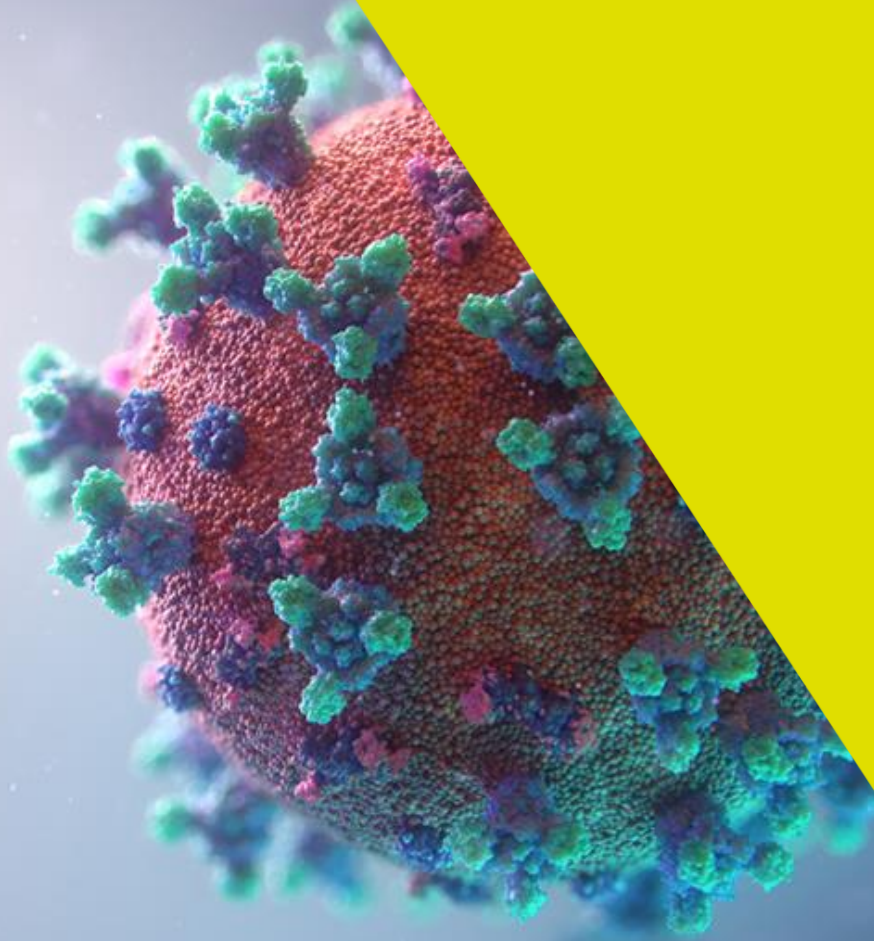


 Burness Paull

COVID-19 CLIENT GUIDE

Electronic Signatures



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Signing remotely

The current Covid-19 outbreak has meant a huge increase in the number of people working from home without easy access to printers and scanners usually used to evidence signing. This has brought electronic signatures, and when these can be used to sign legal documents, sharply into focus.

This Guide has not been prepared with any particular document or transaction in mind, and should be read as a high level summary of electronic signatures under Scots law and English law.

What is an electronic signature?

Electronic signatures are simply signatures in electronic form. They can take many forms and can range from a **simple electronic signature** (such as a scan of a handwritten signature) right up to a **qualified electronic signature** which is the most secure form of electronic signature available, being a fully certified encrypted secure digital signature with additional certification from a Government authorised body.

Simple electronic signatures are the most common and can include ‘two-factor authentication’, which most electronic signature platforms offer. This can involve providing a unique pin code or password which the signatory uses to access the document and apply their signature. This provides far more evidential value than a scan of a handwritten signature. In fact, certain electronic signatures can give far more evidence of signing than a scanned copy of a traditional signature.

Which documents can I sign electronically?

Most day to day documents can be signed electronically under Scots law and English law. Examples of documents that can (subject to specific requirements and other considerations) be signed electronically using a simple electronic signature are:

- simple contracts;
- heads of terms;
- engagement letters;

- board packs and board minutes;
- non-disclosure agreements.

A limited number of types of documents are not suitable to be signed electronically and these include:

- wills and certain trusts;
- documents with particular registration requirements;
- documents where there are constitutional restrictions on signing; and
- documents that need to be signed in a ‘self-proving’ or ‘probative’ way (see below).

In these cases, traditional “wet-ink” signatures will be required.

Where under English law a document is to be signed as a deed care should be taken as there is a debate around what is required in terms of witnessing, and law reform has been suggested in this area.

Where the parties signing are from another jurisdiction advice should be taken in the relevant jurisdiction on whether or not electronic signing is valid.

We would not recommend that electronic signing is used where the matter is high risk, contentious or likely to become contentious, simply to avoid any debate about validity of signing.

In all cases, the nature of the document and the risk and value of the particular transaction need to be weighed up in deciding whether to sign by electronic signature and, if so, what type of electronic signature to use. The contracting parties need to be comfortable that there is enough evidence to show that the actual signatory applied their signature to the document and that they intended to sign that document.

Do I need a witness and can I do this electronically?

It is common market practice in Scotland for many documents to be signed in the presence of a witness. Under Scots law this generally gives a ‘self-proving’ or ‘probative’ document. This means there is a presumption that the document has been validly signed. This can be helpful if trying to rely on a document in court or otherwise exercise certain contractual or security remedies without requiring court involvement, but for many documents this is not essential.

Some of the electronic signature providers do offer the function of adding a witness to an electronic signature. **However** under Scots law this function **will not** mean that the signature is self-proving so this can be misleading.

In order for a document to be 'self-proving' under Scots law using an electronic signature, the electronic signature must be a 'qualified electronic signature'. However at the moment qualified electronic signatures are not widely available through the electronic signature providers in the UK.

It is worth noting that any enrolled Scottish solicitor, including registered in-house counsel, may obtain a Law Society of Scotland Smartcard which is a valid way of creating a qualified electronic signature.

If there is a requirement for the document to be 'self-proving' under Scots law, then it would have to be signed using a qualified electronic signature or in the traditional way.

Can I mix electronic signatures with traditional signatures?

The short answer is 'yes, but...'. Yes, it is possible to have one or more parties sign electronically and others sign in a traditional way (using counterparts). It may be easier if all parties follow one type of signing. The electronic signature providers can set the documents up so that they are signed in the correct order and by the correct people which is another advantage of this way of signing!

If mixing types of signing then care should be taken to ensure the final document is saved properly with the electronic data saved as well.

So what now?

The law in Scotland and in England is set up so that many documents can be signed electronically. Given that it is currently harder to print, sign and scan documents we expect electronic signatures will be used more and more and that parties will become more comfortable with using them where appropriate.

For Scots law documents which require self-proving status a platform supporting qualified electronic signatures, or traditional "wet-ink" signature/witness, must be used. Given there is

now more focus on this topic qualified electronic signatures may be made more widely available.

For the limited number of documents which still require traditional signatures or have other particular requirements, electronic signatures will not be suitable.

For documents which only require simple signatures, electronic signatures can be a very effective and efficient option and we expect both businesses and lawyers to embrace this helpful option over the coming weeks.

This is a complex area of law and full advice should be taken for each particular circumstance.

We hope that this provides you with a helpful summary of the position. This guide is not legal advice, but should you require any further advice or assistance, please do not hesitate to get in touch with your usual Burness Paull contact.

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