace "Mercury" email to coordinate the signature and return of documents by pdf file. Whilst the "Mercury wording" used varies slightly in practice from firm to firm, both parties signing and/or their legal advisors typically provide deemed confirmations which say that documents have been seen in their entirety and that by returning signed documents, each party agrees to be bound by them.

It is important here to distinguish between a "party" and a "signatory", because in assessing the validity of an e-signature, it is the person signing the document who needs to have the intention to authenticate it and a party (eg a company) may have more than one signatory to a document. As such, the typical Mercury confirmations discussed above will not necessarily provide a confirmation that each signatory who signed using an e-signature, actually signed the document.

So how do you deal with that? Well, you could ask each signatory to provide their own separate confirmation, but that may not always be practical or desirable, especially if the document has to be forwarded to a busy senior director to sign. Where parties and signatories are well known through "know your customer" checks and the course of negotiations, there may already be a sufficient level of trust for this not to be a material concern. However, where signatories have not been involved in negotiating the transaction or evident in the decision making process, additional signatory confirmations may be more desirable.

With the rapid advancement of legal-tech, it is hoped that a safe solution to evidencing signatories can be achieved, whereby signatories sign via secure and encrypted servers, to create the necessary element of trust and remove any elements of doubt from the signing process. The UK Jurisdiction Taskforce LawTech Delivery Panel's legal statement on cryptoassets and smart contracts (issued on 18 November 2019) also touches on this. Given that the use of "private keys" provides the authentication through which dealings in cryptoassets can be made, "signing off" on digital transactions will also need to be in trusted hands.

Companies Act 2006 company communications requirements

Tucked away towards the back of the Companies Act 2006 (CA 2006) are the company communications provisions (ss 1144 to 1148 and Schs 4 and 5 CA 2006). Of particular note, s 1146 CA 2006 says that documents supplied by a person to a company in electronic form will be sufficiently authenticated if:

- the identity of the sender is confirmed in a manner specified by the company, or
- where no such manner has been specified by the company, the communication contains or is
accompanied by a statement of the identity of the sender and the company has no reason to
doubt the truth of that statement.

Copies of corporate approvals form a key role in finance transactions and their authentication is
important in evidencing corresponding proceedings (see for example, s 249 CA 2006 on board
minutes). So, where e-signature is used, establishing the authenticity of corporate authorisations
means a close examination of the s 1146 CA 2006 mechanics. (This is something that was
highlighted by the Law Society’s practice note titled ‘Execution of a document using an
electronic signature’ dated 21 July 2016).

Is the s 1146 Companies Act 2006 confirmation approach useful from a Mercury perspective?
Trust is key on any finance transaction in ensuring that documents have not been fraudulently
entered into, but the typical "know your customer" checks and continuing dialogue and email
correspondence on transactions means that the risk of fraud on any well run finance transaction
should be relatively low.

Of course, that does not mean that there is "no risk" and the s 1146 CA 2006 process could
add a useful additional confirmatory mechanic to Mercury signing instructions, in establishing
sufficient trust with less familiar parties and signatories.
However, the whole point of using e-signatures is to get away from extra layers of complexity
and confirmations, so there must be a better technological fix that provides parties and their
advisors with a sufficient level of comfort and which keeps any fraud risk to the minimum.

Governing law and jurisdiction

Another more obvious issue, but an important consideration nonetheless is the impact of
governing law and jurisdiction clauses within documents. In "e-signature friendly" jurisdictions,
there may be fewer hoops to jump through to establish the validity of e-signatures. However, as
we have seen with English law, even where e-signatures are valid, other issues such as those
examined in this article will need to be thought through on a case by case basis.

When considering the use of e-signatures on finance transactions, the content of legal opinions
should also be checked carefully (as discussed in Legal Opinions in Part Two (Disguised
documentation and other issues)).

Statutory and filing requirements

We touched on statutory requirements for deeds earlier, but any other statutory or filing
requirements requiring documents to be signed or provided in a certain manner should also be
considered at the outset of a transaction, as not all e-signatures are accepted by all bodies. Consideration of where a document may need to be filed or registered is crucial in ensuring that proprietary and other interests are adequately protected, particularly if a registry has a strict filing deadline where it may be more difficult to deal with requisitions in a timely fashion.

Part two: Disguised documentation and other issues

- Security over intangible assets and/or assets subject to requirements from other jurisdictions
- Recognition of notices of assignment signed electronically in other jurisdictions
- CP confirmations
- Assumptions and qualifications in legal opinions

Disguised documentation issues

Once you have looked at process, if you can establish that the use of an e-signature on your transaction will be a valid form of execution, is there anything else that you need to think about? As is often the case on finance transactions, the devil may very well be hidden in the detail.

