

A new and better regime for electronic signatures in Jersey

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The Jersey legislation that governs electronic communications and related matters will be updated shortly, by the Electronic Communications (Amendment No. 2) (Jersey) Law 2022.

The changes are to be made in light of new technologies, changes in business practices and lessons learned from the accelerated move to remote working as a result of COVID-19, and include changes that will clarify the existing legislation.

These further amendments to the Electronic Communications (Jersey) Law 2000 (the “E-Comms Law”) are likely to be made in the next few months: the Amendment No.2 Law has been approved by the Jersey States Assembly and is awaiting the final usual steps to come into force.

The benefits of these amendments will be felt across every area in Jersey that relies on the electronic execution of documents. Businesses and other organisations (in particular those that are regulated) executing documents in this way, or thinking of doing so, should consider formulating new or updated document execution/witnessing policies and procedures to take account of the forthcoming changes to the law.

We can of course provide detailed advice on the changes and assist with the preparation of such policies.

Principal changes

In summary, the principal changes relate to:

Remote witnessing of signatures

The E-Comms Law does not currently specify how to electronically witness a person’s signature on a document.

The amendments will set out ways to electronically satisfy a requirement (whether under an enactment or otherwise) for a signature to be witnessed. This will be in addition to any other lawful means of witnessing that signature. It will apply to the electronic witnessing of both electronic and (to some extent) traditional signatures.

Under this new provision, such requirement for witnessing may be satisfied where:

- at the time the document is signed, the signatory and the witness are able to see one another by means of an audio-visual link; and
- *either (where the signatory is signing either a hard copy or electronic document):* (i) by means of that (audio-visual) link the witness identifies the signatory and sees the signatory sign the document; (ii) the signatory sends an e-copy of the document to the witness; and (iii) the witness signs it, attesting to the signature of the signatory;
or (where there is screen sharing and where both signatory and witness can see and manipulate the same electronic document): at the time the document is signed: (i) the signatory and the witness are also in communication by any other electronic means; (ii) the signatory and the witness can both see the document; (iii) the signatory makes his or her electronic signature on or in relation to the document; and (iv) the witness signs it, attesting to the signature of the signatory.

Despite the requirements under the second bullet point above, the new provision permits a person, who has electronically witnessed the signature, at any time to make a declaration in writing attesting to the fact. This provision could be relied on where for example the relevant document could not be provided electronically to the witness for attestation.

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Authority to attach electronic signature for another person

The E-Comms Law does not currently expressly deal with a person attaching an electronic signature for another person.

A new Article will be added to the E-Comms Law that will apply where a person is required or authorised to sign a document. It permits a person to authorise another person to attach the first person's electronic signature to the document on the first person's behalf. It will apply despite any rule or presumption relating to agency or delegation.

Clarifying changes

There are further changes proposed to the E-Comms Law as well which are clarificatory in nature. These include:

Validity of electronic signatures etc. generally

Currently the provision of the E-Comms Law that states that a signature, seal, attestation or notarisatio is not to be denied legal effect, validity or enforceability only because it is in electronic form, is in Part 3 (Requirements under enactments) of that Law.

This provision will be moved to within Part 2 (General principles) to make it clear that it is of general application and does not only apply in circumstances where there is a requirement for a signature under an enactment, as implied by its current position in the E-Comms Law.

In the E-Comms Law as it stands this provision contains the only substantive references to a seal, attestation or notarisatio, so it is important that it is in the right place.

Electronic records within the definition of "electronic communication"

As its name suggests, most of the E-Comms Law applies to electronic communications, but the definition of "electronic communication" will be expanded to include electronic records – information which may not be communicated by electronic means. Electronic records includes information that may be generated, received or stored by electronic means (and that may also be – but not necessarily – communicated by such means).

Conclusion

We welcome these changes as bringing further certainty and clarity to the E-Comms Law. They follow intense scrutiny of that legislation during the COVID-19 pandemic, when remote working, and electronic signature of documents and witnessing, became the 'new normal'. Carey Olsen worked closely with the Government of Jersey in the development of these new changes to the E-Comms Law and is well-placed to provide advice on their scope – as well as on the E-Comms Law generally.

Our recommendations are set out below.

If you have any queries in relation to these changes or more generally the E-Comms Law, please contact us.

Recommendations

As noted above, we recommend that Jersey businesses and other organisations that execute documents electronically prepare new or updated document execution/witnessing policies and procedures to take account of these changes. In particular:

- Organisations should risk assess (or again risk assess) which methods of execution are acceptable in the context of their business or other activity and then adopt clear and documented protocols for their use. Organisations will need to be clear as to what methods of execution (electronic or otherwise) are approved by them for use.
- There should be clear controls around signing and witnessing which set out when electronic signatures and electronic witnessing may be used and where, if at all, they are prohibited.
- Where signing authority is to be delegated there should be clear rules around such delegation including:
 - a. when such delegation is permitted and in respect of what type of documents;
 - b. who may delegate their signing authority;
 - c. how the delegation will be granted and withdrawn; and
 - d. how the delegation will be authorised and evidenced.
- Consideration should be given, or again be given, to whether the standard level of authentication of identity offered by chosen methods of electronic signature and witnessing will be appropriate in all cases. In most cases the standard email-based method of authentication used by DocuSign and other similar platforms should be sufficient. There may however be cases where additional levels of authentication, such as SMS authentication, should be considered, particularly for documents that have special importance or are entered into in unusual circumstances. Once again, the requirements adopted should be documented.
- Where a document (whether Jersey or foreign law) is to be signed electronically on behalf of a Jersey entity, then its constitutional documents must be checked as to: (a) whether such documents expressly permit, with or without restrictions, or simply do not in any way prohibit, electronic signature on behalf of the entity; and (b) any requirements that an electronic signature must satisfy. Additionally, the relevant corporate authorisations must be checked: the inclusion of an express reference to electronic signature of such document can give additional certainty, but against that there is a risk that any such reference is to a wrong method of electronic signature or is drafted too narrowly. It may be possible to amend constitutional documents to ensure that electronic signatures may safely be used.
- Foreign law will be relevant, or also relevant, to electronic signature of a foreign law document by a Jersey entity.



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