

**THE COMPLETION
OF ISLE OF MAN
TRANSACTIONS
DURING THE
COVID-19 PANDEMIC**

the options for Isle of Man entities

KEYSTONE LAW

REMOTE WORKING, SOCIAL DISTANCING, ENFORCED ISOLATION AND TRAVEL RESTRICTIONS HAVE MEANT THAT FACE-TO-FACE MEETINGS CAN NO LONGER BE HELD. FURTHERMORE, NOT EVERY SIGNATORY MAY HAVE THE CORRECT EQUIPMENT AT HOME TO PERMIT PRINTING, SIGNING AND SCANNING. THIS HAD LED TO INCREASED SCRUTINY BY CLIENTS AND LAWYERS OF THE CURRENT RULES AND PRACTICES RELATING TO THE EXECUTION OF DOCUMENTS BY ISLE OF MAN COMPANIES.

IN THIS NOTE WE EXAMINE THE TECHNICAL AND PRACTICAL ISSUES SURROUNDING THE COMPLETION OF TRANSACTIONS BY ISLE OF MAN COMPANIES AND SET OUT THE OPTIONS AVAILABLE.

APPROVING BOARD OR SHAREHOLDER RESOLUTIONS

Isle of Man law does not restrict where a board or shareholder meeting can be held. Nor does it prohibit meetings by telephone or by other electronic means (which we would expect to cover all popular video conferencing apps, such as Microsoft Teams and Zoom), provided all participants in the meeting can hear each other.

Despite this, it is essential to review each company's Memorandum and Articles of Association or equivalent (**M&As**) and any related shareholder agreements, as it is prudent for the language allowing meetings by telephone and by other electronic means to be explicit. Additionally, there are often indirect restrictions contained in the M&As or any related shareholder agreements. For instance, the M&As could require that the majority of directors be physically present in the Isle of Man (this is often included for tax or economic substance requirements).

If such restrictions are included, there are a couple of simple solutions:

- appoint additional local directors or local director alternates (companies should consider noting the temporary nature and rationale for the appointment in the related board minutes); or
- amend the M&As so that the restriction is removed (although thought should be given to any potential tax and economic substance implications).

Companies and their signatories should consider the wording of the M&As at an early stage of a transaction. It may take additional time to arrange for the signing of the resolutions to add directors (and, if applicable, register the relevant form at the Isle of Man Companies Registry) or amend the M&As (which may also require Isle of Man Companies Registry registration). Furthermore, if a company is regulated, the appointment of additional directors will require regulatory approval.

Subject to the specific wording of a company's M&As, a shareholder has the ability to appoint a local proxy or a corporate representative under the laws of the Isle of Man.

Lastly, if permitted by a company's M&As, written resolutions of either the shareholders or the board of directors may be used. If used in conjunction with the electronic signatures of the relevant parties, this is likely to be the easiest and quickest method of approving resolutions of Isle of Man incorporated companies. Please see below an examination of the use of electronic signatures in more detail.

EXECUTING TRANSACTION DOCUMENTS

During the Covid-19 pandemic, the signing of deeds and the availability of one or more signatories is likely to present a challenge for Isle of Man incorporated companies. Fortunately, there are still multiple options available for signatories under Isle of Man law. However, to ensure a simplified process, companies and lawyers should consider avoiding the use of deeds unless necessary (for example, where there is a lack of consideration, a longer limitation period is thought prudent for enforcement or a deed is required by law).

WET INK SIGNING

If the timeline for completion allows, physical copies of documents can still be distributed to signatories by courier or postal services. However, if signatures are required to be witnessed, this may require further preparation (please see below for further information on the witnessing of signatures).

According to applicable law at the time of writing*, there are certain circumstances that require wet ink signatures, which include:

