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23 November 2018

Dear Sirs

**Re: BVCA response to Law Commission Consultation Paper Number 237: Electronic execution of documents**

We are writing on behalf of the British Private Equity and Venture Capital Association (“**BVCA**”), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Over the past five years (2013-2017), BVCA members have invested over £32bn into nearly 2,500 companies based in the UK. Our members currently back around 3,380 companies, employing close to 1.4 million people on a full-time equivalent basis (FTEs) across the world. Of these, around 692,000 FTEs are employed in the UK.

The BVCA welcomes the opportunity to respond to the Law Commission’s consultation on the electronic execution of documents (the “**Consultation**”).

**Executive Summary**

We refer to the two Law Society/CLLS Practice Notes on execution of documents, issued in 2016 and 2009 (updated in 2010) respectively and endorsed at paragraph 1.18 of the Consultation. These notes were co-authored by a number of leading UK law firms and represent the BVCA’s view of the law and good practice.

The BVCA agrees with the Law Commission’s conclusion that an electronic signature satisfies current statutory requirements for execution of documents and that there is no need for legislative reform. It is our experience that the majority of issues currently faced when engaging with electronic execution of documents are practical rather than legal, although we do note that cross-border transactions also present challenges for the widespread use of electronic signatures among our members.

We have set out our responses to the Law Commission’s specific questions below.

**Q1. Our provisional conclusion is that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document. Do consultees agree?**

The BVCA agrees with this conclusion. We consider the current combination of statute and case law to mean that an electronic signature is capable of satisfying a statutory requirement for a signature.

We believe current law on electronic execution of documents is sufficiently clear and would be concerned that if legislation were to be reformed there could be a risk that any resulting statute would be overly prescriptive or restrictive when compared to the current requirements. We would also be concerned about any period of uncertainty that might arise during any such legislative reform process.

**Q2. Our provisional conclusion is that the requirement under the current law that a deed must be signed “in the presence of a witness” requires the physical presence of that witness. Do consultees agree?**

We agree that physical presence would have been envisaged at the time of drafting the law. However, if this issue were to come before the court, given the broader stance the court has taken in relation to electronic execution and its general flexibility of approach, we believe that the court may interpret “in the presence of a witness” to include scenarios where the witness is not physically present (for example, if by unobstructed video camera view the witness can view the signatory contemporaneously executing the document). However, in the absence of further case law or legislation, we note the Law Society/CLLS 2016 Practice Note position that physical presence will remain best practice.

**Q3. We welcome consultees’ views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.**

In our experience, the cross-border considerations surrounding electronic execution are one of the more significant deterrents to widespread use of electronic signatures for our members. In each transaction involving a non-England or Wales party or a non-English law element, the time and cost involved in obtaining local legal advice for the relevant jurisdiction can deter adoption of electronic signatures. However, over time the market may become more comfortable with electronic execution, and we think that it is useful that England & Wales are leading in this respect. Our members report that US counterparties are becoming more comfortable with executing documents electronically, and would find it very beneficial if more jurisdictions could be harmonised.

**Q4. We believe that where specific provision is necessary in relation to certain types of documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney), that is a matter for specific legislation or regulation, and not for the general law of execution of documents. Do consultees agree?**

This is not an issue as such for our members, but we agree with the conclusion nonetheless.

**Q5. We consider that legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature. Do consultees agree?**

Yes – we agree with this conclusion for reasons noted earlier in this letter.

**Q6. We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree?**

We have no objection to an industry working group to consider such issues, and would be enthusiastic to participate in any such group.

**Q7. We provisionally propose that it should be possible to witness an electronic signature via video link and then attest the document. Do consultees agree?**

Further to our response to Question 2 above, we agree that it would be helpful for video link witnessing of electronic signatures to be possible. In our view, witnessing via video link is sufficiently similar to witnessing in the physical presence of the signatory.

From a legal perspective, it would be important to ensure that the witness is sufficiently certain of what they are witnessing. However, we believe issues associated with such witnessing are largely practical, rather than legal. For example, is there adequate security, quality, continuity and reliability of the video link and does the witness have sufficient visibility of the signatory and document?

That being said, we are not aware of significant difficulties in practice with having a witness physically present.

