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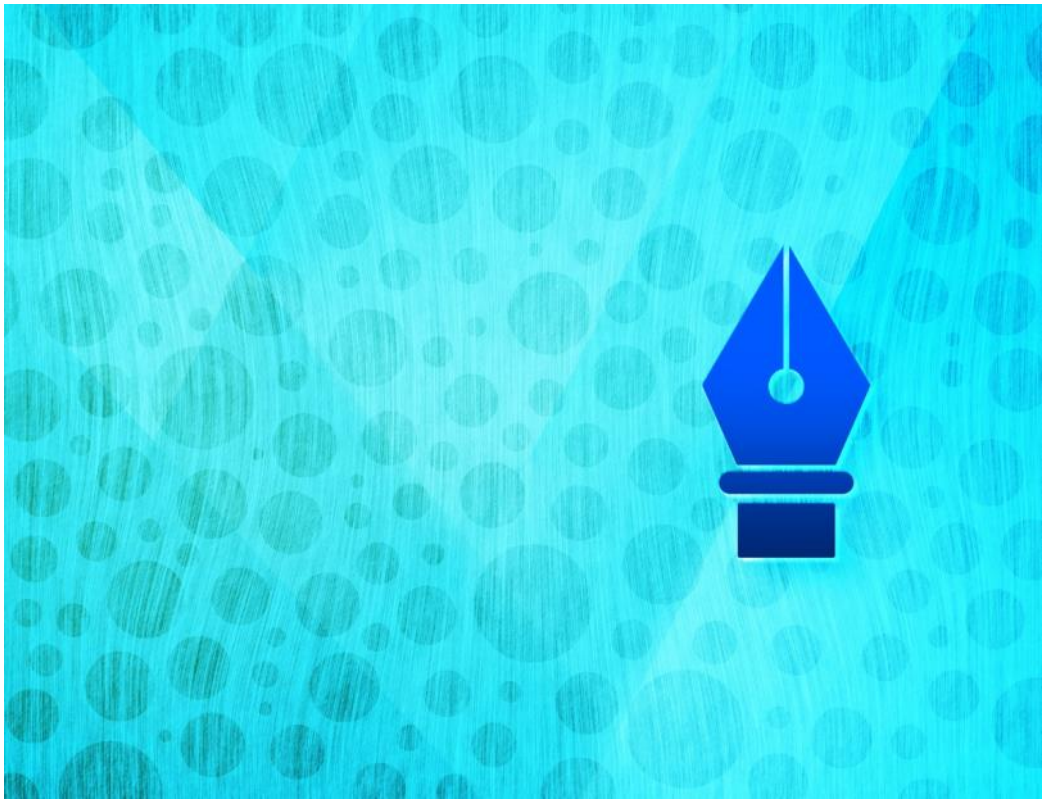
Execution of Documents and E-signatures
Is it as straightforward as we would all like it to be?



We previously published an article in April 2020 on the use of electronic signatures:
Signing Documents and Completing Deals in the Age of Remote Working

The article that follows takes a more in-depth look at the execution of documents, both by traditional methods and by use of electronic signatures under Scots law.

The use of e-signatures is becoming much more common but is it as simple as forgetting about the traditional methods and simply using e-signatures on all occasions?

Execution of Documents and E-signatures
Is it as straightforward as we would all like it to be?

The working conditions resulting from the Covid-19 lockdown have brought into sharp focus the different ways in which documents can be executed. Anyone who has been involved in a transaction – purchase or sale of a company, a business or a property, lease of a property, issue of shares, loan facility etc – will know that these often involve large numbers of documents. Some of these documents will need witnessed, some will involve several parties and the transaction will not be able to be concluded until all the documents have been executed and the various lawyers have confirmed that they are all satisfied with the process.

Even before Covid-19 changed our working conditions, it had become more common for transactions to be conducted by email and for documents to be executed remotely from the lawyers. It used to be the norm that completion of a transaction involving multiple documents would have the parties physically meeting together – the completion meeting – and actual documents being passed around and signed. Email has greatly reduced the number of physical completions but when they do happen it can often be a much more efficient process than rounds of emails. The increase in non-physical completions of transactions has brought an increase in questions on how documents should be executed and challenges in following the traditional methods.

The processes for executing documents under Scots law have changed over the years and, although clients may at times find them frustrating, they are now well suited to commercial transactions.

Scots' legislation on the execution of documents can be traced as far back as the Subscription of Deeds Act 1540. The changes we have seen since that time include:

- a document no longer needs to be handwritten by the granter (a "holograph writing") or, if not handwritten by the granter, signed by the granter and "Adopted as holograph";
- with a few exceptions, a document no longer needs to be signed on every page;
- there is no requirement to have two witnesses to a signature.

