

A guide to signing Scots law documents electronically

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The last couple of years have seen a sharp increase in electronic signing of documents by Scottish businesses in response to remote working. Two other factors are driving growth in use in 2022: (i) the increased availability of the most secure forms of electronic signature and (ii) the gradual removal of some restrictions on being able to register electronically signed documents. It has never been more important to understand the available types of electronic signatures and when use is, and is not, appropriate.

This guide briefly summarises a complex topic. It is not legal advice and no person should take any specific action on the basis of its contents. Please get in touch if you would like advice.

What is an electronic signature?

Electronic signature is the signing of a document in electronic form by electronic means. As with a wet ink signature, it is used to demonstrate an intention of the party to be bound by a document.

Electronic signatures can take many different forms. Some examples include:

- typing your name into a contract or an email containing the terms of a contract;
- using a stylus or finger on a touchscreen to write your name electronically in the contract;

- pasting a signature image into an electronic document; or
- accessing a contract through a web-based electronic signature platform and clicking to have your name inserted in a typed or handwriting font.

Electronic signature platforms are often the preferred method of electronically signing commercial contracts. They are simple to use and have security processes designed to limit the ability of anyone other than the intended signatory from applying the signature.

There are three main tiers of electronic signature recognised by law and provided by electronic signature platforms:

- **simple electronic signature** – the most commonly encountered form of electronic signature, widely available via electronic signing platforms. A document is uploaded to the signature platform and a link to the document emailed to the signatories who can access the document and sign from their computer or phone.
- **advanced electronic signature (AES)** – a more secure form of electronic signature, providing the signatory with a greater level of control over the use of a signature uniquely linked to them and ensuring that any change to the signature is detectable. AESs have recently been introduced to the market by e-signing platforms and third party providers, although, so far as we are aware, there has not been significant uptake in Scotland.
- **qualified electronic signature (QES)** – the highest standard of electronic signature, where a “trusted third party” verifies the signatory’s identity in advance (usually by way of a video call). Scottish solicitors have been able to apply a QES using a Law Society smartcard for several years, although these are not widely used. QESs have recently been made publicly available by e-signing platforms and third party providers. Lawyers at several Scottish law firms, including Dentons, are now set up to sign by way of QES. We are not aware of significant uptake beyond the legal profession.

Can I use an electronic signature and, if so, which type do I need?

It is competent in Scots law to conclude many types of transaction using electronic signatures, with standard functionality often being adequate.

However, dependent on the nature of the document, an AES or QES may be required, or electronic signature may not be appropriate at all. The following are the key considerations:

Requirements for a valid signature

To be authenticated electronically, documents which are required to be in writing under the Requirements of Writing (Scotland) Act 1995 must be signed with an AES to be valid and a QES to be “self-proving” (see further below on the matter of self-proving status). Broadly, these are certain types of guarantee and documents which transfer or create an interest in land.

The majority of documents that are required by law to be in writing continue to be signed in wet ink at this time, due to the additional costs and set-up time associated with AES and QES, combined with the current restrictions of registration of electronically signed documents (see below).

Wills and other testamentary writings cannot be signed electronically.

Achieving self-proving execution

Under Scots law, a QES is the only type of electronic signature that is self-proving (probative). A self-proving document is one which creates a rebuttable presumption that the document was signed by the granter, which can be helpful in court proceedings in the event of a future dispute.

Day-to-day contracts are not usually signed in a manner that is self-proving. However, contracts that are of higher value or of greater commercial significance to a business are often signed in a self-proving manner. A QES now provides an alternative to wet ink signing for such documents.

It is a matter of considering the value and risk profile of the contract to be signed. In many circumstances, adequate comfort can be taken from the audit trail recorded by a platform’s simple electronic signature functionality which sets out how each signatory signed and how they accessed the document for signing (i.e. their email address and IP address), providing significant evidential value.

Registration requirements

Another important restriction on use of electronic signature is that it is not currently possible to register electronically signed documents in the Land Register, Register of Sasines or Books of Council and Session in Scotland. This mainly impacts on real estate transactions. With a couple of limited exceptions (such as the digital discharge service), it is not currently possible to register a deed transferring or creating a legal interest in land which has been electronically signed. Wet ink signature is still required.

However, a significant change will occur on 1 October 2022 when the Books of Council and Session will accept deeds signed with a QES for registration for preservation and execution. This will allow leases of less than 20 years, as well as ancillary real estate documentation (which does not need to be registered in the property registers), to be signed with a QES.

What remains unclear is when deeds that are required to be registered in the Land Register or Register of Sasines will be able to be signed electronically. This remains a significant impediment to using electronic signatures in Scottish real estate transactions.

Overseas aspects

Caution should be exercised (and local advice sought) where a document involves a foreign party or jurisdiction. For example:

- other countries and jurisdictions may have more prescriptive formality requirements;
- an overseas company signatory may not be permitted by that company's own governance and constitutional arrangements to execute documents electronically; and
- if litigation or other action may be required outside the UK in respect of a document, a document signed with an electronic signature may not be acceptable in certain jurisdictions.

Remote signing – alternatives to electronic signature

It is worth remembering that there are simple alternatives to electronic signing of documents that can also be carried out remotely. Where time permits, a traditional "round robin" signature process enables each party to a document to sign in wet ink and send on to the next party until all signatures have been collected.

The option of signing in counterpart also provides a simple process for "virtual" completions using wet ink signing. Each party signs its own duplicate, interchangeable copy of a contract (a counterpart) which takes legal effect once each counterpart has been delivered to the other parties. Delivery (in a legal sense) can take place electronically and the parties can control the date and time at which their counterpart is to be treated as delivered and when the document will take legal effect.

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