

There has been a submission of the form Tenth Programme consultation response form through your concrete5 website (21.6.17)

Name

Martin Sloan

Organisation

Brodies LLP

Address

15 Atholl Crescent

Edinburgh

EH3 8HA

Email address

martin.sloan@brodies.com

Do you have any suitable law reform projects to suggest?

Electronic signatures and contract law (excluding real estate/conveyancing contracts)

Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Please provide us with information about the issues with the law that you have identified:

The amendments to the Requirements of Writing (Scotland) Act 1995 to enable electronic execution of s.1(2) documents have created some unintended obstacles to the use of electronic signatures in general commercial contracts and an imbalance in the requirements for self-proving status for documents written on paper and those in electronic form.

Having researched this area extensively, it appears that the consultations on the amendments to the 1995 Act and the Electronic Documents Regulations (Scotland) 2014 the focus was on enabling electronic execution/authentication of missives, which are generally executed/authenticated by solicitors on behalf of clients. The consultations did not appear to consider either the authentication of other s.1(2) documents or the requirements for self-proving status of electronic documents.

Looking at these issues in more detail:

Authentication of s.1(2) documents

In order for a s.1(2) document to be validly executed/authenticated, it must be authenticated using an advanced electronic signature.

An advanced electronic signature is defined in Article 26 of the eIDAS Regulation. However, there is uncertainty as to whether the major electronic signing platforms such as Adobe and DocuSign meet the requirements for an advanced electronic signature. This is in part due to the fact that eIDAS does not mention advanced electronic signatures other than when used in conjunction with qualified certificates for the purposes of defining a qualified electronic signature (QES).

Platforms such as Adobe and Docusign work on the basis that the signatory clicks on a link sent to their email account to "sign" the document. Neither platform verifies the identity of the individual. Instead, the metadata collected simply confirms the link to which the email address was sent and a date and time stamp. It is unclear whether that is sufficient to say that the signature is "uniquely linked to the signatory" and "created using electronic signature creation data that the signatory can, with a high degree of confidence, use under his sole control", as is required by Article 26.

At a technical level, the certificate embedded in the "signed" document belongs to the platform (ie Adobe or Docusign). I understand that Adobe is unwilling to contractually commit to its signing platform meeting the requirements for an advanced electronic signature.

This uncertainty means that it is difficult to know what types of electronic platforms are legally valid for the authentication of s.1(2) documents. Note that these issues do not arise in practice for missives as these would be executed by solicitors using a higher standard QES.

Self-proving status

In order for an electronic document (of whatever sort) made under Scots law to have self-proving status under the 1995 Act, it must be authenticated using a QES. Scots law does not recognise witnessing of an electronic signature by a third party.

Whilst the Law Society of Scotland smart card issued to all qualified solicitors in Scotland contains a QES, QESs are not generally available - either to members of the public or business. Instead, QESs generally only offered as part of a "closed loop" system (eg BACS for making payments through the BACS system, Registers of Scotland for submitting documents through ARTL), where the scheme "owner" is able to verify the identity of the individuals in question prior to issuing them with a QES. Instead, QESs generally only offered as part of a "closed loop" system (eg BACS for making payments through the BACS system, Registers of Scotland for submitting documents through ARTL), where the scheme "owner" is able to verify the identify of the individuals in question prior to issuing them with a QES. There is an administrative cost and expense to providing QESs.

In my view, there is an imbalance between the requirements for self-proving status for paper documents and those for electronic documents. In order for an electronic contract to be self-proving, the parties must (in effect) instruct their Scottish qualified solicitors to authenticate the document on their behalf. In contrast, a paper document simply needs to be signed by an authorised signatory in the presence of another person.

Please provide us with information about the impact these issues are having in practice:

Having advised a number of clients on the law relating to the use of electronic signatures we are aware that the issues identified above cause concern and create obstacles, to the extent that some entities may choose to execute documents electronically under English law rather than Scots law (whether electronically or on paper).

As a practical example, if a bank wishes to speed up and simplify its processes by using electronic authentication for loan or finance documentation and as part of that wishes to obtain a guarantee from a director or spouse (a gratuitous unilateral obligation under s.1(2) of the 1995 Act), then there is a risk that using a platform such as Adobe or Docusign would mean that the purported authentication of the guarantee would be invalid and (therefore) that the guarantee may be unenforceable. For the reasons noted in the second issue identified above, this cannot be avoided by having the electronic signature witnessed, as the 1995 Act does not recognise the concept of witnessing electronic authentication.

In contrast, under English law (where there is currently no specific law dealing with authentication/signing of electronic documents) there appears to be no issue with signing simple contracts or deeds electronically - even where a signature is attested by a witness.

On the issue of witnessing/self-proving status generally, many paper contracts under Scots law are as a matter of practice witnessed in order for the document to have self-proving status. The absence of self-proving status is viewed by some as a reason to continue signing documents using wet ink signatures rather than electronically, leading to a perception that Scots law is antiquated.

Please provide us with information about the potential benefits of law reform:

Removal of uncertainties that may dissuade organisations from contracting under Scots law.
Providing clear rules on electronic signing that ensures Scots law keeps up to date with commercial practice and the move to electronic contracting, and that the rules for an electronic document being self-proving are proportionate and reasonable.

General comments:

This is a complex issue (not just in terms of the law, but also the technology). I would be happy to discuss these issues further with the SLC.