Three years ago, Voisin Law published an article on some practical considerations to be taken into account in relation to electronic signatures and which also strongly recommended that the Electronic Communications (Jersey) Law 2000 (the **"Law"**) be updated.

With the majority of the Jersey work force now working from home or self isolating and in light of the travel restrictions which are now in place as a result of COVID-19, it is more important than ever to consider the Jersey legal framework on electronic signatures and practical issues that should be considered.

Fortunately, calls for the Law to be reformed have been heeded and the Law has indeed been modernised, with the coming into force of the Electronic Communications (Amendment of Law) (Jersey) Regulations 2019 (the **"Regulations"**) which came into force on 9th October 2019.

Use of Electronic Signatures

The Regulations have assisted in modernising the Law and clarified a number of uncertainties surrounding the use of electronic signatures in Jersey.

In particular, with regards to the use of electronic signatures, the insertion of a new Article 12 (3) of the Law makes it clear that *"a signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability only because it is in electronic form"* which is a very helpful *"for the avoidance of doubt"* provision.

Formation of Contracts

The Law has always recognised that contracts can be formed by electronic means, with Article 4 (1) of the Law confirming that *"in the formation of a contract, unless the parties have otherwise agreed, the offer and the acceptance of the offer may be expressed by means of an electronic communication."*

Practical Considerations

The following should be borne in mind in relation to the use of electronic signatures:

1. in relation to a legal entity, the constitutional documents should be checked to ensure there are no restrictions on the use of electronic signatures (this is particularly relevant when a company, for example, has old or outdated articles of association);
2. the terms of the contract itself should also be carefully reviewed to ensure that they do not contain any express prohibition on the use of electronic signatures;
3. the law of the place of the legal entities incorporation (if this is not Jersey) should be checked and legal advice obtained from the relevant jurisdiction to ensure that the relevant foreign law permits electronic signatures and doesn't contain any restrictions on the type of document that can be signed by way of electronic signature;
4. an electronic signature must also be applied with the necessary intention and appropriate authority

(for example, the holding of a board meeting of a company to authorise one or more directors to sign a document);

5. it should be checked whether all the parties to a document are required to execute the document in the same manner. For example, some parties to a document could potentially sign by electronic means, whilst others could still sign the document using a wet ink signature; and
6. a statute may also provide that a document must be signed failing which it will be invalid. In such circumstances, the Law (as amended by the Regulation) confirms that: an electronic signature will meet the requirement of a statute for a signature provided that a method is used to (a) identify the person and to (b) indicate the person's approval of the information communicated. This condition can be achieved, for example:

- with most software products available on the market for electronic signatures, such as DocuSign; or
- if the signatory affixes an electronic signature to a contract and circulates the electronic signature directly to counterparties by email.

On a practical level, the person who has been authorised to sign the document should be the one who inserts or pastes their name or signature electronically and they should not authorise someone else to do this on their behalf.

Ideally, the person who was authorised to sign the document should also be the one who sends the electronically signed document from their own email address back to the relevant parties or their lawyers.

In relation to the execution of documents by electronic signatures, the Law Commission of England and Wales in its report dated 4th September 2019 on the Electronic Execution of Documents also provided some helpful guidance on the use of electronic signatures and there have been a number of English cases (which would be very persuasive in Jersey) which have upheld the validity of electronic signatures. For example, the English 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.

Cases where wet ink signature are still required

There are however, some cases where wet-ink signatures are still required such as wills, a power of attorney relating to land and contracts relating to land in Jersey (including documents relating to the creation of a Jersey Hypothec).

The Law also does not address physical practicalities required to execute certain documents such as powers of attorney granted by individuals under the Powers of Attorney (Jersey) Law 1995 needing to be signed in the presence of a witness.

Fortunately, in these fast moving times, a revised direction of the Royal Court has recently been issued confirming that the witness must be physically present at that signing or alternatively, where a natural person is to execute the power of attorney, witnessing by video conference is acceptable subject to the conditions set out in that Royal Court Direction which includes a direction that once the donor has signed the power of attorney they must post, send by scanned email or deliver it in some other way to the witness

who at that stage attests to the document by wet ink signature.

Approach of Regulators

Although, in relation to property transactions in Jersey, a paper-based registry system is still in use, some of the Island's key regulators in Jersey have been extremely proactive in these difficult times and have indicated that they intend to demonstrate a pragmatic approach and are accepting the majority of filings and submissions online. The International Stock Exchange Authority has also indicated they intend to provide appropriate flexibility to ensure effective business continuity is maintained.

Board Meetings by telephone or other electronic means

The constitution of the legal entity should of course be checked, but the articles of association of a modern Jersey company (for example) will usually provide that board meetings can be held by telephone or other electronic means such as by video conferencing.

If meetings by telephone or other electronic means are not permitted by the company's constitution, it should be a fairly straightforward exercise to amend the constitution to permit such meetings and Voisin Law could assist with such an exercise. Alternatively, the articles of association will usually permit written resolutions of the directors which would avoid the need for any physical meetings to take place.

Any tax implications arising from Board Meetings by electronic means or written resolutions of the directors should be considered. However, with regards to economic substance, the Jersey Comptroller of Revenue has recently given reassurances to companies in this regard.

Conclusion

These are clearly very challenging times. Fortunately, the recent Regulation amending the Law has clarified the provisions around electronic signatures, together with the making of contracts by electronic means, and Jersey has shown itself to be very adaptable and flexible in ensuring that transactions can continue to take place, with the Royal Court regularly issuing new Practice Directions to address issues such as the witnessing of power of attorneys, affidavits and wills.

For further information on this please contact a member of our Commercial team (Kate Anderson, Daniel Walker or Chris Le Quesne).