In addition to that, the important recent changes are:

- where a document needs to be witnessed, only one witness is required;
- a document can be executed in counterpart, ie not all parties need to sign on the same physical document;
- a document can be executed using an electronic signature.

What is the relevant legislation?

The key legislation (and how we refer to it in this paper) is:

- Requirements of Writing (Scotland) Act 1995 – ROWA.
- Legal Writings (Counterpart and Delivery) (Scotland) Act 2015 – Counterpart Act.
- EU Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market, Electronic Communications Act 2000 and The Electronic Documents (Scotland) Regulations 2014 – E-signature Legislation.

Does a contract need to be constituted in writing and executed by the parties?

There is no general rule under Scots law (or under English law) that requires a contract to be in writing and signed by the parties. For Scots law, ROWA sets out exceptions to this general rule, and the key ones include:

- a disposition or a standard security, being documents which create, transfer, vary or extinguish a real right in land, or a contract to do any of these things;
- a "promise", being a gratuitous unilateral obligation (except if undertaken in the course of business);
- a will, testamentary trust disposition and settlement or codicil.

The reason that contracts, especially complex ones, are documented and executed are to achieve certainty on the terms of the contract and to provide an evidentiary record of the terms.

In addition, the method of execution (witness or no witness) can enhance the evidentiary status of a document and make it "probative" (or self-evidencing).

What is a "Deed"?

The position differs under Scots law and English law.

The term "Deed" has no specific meaning under Scots law. The general expression of "a deed" does have some meaning in that a document which is termed, under Scots law, to be a "deed" (eg trust deed) will have some degree of formality and generally shows the intention to create legal obligations or a legal relationship.

The normal Scots law rules of execution will apply to a document termed a "deed".

Under English law, a "Deed" must not only be stated to be "executed as a deed" and delivered but the signature of the party must also be attested to and witnessed.

What is the difference between "subscribe" or "execute" and "sign"?

The term "subscribe", or "subscription", is the formal signature of a document by an individual on the last page (excluding any schedule or attachment), in compliance with ROWA. The term "execute", or "execution", is the equivalent for a company, LLP or other form of incorporated body, again in compliance with ROWA.

The term “sign” applies to a less formal signature of a document (eg signing the front cover or initialling the last page), which does need to be in compliance with ROWA.

How does a company execute a document?

A company executes a document by it being signed by “officers” of the company.

Under Scots law, by a combination of ROWA and the Companies Act a document is executed by a company if:

- it is signed by a director, the secretary or an authorised signatory and, where required, that signature is witnessed

or

- it is signed by two directors or by a director and the secretary or by a director and an authorised signatory or by two authorised signatories, in which case no witness is required.

Under English law, the Companies Act provides that a document is executed by a company if:

- it is signed by a director and the signature is witnessed

or

- it is signed by two authorised signatories, in which case no witness is required. For this purpose, an “authorised signatory” is a director or the secretary.

What is “self-evidencing” or “probative”?

This is important when it comes to enforcing a contract. A self-evidencing contract is one which is presumed to have been subscribed or executed by the relevant contracting party – termed “probative”.

The fact that a contract is self-evidencing does not affect the formal validity (ie enforceability) of the contract.

Where there is self-evidencing status, no further evidence is needed to prove valid subscription/ execution from the party seeking to enforce the contract. However, where a contract does not have self-evidencing status, additional evidence is needed to prove valid subscription/execution.

The requirements to achieve self-evidencing status are that it must be clear from the contract itself that:

- it was subscribed/executed by all the parties;
- each subscription (by an individual) was witnessed or execution by a corporate entity done in accordance with the rules (which need not involve a witness);
- the name and address of each witness is stated;
- nothing in the contract indicates that the subscription/execution was not by the party or that the witnessing was not valid.

Is a witness required?

The main difference between a contract which is witnessed and one which is not is the resulting self-evidencing status.

The lack of a witness will result in the contract not having self-evidencing status – it will have no effect on whether the contract is valid and enforceable.

Execution by a corporate entity may, if done in accordance with the rules, not require a witness.

It has been common practice to have any subscription/execution of contracts witnessed, as it avoids any future need to produce evidence to substantiate valid subscription/execution. It is a risk-based assessment as to whether the addition of witnessing can be dispensed with. If the risk of having to rely on the document in court is low, then the parties may well be happy to proceed on the basis of no-witnessing; if, however, there are provisions in the contract which are important to be able to enforce at a future date - eg payment obligation, warranty claim, tax indemnity or restrictive covenant - then the contract should have self-evidencing status and therefore be witnessed.

Who can act as witness?

