

The legal validity of electronic signatures in Bermuda, the British Virgin Islands and the Cayman Islands

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The legal validity of electronic signatures

As the COVID-19 pandemic continues to cause disruption at unprecedented levels, the need for convenience and flexibility with respect to deal-making logistics has never been higher.

While it is common that certain types of contracts are made purely by electronic means (e.g. 'one-click' e-commerce transactions), the usage of electronic signatures (or 'e-signatures') in complex international financing transactions has remained relatively low to date.

However, in the face of mounting liquidity concerns and the possibility of signatories having to undergo extended periods of self-isolation, quarantine or working from home, we anticipate that there will be increased demand for e-signatures as businesses seek to execute financing transactions, whilst struggling to maintain operations.

This briefing note contains a summary of the key points of law, provides a high level comparison of the different jurisdictions and offers some practical points to assist during these challenging times.

What is an electronic signature?

E-signatures can take different forms, including:

- typing a name at the bottom of an email
- importing a JPEG copy of a wet-ink signature into a signature block
- clicking an 'I accept' tick box on a website
- a cryptographic signature
- a thumbprint on a tablet
- an electronic sound or symbol attached to a document.

Legal framework

The laws of Bermuda, the British Virgin Islands (BVI) and the Cayman Islands are based on common law principles and English case law provides useful, non-binding guidance.

The EU

The European Union adopted Regulation (EU) No 910/2014 (the 'eIDAS Regulation') with effect from 1 July 2016, which established an EU-wide legal framework for e-signatures. However, the eIDAS Regulation provides that it is for national law to define the legal effect of e-signatures.

English law

English law provides a statutory framework for the admissibility of electronic signatures in legal proceedings under the Electronic Communications Act 2000. English common law has always been flexible in recognising that a range of different types of signature may be valid in respect of English companies. For example, the courts have accepted electronic forms of signatures including a name typed at the bottom of an email or clicking an 'I accept' tick box on a website.

A report published by the Law Commission of England and Wales in 2019 (the 'Law Commission Report') confirmed that it is possible to use an electronic signature under English law. However, the Law Commission Report acknowledged that there are a number of practical and other obstacles in certain situations (e.g. in connection with the mechanics for executing/witnessing English law deeds).

Offshore jurisdictions

As leading international offshore jurisdictions, Bermuda, BVI and the Cayman Islands adopt modern and flexible attitudes aimed at facilitating cross-border transactions. Bermuda, BVI and Cayman Islands legislation draws extensively on the eIDAS Regulation and the UNCITRAL Model Law of 1996 that preceded it.

Each of these jurisdictions has implemented legislation that recognises the use of electronic signatures and following is a comparison table summarising some key points.



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PUBLISHED

/ April 2020

	Bermuda	British Virgin Islands	Cayman Islands
Relevant legislation	Electronic Transactions Act, 1999	Electronic Transactions Act, 2001	Electronic Transactions Law, 2000
Key legal requirements	<p>Must:</p> <ul style="list-style-type: none"> • be uniquely linked to the signatory; • be capable of identifying the signatory; • be created using means that the signatory can maintain under his/her sole control; • be linked to the information to which it relates in such a manner that any subsequent alteration of the information is revealed; • be an appropriate method to identify the signatory and indicate the signatory intended to sign or otherwise adopt the information in the electronic record; and • be reliable as is appropriate for the purposes for which the electronic record was generated or communicated, in light of all the circumstances, including any relevant agreements. 	<p>Must:</p> <ul style="list-style-type: none"> • adequately identify the signatory; • adequately indicate: (i) the signatory's approval of the information to which the signature relates; and (ii) if a signature or seal is being witnessed, that the signature or seal has been witnessed; • be reliable as is appropriate given the purposes for which, and the circumstances in which the signature is required; and • the recipient of the information to which the signature relates consents to receiving the electronic signature and the electronic signature of each witness, if any. 	<p>Must:</p> <ul style="list-style-type: none"> • be reliable as was appropriate for the purpose for which the electronic record was generated or communicated, in all the circumstances, including any relevant agreements.
What does "reliable as appropriate" mean?	<p>There is no statutory definition and we expect that shared common law principles and market practice will provide guidance. Please seek further advice from your legal counsel.</p>	<p>It is presumed that an electronic signature is as reliable as is appropriate if:</p> <ul style="list-style-type: none"> • the means of creating the electronic signature is linked to the signatory and no other person; • the means of creating the electronic signature was under the control of the signatory and no other person; • any alteration to the electronic signature after the time of signing is detectable; and • where the purposes of the legal requirement for a signature is to provide assurance regarding the integrity of the information to which it relates, any alteration made to the information after signing is detectable. 	<p>An electronic signature shall be reliable if:</p> <ul style="list-style-type: none"> • the means of creating the electronic signature is, within the context to which it is used, linked to the signatory and no other person; • the means of creating the electronic signature was, at the time of signing, under the control of the signatory and no other person; • any alteration to the electronic signature made after the time of signing is detectable; and • where the purpose of the legal requirement for a signature is to provide assurance regarding the integrity of the information to which it relates, any alteration made to the information after signing is detectable.