- **Signatory restrictions:** The M&As of a company may restrict the use of electronic signatures either directly or indirectly.
- **The requirements of Isle of Man Government departments:** In some cases the Financial Services Authority require documents to be executed using wet ink signatures. Some bodies such as the Income Tax Division already allow for electronic filings and some UK bodies are relaxing their requirements, for example, HMRC is allowing electronic submissions for some filings. As a result of the COVID-19 pandemic, the Isle of Man Government has passed regulations allowing the Isle of Man Companies Registry to accept forms and documents submitted and signed electronically.
- **Manx law execution formalities:** Special execution formalities can apply to certain documents created under common law or statute. Further, there are specific types of documents (referred to below) that are specifically excluded under the Isle of Man electronic transactions legislation.
- **Foreign law execution formalities:** the document may need the notarisation or apostilling of a wet ink original. Depending on the location of the signatory, the jurisdiction may not permit or recognise electronic signatures as valid, binding and enforceable or the laws of the relevant jurisdiction may restrict the signing of documents electronically. For instance, the UK's Land Registry requires wet ink original documents for many submissions.
- **Foreign enforcement:** If the document or the assets of a company require enforcement in a foreign jurisdiction, that jurisdiction may not recognise electronic signatures as valid, binding and enforceable. Care must be given to consider this at an early stage of the transaction.

MERCURY-COMPLIANT SIGNING

Following the High Court decision in *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721, The Law Society of England & Wales' Company Law Committee and The City of London Law Society's Company Law and Financial Law Committees issued guidance in February 2010 entitled "*Note on execution of documents at a virtual signing or closing*".

This guidance specifies a range of options available to enable virtual signings, including the printing, the wet ink signing, the scanning of signature pages and then their transmission by email. In the email, parties should state in a clear, complete and obvious manner the version of the document to which their signature relates. Further, to fulfil the Mercury condition of being the same physical document, parties must take care that the e-mail contains either: the final version of the document and the signed signature pages; or a PDF copy of the entire signed document.

While this guidance is in relation to the execution of documents under the laws of England & Wales, it is our view that the processes outlined in the guidance are appropriate and valid for the execution of documents under the laws of the Isle of Man.

This process can continue to be used providing the signatory is able to print and scan the signature pages. The guidance does not refer to the use of cameras to photograph signature pages; however, it is our opinion (at least during the continuance of the Covid-19 pandemic) that this is an appropriate alternative option to scanning the signature pages.

SIGNING BY AN ATTORNEY UNDER A POWER OF ATTORNEY

As a power of attorney must be executed as a deed, it is unlikely to simplify the process of signing documents over and above other methods outlined in this note. Nevertheless, signing by an attorney under a power of attorney does offer the benefit of certainty as to the location of a document's execution and may be required in some circumstances for companies incorporated under the Companies Act 1931 when they are executing a deed. However, it is worth noting that the Isle of Man Companies Act 2006 permits the use of 'authorised signatories' to sign documents on behalf of a company, which may prove to be a more straightforward option.

* It is expected that a number of accelerated changes will be made applicable Isle of Man legislation from time to time until the Covid-19 crisis can be averted, so please check with us or your legal advisors to confirm the applicable legislative framework before taking any action

ELECTRONIC SIGNATURES

Electronic signatures have been permitted in the Isle of Man since November 2000. Utilising electronic signatures are an attractive option where signatories have limited access to scanning and/or printing equipment.

Electronic signatures include the following (with each having varying degrees of safety):

- the typing of the signatory's name into an electronic document;
- clicking an "I accept" or "I agree" button on a website;
- a scanned manuscript signature that is applied to an electronic document;
- a biodynamic version of a manuscript signature; or
- an electronic signature using an encryption system that confirms the authenticity of the signature (e.g. DocuSign).

Isle of Man law recognises electronic signatures as valid, binding and enforceable if:

- a method is used to identify the signatory and to indicate their approval of the information communicated (there is no statutory guidance as to what this means in practice and parties should consider on a case-by-case basis whether they are satisfied that they and the other parties in the agreement have met this threshold);
- having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
- the signatory confirms their approval and the validity of their electronic signature (an email will suffice).

For a contract to be valid, a signatory utilising an electronic signature will still be required to have the intention to authenticate and comply with the applicable formalities.

Electronic signatures can be used to sign simple contracts, deeds and other documents (whether these can be electronic must be considered on a case-by-case basis). At the time of writing*, electronic signatures cannot be used in relation to the following:

- the conveyance or creation of an interest in land;
- a mortgage or charge of land;
- the grant of a power of attorney;
- a transfer or mortgage of, or a share in, a registered ship or registered vessel; and
- the granting of security by a company over its undertaking, property or revenue.

It is not recommended that electronic sealing is used as a method of execution as it is unclear whether it is permitted by statute. Nor should individuals authorise other parties to affix the individual's electronic signature to a document as it is possible that this may invalidate the execution.

