

**Insights**

## **ELECTRONIC EXECUTION: ANOTHER “NEW NORMAL”?**

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### SUMMARY

Electronic signatures and virtual signings (using the Law Society guidance following the “Mercury” Tax case) have been gaining popularity for some time with electronic execution given an added boost in Autumn 2019 when the Law Commission published its report on e-signatures.

The report’s key findings were that:

- Deeds and documents can be signed electronically so long as the signatory intends to authenticate the document and any relevant formalities are satisfied.
- It is possible to witness an electronic signature, but the witness must be physically present.
- Electronic signatures are capable of satisfying a statutory requirement for a signature.

Historically in the construction industry, uptake of **electronic execution** has been slow. Parties have generally preferred to opt for the familiar security of a “wet ink” signature. Virtual or electronic execution methods were typically reserved for special occasions, such as when signatories were based abroad and time did not allow for hard copies to be circulated.

The **COVID-19 lockdown** has, of course, changed a great deal. However, certain things have not changed and one of these is that construction contracts still need to be executed. In the last month, we have seen **electronic and virtual execution** fast become the new normal for concluding contracts. With this in mind, I thought it might be interesting to explore some of the more common queries that we’ve been encountering.

### **Can I use electronic execution for all types of contract?**

No. There are some circumstances where an electronic signature should not be used, such as when documents need to be registered with the UK Land Registry or because of a particular requirement (for example, under statute). Care also needs to be taken when one of the parties is an overseas entity (more on this below).

## **Can overseas companies electronically execute contracts governed by English law?**

Possibly but you do need to check. Whether an overseas entity can validly execute using an electronic signature is a local law issue regarding the capacity of the entity and the authority of the person signing. Accordingly, you should always take local law advice.

## **Can one party simply go ahead and electronically execute the contract or do they need to tell the other signatories?**

Up front agreement between the parties and their legal advisers as to how the contract will be executed is vital. The Law Society guidance for Mercury (and the Counsel's opinion behind it) is predicated on consent:

“You should choose which option to follow at your own discretion and according to the facts of each transaction. Before choosing one of the options, you should have prior approval and co-operation of all the parties...”

The parties and their legal advisers should agree a “signing protocol” that sets out how the contract will be signed and, if it is a deed, who will date the deed and when it will be “delivered”.

## **Do witnesses need to be physically present?**

Yes – because we cannot be confident that the law currently allows a person to be a witness if they are “present” in some other way (a conclusion also reached by the Law Commission). Accordingly, if a signature needs a witness, that witness must be physically present when the signatory signs the contract. This may prove tricky to achieve given the current requirement to adhere to social distancing. It's worth noting that a Law Commission working group is currently being formed to consider security, technology platforms and the possibility of video witnessing in the future.

## **Can I use a combination of execution methods?**

Yes, there is no reason why a contract cannot be signed using a combination of different methods (such as electronic signatures and “wet-ink” signatures) so long as each party uses a valid signature method. This should also be agreed in advance as part of the signing protocol.

## **How do I execute a building contract electronically?**

Building contracts – including all their technical documents – often amount to many hundreds of megabytes. This means that they may exceed the file size limit supported by e-mail and web based electronic execution platforms.

Pre-lockdown, this meant that parties almost invariably opted for the traditional “wet ink” route because there did not seem to be a straightforward electronic option available. However, the current situation has forced a review of available options and technological capabilities.

One possible option is a Mercury “virtual” execution process. Fundamentally though, this requires a final version of the contract to be circulated by email. For a large building contract, this would require the use of a download link (rather than a PDF attachment). The problem with this is that many such links are pre-set to expire after a period of time or they allow changes to be made to the underlying documents after the link has been circulated. Therefore, there is an inherent evidential hurdle to overcome if you ever need to refer back (and rely upon) the “original” contract as executed.

An alternative option is electronic execution using an electronic signing platform. As noted above, these platforms usually have a recommended file size limit on each “envelope” issued for signature. We have seen a couple of methods being used to get around this:

**Option 1** – split the contract documents into multiple separate “envelopes” (each within the file size limit) for the parties to execute. First, the envelopes containing the supporting technical documents are issued (to be initialled). These documents are issued first to ensure that the parties have reviewed (and accept) them prior to signing the main agreement. Then, the main agreement is issued for execution in the normal way. The main agreement should also refer to the separate envelopes of documents as having been initialled for identification purposes so it is clear which documents form part of the signed contract.

**Option 2** – if it’s not practical to split the contract documents up into multiple smaller envelopes (as described above), then another option we’ve seen used is for a secure data site to be set up to host all of the contract documents. The parties are given access to the data site to review and get comfortable with its contents. Once the contract documents are agreed in principle, the data site can be locked and the main agreement issued for signature using an electronic signing platform.

Importantly, the main agreement should include a register of all the supporting contract documents (each clearly identified) hosted on the data site, but which are to be incorporated by reference into the contract. This register should be initialled by the parties.

From a practical perspective, most parties are unlikely to want to have to maintain a data site for the full duration of the contract (up to 12 years). If this is the case, the parties should agree as part of the signing protocol that, once the contract has been entered into, in due course, the host of the data site will provide a CD bible (or similar) containing a copy of the fully executed main agreement and all the contents of the data site for future reference.

## **Final thoughts**

COVID-19 has forced a rapid acceleration of the use of electronic execution methods within the construction industry. It will be interesting to see whether it lasts and if this “new normal” does remain the norm.

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