ROWA sets out the requirements for a contract to be validly witnessed.

It is easier to say when a person should not act as witness:

- if they are a party to the contract;
- if they do not know the party whose signature is to be witnessed (and in this context "know" is not an especially stringent test and an introduction immediately prior to the act of witnessing would be sufficient);
- if they are aged under 16;
- if they are not mentally capable of acting as witness.

ROWA does not specifically cover the issue of "independence" of a witness. The best practice is for a witness to be wholly independent, but it is acceptable for a family member to act as witness.

The best practice is for the witness to truly "witness" the signature, ie to be physically present at the act of signing, but it is competent for a signatory to acknowledge their signature to a witness after the act of signing and for the witness then to act as witness. This is sometimes referred to as "speaking to your signature".

What is "counterpart" execution?

The concept of counterpart execution has been effective under English law for a long time but was only introduced to Scotland in 2015 by the Counterpart Act.

Counterpart execution allows for copies of the same document to be signed by different parties and for all the signed copies to be brought together to form one document. Prior to this, under Scots law, all the parties had to sign the same copy of the document.

Execution of a document by means of counterparts also brought into Scots law the concept of "delivery". Where a number of counterparts are being executed, each document is likely to be returned at a different time and possibly with days of a gap. Although each counterpart is treated as a separate document and may of itself be validly executed, the Counterpart Act requires delivery in some form (ie the collection of all executed counterparts) to complete the effective execution of the documents. Execution of only some, but not all, of the counterpart documents does not create the contractual relationship amongst the parties and does not make those parties that have executed bound by the contract.

What are the ways to sign?

Wet-ink - The traditional signature of a physical document has become referred to as a wet-ink signature. The reality of commercial life is that it is not always possible to obtain wet-ink signatures to all documents, and this was the case even before the additional problems brought about by Covid-19 lockdown.

E-signature – This is the addition to a document of the individual's "signature" in an electronic format. A combination of ROWA and E-signature Legislation set out the framework for electronic signatures.

What is an electronic signature?

The definition is "data in electronic form that is attributed to or logically associated with other data in electronic form and which is used by the signatory to sign". An e-signature can only be applied to an electronic document; this is a document created in electronic form, as opposed to being on paper or some similar tangible surface.

In practice what that means is that electronic data is used to sign or signify agreement to the content of the document in its electronic form.

It is common practice for documents to be executed by wet-ink signatures, with or without witnessing, and for a PDF of that signed document to be transmitted by email. This does not constitute an electronic signature and is only a convenient way of transmitting documents, although transactions are often completed on the basis of such PDF copies of documents.

There are three types of e-signature:

> ***Standard*** – this is the most basic form and includes typing your name at the end of an email, clicking an "I agree" box, signing on a touch screen or pasting an e-signature into a contract. For high value legal documentation this is unlikely to be appropriate.
>
> ***Advanced Electronic Signature, AES*** – a secure form of e-signature which is uniquely linked to the signatory, is capable of identifying the signatory, is created using e-signature creation data that the signatory can, with a reasonable degree of confidence, use under their sole control and is linked to the data signed in such a way that any subsequent alteration of the date is detectable. These are usually provided by e-signing platforms (such as DocuSign or Adobe Sign) and are much more secure than standard e-signatures.
>
> ***Qualified Electronic Signature, QES*** – an e-signature that fulfils the requirements of an AES but in addition is supported by a qualified certificate issued by a qualified trust service provider, whose credentials have been recorded in a trusted list published by an EU

member state and created by a qualified e-signature device. Under Scots law this is the gold standard of e-signatures and documents signed with a QES will be self-evidencing. The technical requirements to provide a QES are complex and currently QES are not in common use.

When can an e-signature be used?

The Law Society of Scotland has issued useful guidance (currently in draft form) on the use of e-signatures - https://www.lawscot.org.uk/media/368577/electronic-signatures.pdf

As there is no legal requirement under Scots law for most contracts to be recorded in writing and signed, if the parties agree that a written contract should be created, then it follows that this can be signed with a Standard e-signature.

Where there is a legal requirement for a contract to be in writing (as provided by ROWA) or it is intended that the executed contract should be self-evidencing, a Standard e-signature will not be appropriate. An AES would be appropriate for such a contract but where it is intended that it should have self-evidencing status a QES must be used.

If one person signs electronically, must all other parties do the same?

No, a combination of electronic and wet-ink signatures is permissible.

Can an e-signature be witnessed?

Scots law does not recognise the concept of "witnessing an e-signature" in the same way as a wet-signature is witnessed. An attempt to witness an e-signature (for example, by applying the e-signature of another person) does not create a self-evidencing signature.

