

# E-SIGNATURES

## Execution of documents using digital signatures.

This is a digest that provides an overview of the Gibraltar law position in respect of the execution of documents using electronic / digital signatures.

### SUMMARY

It's 2020 and businesses increasingly need to be able to conduct themselves remotely using digital services. A vital part of being able to continue to operate a business or to conduct a business transaction however relies on being able to execute key documents (including contracts, company minutes/resolutions on decisions to proceed or to authorise other elements of a transaction) remotely, digitally or in environments which is not the ordinary environment of the business.

### General Requirements Under Law

The Gibraltar law position in respect of accepting signatures and scanned signatures for the valid execution of documents are set out generally by statute and other principles of contract law. Many particular instances and scenarios may follow principles or approaches under English law.

Whilst there are few statutes that set out formalities in relation to the making of contracts or execution of particular instruments, generally these formalities

relate to contracts and instruments concerning the disposition of land, the assignment of intellectual property rights and the transferring of shares in respect of Gibraltar companies. There are also other formalities required concerning agreements relating to powers of attorney and the appointment of trustees.

Generally, there are a few key 'ingredients' comprised in the making of a contract though the form of execution of an agreement or the form of acceptance is only prescribed for certain documents and situations. For example, a commercial contract may be created by way of oral agreement without the need for a physical or electronic signature. However, to best protect the rights of parties it is important to observe any relevant formalities that may be required for particular types of documents and/or agreements. For example, particular documents such as deeds may need to be executed in the presence of a witness or similar.

### Electronic Signatures

Further to general principles of contract law, electronic signatures that comply with Regulation (EU) No 910/2014 (the "eIDAS Regulation"), which has direct effect in EU member states from the 1 July 2016 and implemented in part by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2017 ("EIDR")\*, would be acceptable under Gibraltar law. Electronic

signatures are defined as 'data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign. Electronic signatures can take a number of different forms including:

- (a) A person typing his name into a contract or into an email containing the terms of a contract;
- (b) A person electronically pasting his or her signature (in the form of an image) into an electronic version of the contract in the appropriate place;
- (c) A person accessing a contract through a web-based e-signature platform and clicking to have his or her name in a typed or handwriting font automatically inserted into the contract in the appropriate place (e.g. next to the relevant party's signature block); and
- (d) A person using a finger, light pen or stylus and a touchscreen to write his or her name electronically in the appropriate place (e.g. next to the relevant party's signature block) in the contract.

The EIDR at regulation 8 also provides that '*in any legal proceedings, an electronic signature incorporated into a particular electronic communication shall be admissible in evidence in relation to any question as to the authenticity of that communication or data as the integrity of the communication or data*'.

It would also be considered good practice that where an electronic signature is being used and may be used (i.e. the document in question is not subject to specific execution requirements such as deeds), then correspondence evidencing the intent of the parties and/or the execution block explaining such an intention and form of execution would be recommended.

*\*(The framework governing electronic signatures may be impacted by the United Kingdom's European Union departure (Brexit). Whilst we are not aware of explicit draft bills or regulations that relate to EIDR, other than the general European Union Laws (Voluntary Implementation) Act 2019 (which is not yet in force), the validity of electronic signatures for the purpose of this advice is not expected to change following the UK's withdrawal from the EU in accordance with Article 50(3) of the Treaty on the European Union. In any event where provisions may be affected by Brexit, the European Union Laws (Voluntary Implementation) Act 2019 allows the Government of Gibraltar to make regulations, rules or*

*orders to give effect to EU provisions, whether in whole or in part)*

## Electronic Signatures and Deeds

The execution of deeds by way of electronic signature is not clearly provided for under Gibraltar statute or case law.

As mentioned, Gibraltar law concerning the execution of documents and contracts does follow principles of English Law and the most recent guidance that can be referred to would be that of the [Law Commission](#) in the United Kingdom.

In respect of the execution of deeds, this would depend on the deed and/or document being executed though the Law Commission's practice note provides that an electronic signature may be applied to a deed if it is done in the presence of a witness who attests the signature. It also sets out that it would be best practice for the witness to be physically present when the signatory signs, rather than witnessing through a live televisual medium (such as live video conferencing), in order to minimise any evidentiary risks as to whether the person genuinely witnessed the signing. However, given social distancing measures and requirements following the Covid-19 pandemic, it may be more difficult to keep with such best practices.

Please note that the Law Commission's guidance on the execution of documents using electronic signatures has not yet been implemented in Gibraltar law by way of statute nor has it been considered in cases to confirm or otherwise construe its interpretation.

## Bank or Client Mandates / Transfer Requests

Ultimately, whether an electronic signature or a scanned signature may be used for a bank mandate / transfer request will depend on the terms and conditions between the bank and the customer as well as any policies that the bank may have in relation to the authorisation of transactions. Banks may clearly set out in these terms or internal policies that digital or scanned signatures may not be valid so as to reduce the probability of fraudulent transactions. However, banks and other institutions can take measures to verify such forms of execution by having secondary forms of verification to reduce instances of fraud.

### We can help

We have assisted a number of our clients including banks and other financial institutions with interpreting the law in respect of the electronic execution of documents and contracts as well as transaction mandates. We have also successfully developed compliant policies and terms and conditions that allow for the electronic execution of documents and transaction mandates that also seek to protect the parties from instances of fraudulent transactions.

Contact either of the members of our team to understand how your policies, terms and conditions can be refreshed to be compliant and considerate of digital operations.

## CONTACTS

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