

Electronic signature and electronic witnessing in the UK

Introduction

Use of electronic signature platforms, such as DocuSign eSignature, is now a well-established business practice for many contracts and formal documents. Some documents, however, must comply with additional formalities. One situation that is particularly challenging is where a document needs to be witnessed.

For most English law governed contracts, where a signatory signs the contract there is no requirement for that signature to be witnessed. Nevertheless, parties sometimes like to include this additional step to emphasize the importance of the document and its correct signature. The witness could also provide independent evidence of signature if it were ever questioned.

A common commercial situation that utilises witnessing is deed execution. A deed is a special kind of formal document. Under English law, a deed must be used for certain kinds of legal instruments (such as land transfers, most security documents and powers of attorney), and is commonly used for other documents such as shareholders' agreements, share and business purchase agreements, loan documents, transfers of assets, guarantees and even ordinary contracts. English law requires the witnessing of certain signatures when a deed is to be executed. The law is flexible when it comes to the selection of a witness—family members, colleagues and advisers can act as witnesses for most documents.

There are particular formalities which apply to the execution of deeds, including a legal requirement that the witness must be in the physical presence of the signatory when the signatory signs the deed. If the parties choose to include a witness for a signatory but there is no legal requirement to do so, these formalities will not apply and remote witnessing of the application of the signature (including by video) is a possible option.

Under English law, a deed can be validly signed and witnessed using an electronic signature platform, such as DocuSign eSignature, in situations where the law allows electronic signing and execution. Different considerations are likely to apply in other jurisdictions and for agreements governed by laws other than English law.

Electronic signature platforms offer a range of advantages including ease and speed of remote contracting through a structured workflow and creating an evidential audit trail of the signing process—who signed the document, when and the contents of the document. These benefits are also available for deed execution, including when some or all of the signatures to a deed require witnessing. The requirement of a witness's physical presence does not prevent the use of an electronic signature platform. Modern signature technology, such as DocuSign eSignature, can be used to record the signature of a witness. As with wet-ink signatures, in most cases the signatory should be able (even when working remotely) to find a convenient witness and the parties can take steps to manage the confidentiality of the document.

Witnessing of deeds

One of the formalities required for deeds is that a deed executed (signed) by an individual or by a single director on behalf of a UK company, that signature must be witnessed. A UK company can also execute a deed without a witness by having two directors or a director and company secretary sign.

A witness can evidence execution of a deed by a particular person, but not the contents of the document. The witness does not need to read the document nor do anything other than watch the signatory sign and confirm that they have witnessed the signature. There is no requirement for the witness to verify the identity of the signatory.

When it comes to the selection of a witness, it must be someone who is not otherwise a party to the document. For most documents, the witness does not need to be independent. This means that a signatory could use any convenient person as a witness. There are exceptions that require an independent witness, such as that the signature of a will. A will is also an example of a document that still requires a wet-ink signature.

The Law Commission's September 2019 report on the electronic execution of documents¹ (2019 Law Commission Report) concluded that deeds can be signed with electronic signatures, provided that (i) the signatory intends to authenticate the document when signing and (ii) applicable formalities are complied with. The 2019 Law Commission Report also contemplated that deeds could be signed and witnessed using an electronic signature platform.

The view of the Law Commission (and of the Law Society in a June 2020 update²) is that where there is a legal requirement for a signature on a document to be witnessed, the witness must be in the physical presence of the signatory and directly observe the signatory signing. It is not permissible for the witness to observe the signing over a remote link, such as by video or by screen sharing. However, if the parties want to evidence that a witness was physically present with the signer, a digital video recording of the signing could be made.

In most circumstances, it should not be difficult for a signatory to find a suitable witness who can be in their physical presence when they sign on an electronic signature platform. Even when working remotely, most signatories are likely to be able to use an adult family member or a neighbour as a witness.

¹ Law Commission report No.386: Electronic execution of documents (Sept 2019): <https://www.lawcom.gov.uk/project/electronic-execution-of-documents/>
² <https://www.lawsociety.org.uk/topics/coronavirus/our-position-on-the-use-of-virtual-execution-and-e-signature-during-the-coronavirus-covid19-pandemic>

Electronic witnessing

What is electronic witnessing?