A self-evidencing e-signature can only be created by use of a QES. The QES, by itself, is self-evidencing and no "witness" is required.

There is a view that under English law the addition of an electronic signature in the presence of an individual (who is not the signatory) can be treated as "witnessing". This was considered in a Report from the Law Commission of September 2019 and it was said that it was unclear if the law would currently accept this as a method for witnessing. It must be stressed that this is only a view and not settled law.

What are the risks associated with e-signatures?

Any signing of a document (by traditional methods or e-signature) carries elements of risk but the use of e-signatures brings some new risks:

- Intention to contract and error – generally when using a wet-signature, it is difficult for a signatory to sign in error. Lack of familiarity with e-signature systems, and the ease of accidentally pressing a button, can mean that a document could be e-signed when the signatory does intend it to happen.

- Authority to use the e-signature – there can be issues as to whether the relevant person applied the e-signature or authorised its application. The more advanced software platforms can get around these issues, but not all e-signature processes are sufficiently advanced. It may be that evidence of authority is needed by way of a board minute or the e-signature being applied during a video call.

- Fraud – no online system can be guaranteed to be totally safe from fraudulent use and the greater use of online systems brings a greater chance of fraud.
- Record keeping – even the best systems can have fundamental coding errors or have built-in insecurities and over time software can cease to be supported. Storing multiple digital copies in different locations and keeping paper copies can raise a different issue of whether a document is “original”.

A wet-ink signature will always be an appropriate method for signing a document. Where it has been agreed that some or all of the parties will use e-signatures, the level of e-signature – Standard, AES or QES – needs to be decided. The tables below set out our position on the general appropriateness of using e-signatures.

For both wet-ink signatures and e-signatures, a risk-based assessment must be made as to whether the document needs to have self-evidencing status; this factor alone will determine whether an e-signature can be used.

Where a document needs to have self-evidencing status but does not (because of the lack of witnessing), then to be able to enforce that document will involve an added burden of proof. The party seeking to enforce will require to prove the execution of the document. In simple practical terms there can be difficulties due, for example, to the time that has passed or the death of a party who has signed.

Any risk-based assessment on whether or not a document should have self-evidencing status would need to consider – the materiality of the transaction (in both terms of value and commercial importance), the likelihood of the need to enforce the terms of the contract, the speed with which any enforcement would need to be carried out and the effect of any delay in enforcement. The risks need to be weighed against the practical difficulties of requiring traditional execution (with a witness).

By way of example, a floating charge could be executed using an e-signature (an AES) but a risk assessment by the charge holder is likely to determine that the document must have self-evidencing status. That would mean that an e-signature is not the appropriate means of execution and that the document must be executed with a wet-signature and be witnessed.

There is a growing appetite, both from lawyers and clients, to use e-signatures. However, it is not as simple as forgetting about the traditional methods and adopting e-signatures for all occasions. Each use of e-signature should be considered in light of the nature and content of the document and the associated legal and commercial risks. Adoption of e-signatures is not as straightforward as some commentaries, and software providers, would have you believe and there are risks in rushing in without careful consideration.

The following documents commonly used in commercial transactions **would be appropriate for e-signature, as no witness is required:**

Document	Type of e-signature
Board Minute/Trustee Minute	Standard
Companies House Form	Standard
General Meeting Notice	Standard
HMRC Form	Standard
Letter of Appointment for non-executive director	Standard
Letter of Consent	Standard
Letter of Engagement	Standard
Letter of Resignation, with no waiver of claims or indemnities	AES
Share Application Form	Standard
Share Certificate	Standard
Stock Transfer Form	AES
Terms and conditions of employment	Standard
Written Resolution/Written Record	Standard

The following documents **could be appropriate for e-signature but before a decision is made on this a risk-based assessment would need to be done** as there would be no witness (and **the document would not have self-evidencing status**):

Document	Type of e-signature
Bond and Floating Charge	AES
Director's Service Agreement/ Employment Agreement	AES
Investment Agreement	AES
Lease (not to be registered)	Standard
Letter of Resignation, with waiver of claims or indemnities	AES
Loan Agreement	AES
Power of Attorney (for a commercial transaction)	AES
Ranking Agreement (not to be registered)	AES
Rent Review Agreement	Standard
Settlement Agreement	AES
Share Purchase Agreement	AES
Shareholder Agreement	AES
Share Subscription Agreement	AES

The following documents are **not appropriate for e-signatures and must be signed using traditional wet-ink signature:**

Document	
Lease (to be registered)	e-signature not appropriate, wet-ink only
Missive	e-signature not appropriate, wet-ink only
Ranking Agreement (to be registered)	e-signature not appropriate, wet-ink only
Standard Security	e-signature not appropriate, wet-ink only

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