**Q8. If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation:**

**(1) Via a signing platform which the signatory and witness both log into?**

**(2) With the document being emailed to the witness by the signatory immediately after signing?**

We think it is important not to be overly prescriptive. Method (2) could cause concerns where, for reasons of confidentiality or other considerations, parties may not wish to circulate electronic copies of documents to witnesses. Rather, in such cases it may be better practice to have documents on a platform which restricts access, or have the document signature page on a shared screen which the witness can attest using a digital pen or other identifier. However, these issues would best be solved on a technological level (and not at a legal level), as we are aware that some of the online platforms do have technological constraints.

**Q9. Do consultees consider that it should be possible to “witness” an electronic signature through an online signing platform in real time, without a video link or any direct communication between the signatory and the witness?**

We view this approach as a more significant departure from the concept of ‘presence’ of a witness as required by statute than the video link approach. This raises a question as to how the witness

can be sufficiently certain as to what they are witnessing, and therefore could introduce uncertainty about whether the requirements of the current law had been satisfied.

**Q10. Our view is that the witnessing and attestation requirement for electronic signatures on deeds should not be replaced with a requirement for a particular type of technology, such as a digital signature using Public Key Infrastructure. Do consultees agree?**

We agree with this view.

**Q11. Do consultees think that there is a case for moving away from the traditional concepts of witnessing and attestation in the context of deeds executed electronically, allowing for electronic acknowledgement? If so:**

**(1) How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?**

**(2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which:**

**(a) acknowledgement must occur after signing; and**

**(b) acknowledgement and witnessing must take place?**

**(3) How should the witness record the signatory's acknowledgement?**

We do not believe that the ability to electronically acknowledge the execution of a deed by the methods described in (1) would be necessarily simpler or easier to achieve than the ability to witness the execution of a deed in person or via video link.

**Q12. Our view is that the requirement that deeds must be delivered does not impede the electronic execution of deeds in practice. Do consultees agree?**

We agree with this conclusion.

**Q13. We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree?**

The implications of Mercury have been largely addressed by parties adhering to the options in the Law Society/CLLS 2009 Practice Note (updated in 2010), and this is now established practice in commercial transactions. However, were a broader review of deeds to be undertaken, this might be an opportunity to find a more straightforward solution.

**Q14. Do consultees think that a review of the law of deeds should be a future Law Commission project?**

We agree that a review of the law of deeds could be a worthwhile project, particularly if it were to look at both electronic and paper deeds.

**Q15. We provisionally conclude that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document. Do consultees believe that this will result in increased confidence in the legality of electronic execution in England and Wales? Is any more needed?**

We believe that this Law Commission conclusion will help increase confidence in electronic execution in England and Wales and so in turn promote wider use of electronic execution.

**Q16. What do consultees believe would be the financial value of increased confidence in the legality of electronic execution in England and Wales? For example, do consultees think there could be a reduction in transaction costs by as much as 10% to 30%?**

We would not expect increased confidence and usage of electronic execution in England and Wales to have a significant impact on transaction costs for our members. While electronic execution can help reduce costs relating to the execution of numerous low value contracts, the majority of deals in our industry are more often less numerous and of higher value. In relation to the cross-border use of electronic signatures, more significant transaction costs are incurred, particularly where the advice/involvement of local counsel and/or notaries is required as to the due execution of a document and other formalities.

It would however improve efficiency and be more environmentally friendly as documents do not need to be printed/collated. Platforms can automatically file executed documents, which is much more time and cost efficient in transactions than manually collating documents.

**Q17. Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would:**

- (1) provide benefits such as reduced transaction costs? If so, how much?**
- (2) provide non-monetary benefits? If so, what benefits?**

We would not expect a significant impact on transaction costs for our members, however an industry working group which addresses some of the practical issues surrounding electronic execution and assisting in bringing together the practicalities with the legal requirements, would be of benefit to anyone using the technology.

**Q18. We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from:**

- (1) the capacity to execute deeds electronically without the physical presence of a witness; or**
- (2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.**

We can see considerable practical benefits, most particularly convenience, in the ability to witness a deed via video link. This could be helpful in the instance of a last-minute need to execute a deed when the signatory is perhaps travelling or otherwise away from their home or office. As regards the other methods, we think it is important not to overstate the potential difficulties of finding a physical witness, as this has not proved overly onerous in our experience.



We would be happy to discuss the contents of this letter with you. Please do not hesitate to contact the BVCA if you have any questions.

Yours faithfully,

A handwritten signature in purple ink, appearing to read 'Amy Mahon'.

Amy Mahon  
Chair, BVCA Legal and Accounting Committee