By way of example, let's take an English law debenture entered into by an English company. Assets secured by the debenture may be acquired or come into existence after the date of the debenture. Those assets may be:

i. created under agreements signed electronically (e.g., intercompany receivables or other intangible assets); and/or

ii. subject to requirements from other jurisdictions (whether tangible fixed or movable assets, or intangible assets).

Furthermore, intangible assets may arise under English law contracts with English parties, or the relevant contract may be governed by foreign law, include an overseas party or be performed overseas.

In assessing the real worth of that security during the life of a finance facility, one might need to consider:

- whether the fact the debenture had been signed electronically creates any issues if the security needs to be enforced, or whether notices of assignment or charge signed using e-signature and/or served electronically are recognised under all relevant laws; and
whether it is safe to assume that where the contract giving rise to an asset (or the sale and purchase of any asset) was signed electronically, that the signature was valid and the contract enforceable, without additional due diligence.

The degree of weight given to these points will vary from transaction to transaction depending on the nature of the borrower's business and the jurisdictions concerned. But if it is significant, be aware that even if you do carry out contractual due diligence and receive a copy of a signed contract, it may not be possible to tell whether something has been signed using an e-signature, particularly if the signing software makes the e-signature look like a copy of a wet-ink signature. This could also add layers of complexity into security reviews and other fatal flaw reviews, because depending on the type of document and jurisdiction, the type of signature could be critical in assessing whether a document might be prone to a validity challenge.

**Giving confirmations**

Confirmations are an important part of any typical finance transaction. On a syndicated transaction for example, a law firm will typically provide a conditions precedent (CP) satisfaction letter to the facility agent. In turn the facility agent will confirm to the lenders in the syndicate and the parent of the borrower group, that CPs have been received in satisfactory form, allowing utilisation notices to be submitted for drawdown of loans. So, does the use of e-signatures affect the CP confirmation process?

Potentially yes. Take a share purchase agreement or business sale agreement signed using e-signature. Taking security over an acquisition document may be important to a lender if it needs to enforce its security and bring a warranty or indemnity claim for a significant breach. The legal and practical issues that we have identified on finance transactions will also apply to other types of transactions and if the validity of an e-signature is in doubt, there is a risk that the security could be worthless.

When confirming that CPs are satisfied or have been received in satisfactory form, it will be important to stop and think what that really means where e-signatures have been used in CP documents and how any CP confirmation will ultimately be relied upon.

**Legal opinions**

Whilst any doubts remain around e-signatures being valid in all instances, careful consideration will need to be given to legal opinions, both when drafting and reviewing them. Assumptions or qualifications on e-signatures that cut through an opinion will need to be approached with
caution, particularly if their actual effect is to give "no opinion" on the validity of e-signatures at all (in which case opinion beneficiaries may wish to consider resorting to "wet ink" signatures). However, the increased use of e-signatures provides an opportunity for firms to discuss any fears or concerns in giving legal opinions on e-signatures. With constructive discussion, those fears and concerns may actually dissipate in time.

Other points

Excluded documents

It is worth noting that the Law Commission's report excluded registered dispositions under the Land Registration Act 2002 (eg transfers of land, leases of land of more than seven years and legal charges), which will be relevant to many finance transactions. As such, it will be important to consider all types of documents that are being signed (whether the main finance documents, ancillary documents or CP documents), to assess the risk of an e-signature becoming problematic further down the line.

Cross border transactions

We have touched on some elements of a cross-border nature throughout this article. Practitioners and parties will need to consider whether an e-signature causes problems with contract validity, perfection, performance of obligations or enforcement on a case by case and jurisdiction by jurisdiction basis. Whilst parties may generally be free to use e-signatures in the place of execution, the place of enforcement will always remain relevant, particularly in a collect out scenario.

Closing remarks

We have covered some of the main areas of consideration when using e-signatures on finance transactions. That isn't to say that others might not be hiding, but as with any well executed finance transaction, stopping to think about potential issues will be of paramount importance where e-signatures are concerned.

It will be interesting to see how quickly the word of finance embraces the use of e-signatures and works through any residual issues as the technology behind signature platforms and smart contracts continues to evolve. The move to a perfect "e-signing world" will benefit from collaboration and support from all stakeholders both within and outside of the industry working group suggested by the Law Commission.
New technology undoubtedly creates space for greater efficiencies in the delivery and execution of finance transactions and that is something that should be warmly embraced. However, as we hurtle faster and faster into a new digital age, it is worth remembering that some old rules still apply and as such, parties will still need to navigate the sea of e-signatures with appropriate caution.

If you have any queries in relation to this insight, please contact a member of our Banking and Finance team.

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