

## COVID-19 - Use of Electronic Signatures

The rapid, recent, change for many of us, from physical office based to remote working, has given rise to many challenges. In seeking to re-create “business as usual” routines in a virtual environment, electronic signatures can prove an invaluable tool to address one key practical issue – how to ensure that we can rely on contracts and documents which need to be signed, but which now have to be signed remotely.

As a general proposition and as a matter of Irish law, an electronic signature can be used in any case where a “wet ink” signature is permitted or required. In practice, the enforceability of electronic signatures depends on the ability to connect the signature that was made with the signatory. Therefore, an e-signature will operate to bind the parties in the usual way. However, there are some caveats to this which need to be borne in mind when implementing an e-signature solution.

### Types of e-signatures

Essentially, a “simple” e-signature is electronic data attached to or logically associated with other electronic data and which is used by the signatory to sign (and can in theory be as simple as a typed name at the end of an email). An advanced electronic signature is one which is (i) uniquely linked to the signatory; (ii) capable of identifying the signatory; (iii) created using electronic signature creation data the signatory can, with a high level of confidence, use under his sole control; and (iii) linked to the data in such a way that any subsequent change in the data is detectable. Qualified electronic signatures are advanced electronic signatures created by a “qualified electronic signature creation device” administered by a third party service provider, and have the equivalent legal effect of a handwritten signature. Where based on a qualified certificate, they also have cross border recognition in the EU. There are several commercial electronic signature products available which may be suitable for use in your business, depending on the nature of the documents to be signed and the level of electronic signature which you may need to implement.

The protections granted to qualified electronic signatures are such that no additional supporting documentation should be required to evidence the signatory’s connection with their signature. However, the principle remains that even lesser forms of signature cannot be denied effect solely on the grounds of their electronic form, although as advanced and basic electronic signatures offer a lesser degree of assurance, they may require additional supplemental evidence in order to be enforceable (if challenged). That said, certain types of signature require the use of qualified electronic signatures, such as signatures which are required to be witnessed or those made under seal.

### The Electronic Commerce Act 2000

The Electronic Commerce Act 2000 (the “ECA”) sets out a number of requirements in relation to the use of electronic signatures. These include specifying cases when a specific level of e-signature must be used, as well as setting out some conditions which apply to the use of electronic signatures (eg, that the person to whom it is “given” consents to use of an e-signature, or that technical conditions imposed by a public body are met).

The ECA also sets out certain cases where use of electronic signatures is excluded. It is important to note that those exclusions apply not only with regard to electronic signatures (subject to the comments in relation to qualified electronic signatures below), but also to electronic writing, originals and records. In addition, the ECA operates without prejudice to the operation of certain other legislation, including eg, tax laws.

### Guidance

On the basis of the above, we offer the following guidance:

- There are practical difficulties where a document is required to be witnessed or executed under seal, so you should seek further specific advice if your document falls into these categories;
- Ideally there should be some form of acknowledgement built into any contracts to be signed electronically to the effect that the parties agree to the electronic format and signature. However, the concept of “consent” for these purposes is not defined, so a course of dealings between the parties should be sufficient to signify consent where there is reliance on electronic signatures, e-communications, e-records etc;
- Where agreements or other documents are prepared for the purpose of fulfilling regulatory requirements, the relevant supervisory authority may also be required to agree to the execution of the document in an electronic form, and may impose specific technical requirements;
- The Companies Registration Office (“CRO”) has given some concessions on filing deadlines (annual returns with a deadline between now and 30 June will be considered filed on time if the filing is completed prior to 30 June). However, it has not yet agreed to accept certain documents without wet ink signatures. We are aware that Chartered Governance Institute has made a submission to the CRO in relation to this issue, and will keep you updated if there are any developments.
- Because of the ECA exceptions, certain documents should continue to be signed using a wet ink signature, specifically:
  - (i) wills, codicils or any other testamentary instrument to which the Succession Act 1965 applies;
  - (ii) trusts;
  - (iii) enduring powers of attorney;
  - (iv) documents for the creation, acquisition, disposal and (subject to public sector requirements or permissions) registration of interests in real property;
  - (v) affidavits and statutory or sworn declarations;
  - (vi) documents required under rules of court etc.;
- Subject to the consent points noted above, everything else should be capable of being signed electronically;
- Board minutes and resolutions can be signed electronically, but you should check constitution documents to confirm that there is no restriction on this;
- You should review your existing document execution policies to identify the types of contracts in respect of which you permit electronic signatures, so that any exceptions based on the above, are reflected. Subject to those exceptions, you may need to extend the scope of documents in respect of which you will accept e-signatures;
- You should confirm that the scope of any individual’s signing authority will not be impacted by the form (electronic or inked), and whether you now need to expand your list of authorised signatories; and
- Remember that you may need to obtain local law advice on a case-by-case basis as to the enforceability of e-signatures in a counterparty’s jurisdiction, to assess if local law considerations affect corporate capacity or authority to execute documents by way of e-signature, and whether there are any exclusions.

There are additional requirements linked to the use of electronic writing, originals and records which are not addressed above, but which will be relevant to the electronically signed documents. We would be happy to provide further detail on this if required.

For more information, please contact [Chris Bollard](#), [Deirdre Kilroy](#) or [Anne-Marie Bohan](#) or your usual Matheson contact.