WITNESSING SIGNATURES

The law on what constitutes signing a deed "*in the presence of a witness*" is unclear. The United Kingdom Law Commission's 2019 Report on the 'Electronic execution of documents', concluded that parties could not be confident that the current law would allow for remote witnessing. It is our view that this holds true under the laws of the Isle of Man and, therefore, the witness and signatory need to be physically present together with the witness watching the signatory apply their signature or electronic signature (the witness can attest to observing the signing on the document utilising the same method of execution on the same counterpart). Therefore, if the signing of a document is witnessed remotely (e.g. over Skype, WhatsApp or Facetime) then it could be deemed invalid.

This clearly presents a logistical issue in the present circumstances as under the current restrictions members of a signatory's household are likely to be the only persons available to act as witnesses. We would normally advise against this, as independent witnesses are preferable for evidential reasons. However, if the proposed witness is not a party to the document, this will be sufficient from a legal perspective.

Under the laws of the Isle of Man, companies formed under the Companies Act 1931 with at least two officers (directors and/or company secretary) can validly execute a deed without the need for a witness. The two officers can sign the same document utilising their wet ink signatures or (save where e-signatures are not permitted, as referred to above) they can affix their electronic signatures to the same document. It is essential that the same document is used either for wet ink or electronic signing for the party's counterpart to be valid. Furthermore, an authorised signatory or single director of a company formed under the Companies Act 2006 can validly execute a deed without the need for a witness.

PRACTICAL TRANSACTION CONSIDERATIONS

When arranging completion of a transaction, there are a number of practical issues which need to be considered:

ORIGINAL DOCUMENTS

Parties should consider at an early stage of a transaction whether there is likely to be any requirement to have original documents. This will enable them to plan around any delay in the sending, transfer and delivery of such documents (noting that offices may no longer have personnel available to receive and sign for couriered documents). Parties could also obtain an undertaking requiring the delivery of the original documents as soon as possible post-completion.

PLACE OF SIGNING

Where a document is deemed to have been signed may have significance for substance requirements and/or tax implications. Care should be taken on a case-by-case basis to consider where the place of signing should be and whether the particular signatory and proposed method of signing will have an impact.

IT SECURITY CONCERNS

Parties should satisfy themselves that any proposed method of signing is secure and reliable. In establishing whether they are satisfied, parties should consider the 2019 Law Commission Report, which outlined three fundamental questions that should be considered for any document whether signed electronically or in wet ink:

- How can one be confident that person A signed the document, and not another person pretending to be person A?
- Does person A have capacity and the requisite authority to sign the document, either for themselves or for their principal, usually a body corporate?
- What is the document that is being signed?

We would also add the following questions:

- How does one know that the witness did actually see the signatory apply their signature?
- How can one gauge the signatory's intention or capacity to enter legal relations?
- How can one gauge duress?

AVAILABILITY OF AN ELECTRONIC SIGNATURE ENCRYPTION PLATFORM

Parties should establish whether they have access to an electronic signature encryption platform or if it would be straightforward to start using such a platform. If other parties are proposing to use such a platform, they should be satisfied that the proposed platform is suitable and fit for purpose. Parties should distinguish between the validity of the electronic signature and its evidential weight; the more robust method of electronic signature, the easier it will be to show its authenticity/integrity in the event of a dispute and will deter non-repudiation.

WITNESSING

If the document requires a signature to be witnessed, parties should first establish (if they have two officers) whether it is appropriate that they sign without the need for a witness. If this is not possible, they should confirm that the signatory has an appropriate person within their household available to act as such.

AUTHORITY

If an electronic method of signing is proposed, parties should ensure that the person that will apply each party's signature, if different from the actual signatory, has sufficient authority to do so.

EQUIPMENT

Parties should identify the person or persons likely to sign on their behalf at an early stage of the transaction and establish what equipment they have at home. They should ensure that they have sufficient paper, a working printer and a working scanner or camera.

PHYSICAL DUE DILIGENCE INSPECTIONS

Physical data rooms and onsite inspections of records will still be required for certain transactions. Obviously, attending offices will either not be possible or be extremely difficult in the present circumstances. Parties should be alive to this restriction, ensuring that as much documentation as possible is submitted to the virtual data room and be prepared for the delays in completing appropriate due diligence exercises.

If you are completing a transaction during the Covid-19 pandemic and have concerns or questions, please contact William Margot.



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