Continued

	Bermuda	British Virgin Islands	Cayman Islands
Exclusions	<p>The following are excluded:</p> <ul style="list-style-type: none"> • the creation, execution or revocation of a will or testamentary instrument; • the conveyance of real property or the transfer of any interest in real property; or • any class of transactions, persons, matters or things as may be specified in regulations. 	<p>The following are excluded:</p> <ul style="list-style-type: none"> • the creation, execution or revocation of a will or testamentary instrument; • the conveyance of real property or the transfer of any interest in real property; • any other thing required to be done by deed; • any other matters prescribed under regulations. 	<p>The following are excluded:</p> <ul style="list-style-type: none"> • the creation, execution, variation or revocation of a will or other testamentary instrument; • any class of transactions, persons matters or things as may be specified in regulations.

A key point here is that parties need to consider under Bermuda, BVI or Cayman law is whether an e-signature is reliable as is appropriate. It may be possible for a signatory to establish other methods of satisfying the requirement for reliability. We expect that more guidance on which forms of e-signature are reliable will emerge as market practice develops.

It is important to note that there are common law principles that provide that a person relying on an electronic signature shall bear the legal consequences of his/her failure to take reasonable steps to verify the reliability of an electronic signature.

Execution of deeds

The Law Commission Report acknowledged that there are issues with respect to the execution/witnessing of deeds using electronic signatures. Where it is required that a deed be executed in front of a witness, the witness would need to apply its e-signature whilst actually being physically present with the main signatory who is applying its e-signature. The Law Commission recommended that an industry working group be formed to consider legislative reform to permit video witnessing.

If there are issues with the availability of witnesses, it may be possible to mitigate such a requirement by, where this is possible, having two directors execute a deed remotely, each using separate e-signatures without a witness.

Please note that the BVI Electronic Transactions Act, 2001 provides that anything required to be done by deed may not be executed by e-signature. We think the correct interpretation is that this exclusion does not apply to documents that are not required by law to be done by deed but that are executed as deeds nonetheless.

Practical points

Below are some practical points to help deal with situations in which electronic signatures may be required:

- We recommend that parties consult with legal counsel to discuss options at an early stage, especially if documents are to be executed as deeds. Deeds may need to be signed using the traditional 'wet-ink' method in front of witnesses.
- Check your constitutional documents for any restrictions or requirements in respect of the execution of documents and amend them if necessary.
- Check your internal signing policies and amend them if necessary.

- If the counterparty is a bank, check if the bank will accept your proposed e-signature. Banks may require wet-ink signatures for security documents on large or cross-border financing transactions.
- If a legal opinion is required, check if the law firm will be able to issue a clean legal opinion on a document executed using an e-signature.
- Consider if the location of signing has any tax or regulatory implications.
- Consider if the electronic signature method otherwise meets all the requirements listed above.
- Consider whether hard copies of any documents need to be filed, and if so, if traditional wet-ink signatures are required.
- In the meantime, ensure that key signatories have access to printers and scanners as a fall back so they can scan copies of wet-ink signatures in accordance with existing established virtual signing protocols.



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59

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