Electronic witnessing requires a witness to physically witness the application of a signatory's electronic signature and then add their own electronic signature and details to confirm that witnessing. With DocuSign eSignature, this involves the signatory receiving the document by email, specifying the name and email address of the witness and the witness receiving a separate email requesting their signature and details.

Signing and witnessing deeds with electronic signatures

The suitability of electronic signatures and the use of electronic signature platforms for executing deeds depends on the circumstances of each deed. For example, (i) are there other formalities to consider, such as for certain consumer contracts? (ii) when legal entities are party to the contract or deed, do their constitutional documents restrict the use of electronic signatures?, (iii) when those legal entities are overseas (non-UK), are there local law restrictions on the use of electronic signatures?, (iv) does the document need to be filed at a registry that requires wet-ink signatures or is it of a type where wet-ink signatures are required (such as for wills)? HM Land Registry (HMLR) updated its guidance in July 2020³ to allow land transfers and certain other deeds to be signed and witnessed on an electronic signature platform. The guidance requires parties to use conveyancers who certify that the document has been signed accordingly.

Benefits of signing and witnessing on an electronic signature platform

All of the benefits of using electronic signature platforms are potentially available when signing deeds and other documents that need to be witnessed.

These benefits include:

- Ease and speed of contracting – digitising the entire contract process with a digital workflow allows greater consistency in how document signature is handled, the ability to digitally route the document, define signatory and witness signing order and to track the status of the document;
- Removing the need for hard copy documents, printing and scanning at any stage
- Auditability of the transaction details (signatories, timing, content) and clear evidence of which version of the document is being signed (which English case law relating to deeds suggests is important)
- Admissibility in evidence – under both EU and UK law, electronic signatures are admissible in evidence
- Reduced risk – additional verification steps can be used to confirm the identity of the signatory and witness
- Environmental benefits of using less paper

Recent COVID-19 lockdown restrictions have also highlighted the benefits of electronic signature platforms when signing contracts and other legal documents remotely, where there are social distancing restrictions or travel restrictions and where signatories have limited access to printers or scanners.

³ HM Land Registry, Practice guide 8: execution of deeds (updated 27 July 2020): <https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds>

Good practice for deed execution

Law Society good practice guidance⁴, Option 1, for the execution of deeds at a virtual completion meeting (when they are not physically present together), involves emailing a PDF or Word version of the final document to the parties who return the document with their signed and scanned signature pages. The Law Society describes this approach as being for parties who “wish to take a prudent approach in relation to the execution of deeds.”

Electronic signing platforms can offer a viable alternative. The 2019 Law Commission Report noted that the benefits of using The Law Society’s virtual completion guidance will also apply where a deed is properly signed (and, where applicable, witnessed) on an electronic signature platform. This means that the benefits of the “prudent” good practice approach recommended by the Law Society are available where the parties use an electronic signature platform.

The 2019 Law Commission Report separately recommended that an industry working group be established to consider the practical and technical issues associated with the electronic execution of documents, including the question of video witnessing of electronic signatures. Where remote witnessing of signatures is possible and desired, including where the parties choose to have signatures witnessed when there is no legal requirement to do so, electronic signature platforms can be used for remote witnessing, further enhancing the benefits of electronically signing documents.

Ten practical steps for witnessing deeds on an electronic signature platform

- Deeds are complex legal documents and you should take legal advice to ensure correct execution.
- When more than one law firm or attorney is advising on a transaction, they should agree on an approach to the execution of the deed. This approach should include not only the signing requirements, but also how delivery and dating of the deed will be affected.
- Clear instructions should be given to the signatory and witness to ensure correct execution of the deed, including the requirement for the witness to be in the physical presence of the signatory and observe the signing.
- The signatory and witness should apply their own electronic signatures (witness after signatory) and not have someone else do this for them, or this may invalidate the signature and the document.
- As stated above, the witness does not need to read or understand the document that is being signed. At a physical completion meeting, the confidentiality of the document can be preserved by limiting the access that the witness has to the document. When the document is being signed on an electronic signature platform, the witness may have greater access to the document (and to other confidential documents in the “envelope”). Practical steps to protect confidentiality in this situation could include (i) sending the document to be witnessed in a separate envelope, (ii) limiting the access the witness has to the document until it is ready to be witnessed, (iii) the signatory supervising the witness signing and (iv) locking access to the document once it is fully signed by the signatory and witness.
- For high value transactions, consider additional signatory authentication (such as two-factor authentication through a code sent to a mobile device).
- When there are multiple signatories to a deed, consider any signature platform signatory limits and note that both a signatory and a witness can count towards these limits.

⁴ The Law Society, Execution of documents by virtual means (February 2010, reviewed May 2020)
<https://www.lawsociety.org.uk/topics/business-management/execution-of-documents-by-virtual-means>

- Check that the Certificate of Completion shows correct execution (including the witness signing after the signatory) and download the final completed document(s) and the Certificate of Completion onto your own local computer system.
- For evidential purposes, when using an electronic signature platform, the Certificate of Completion should not suggest that the signatory and witness are in different locations (using different IP addresses). This might be the case if one uses Wi-Fi and the other a mobile network. Ideally, both individuals should use the same Wi-Fi or mobile device or alternate evidence should be obtained and retained to confirm that the signatory and witness were in each other's physical presence (such as separate email confirmation).
- Report back to all parties when the deed has been completed and dated.
- Where there is no legal requirement for a document signature to be witnessed, but the parties choose to have signatures witnessed, most of these practical steps will still be relevant. However, it will not be necessary for the signatory to sign in the physical presence of the witness and the parties could choose to use remote witnessing.

Conclusion

Deeds are commonly used in the UK and certain signatures on deeds need to be witnessed. The view of the Law Commission is that, under English law, it is possible to sign and witness deeds using electronic signatures on an electronic signature platform.

All of the benefits of electronic signature platforms, including ease of contracting, evidence of signature and the legal admissibility of that evidence are available for deeds, including witnessing requirements for certain signatures.

When the parties choose to have signatures witnessed, but there is no legal requirement to do so, electronic signatures and electronic signature platforms, such as DocuSign eSignature, can also be used and there will be more flexibility over the methods of witnessing, including remote witnessing.

Witnessing signatures with DocuSign eSignature

DocuSign helps organisations digitally transform how they do business via contracts and other forms of agreements. DocuSign provides solutions for signing and witnessing the signature of deeds electronically based on specific requirements and use cases, including HMLR deeds.

DocuSign eSignature offers a fast and easy way to obtain signatures on documents that require a witness.

Get going quickly

DocuSign eSignature is flexible, easily configurable and easy to use for all parties, including senders, signers and witnesses.

Accelerate agreement completion

Digitise manual and paper-based processes to speed up the contracting process. What used to take weeks can now be completed within a few hours, or even minutes, and eliminate unnecessary printing of paper heavy agreements.

Capture witness evidence

Every document signed with DocuSign eSignature comes with a Certificate of Completion that provides supporting evidence of the signature process and can be used in a legal dispute. For transactions with witness recipients, information about the witness, such as occupation, address, email address, IP address and time stamps, is also captured in the Certificate of Completion to provide auditability of signature and witnessing process to all transaction parties.

Ensure security

Stay confident with DocuSign eSignature's strong security and encryption practices.

For more information on DocuSign eSignature for electronic witnessing in the UK, visit our [website](#).

Disclaimer

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About DocuSign

DocuSign helps organisations connect and automate how they prepare, sign, act on and manage agreements. As part of the DocuSign Agreement Cloud, DocuSign offers eSignature: the world's #1 way to sign electronically on practically any device, from almost anywhere, at any time. Today, more than 500,000 customers and hundreds of millions of users in over 180 countries use DocuSign to accelerate the process of doing business and to simplify people's lives.

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