Issues of Legal Uncertainty: The Use of Electronic Signatures in Authenticating Global Notes

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Financial Markets Law Committee

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1. EXECUTIVE SUMMARY AND INTRODUCTION

1.1. The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2. In March 2020, governments around the world took action to stall the advent of the novel coronavirus (Covid-19) by implementing a range of "social distancing" rules. This has included steps such as the closing down places of business and restricting the movement of people. Several commercial, operational and legal issues have arisen as a result in the context of the wholesale financial markets. The FMLC has listed some of the legal issues in a memo published at the end of that month.[3] One practical issue which was brought to the FMLC Secretariat by stakeholders concerned the complexities relating to the need for "wet ink" signatures in contracts in cases where electronic execution might not be possible. Social distancing measures have meant that employees are working from home, where they may be unable to print and sign with "wet ink" documents in accordance with usual practice; there are additional complications if a witness is required.

1.3. Since 1998, technological developments have introduced new methods by which parties can evidence a willingness to be legally bound, for example, by: scanning back signature pages, inserting a pdf signature into a soft copy document, clicking an onscreen "I agree" (or similar) button, applying a pdf signature directly to an online document, using a "pdf pen" which purports to contain biometric identifiers, signing an electronic document using a touch screen and/or using a "ghost writer" machine, confirming by e-mail, and/or using third party digital execution platforms such as DocuSign, Adobe Sign or software available on Distributed Ledger Technology ("**DLT**") platforms. In many cases, where contracts have needed to be executed during the pandemic-related lockdown, these platforms have been used.

1.4. These circumstances have brought into sharp focus an enduring question about the status of electronic execution in law. The FMLC had, in 2017, initiated work on this topic which had been paused in light of the Law Commission's impending publication of its research on electronic execution. Given the present attention on electronic

[3] FMLC, *COVID-19: Legal issues for financial markets*, (30 March 2020), available at: http://fmlc.org/wp-content/uploads/2020/03/cov19memo-1.pdf

execution of documents, the FMLC considered it useful to publish a paper surveying the position of electronic signatures.

2. BACKGROUND

2.1. An example of a key financial markets activity which, in normal circumstances, requires a "wet ink" signature is that of the signing, authentication and effectuation process for global notes. For example, as far as standalone Eurobonds are concerned, a global note needs to be signed by the issuer, typically in "wet ink". The global signed by the issuer is delivered to the agent to authenticate, again in "wet ink". If the global is a "New Global Note", a third step of effectuation is required by the common safekeeper, also in "wet ink". For medium-term notes ("**MTN**"), the master global note is signed by the issuer at the annual update, typically in "wet ink". On each drawdown, the agent authenticates a copy of the master global note (in this case, the copy contains a facsimile of the issuer's "wet ink" signature) to which the Final Terms for the issue have been attached—it is the copy of the master global plus the final terms that constitute the particular global note for the drawdown. The authentication too is usually completed in "wet ink". Similarly if effectuation is required the common safekeeper will effectuate the global in "wet ink".

2.2. Given the social distancing rules put into place by HM Government and other governments around the world, actors in the above process have struggled to reach their places of work and/or wet sign these documents. In reaction to the new circumstances, and to facilitate the conduct of business as smoothly as possible, the FMLC understands that the International Central Securities Depositories ("**ICSDs**"), Euroclear Bank and Clearstream Banking, have suggested temporary amendments to their procedure. For example Euroclear, an international central securities depository, has suggested an amended process be followed by common depositories ("**CDs**") and common safekeepers ("**CSKs**"). This is in addition to the current issuance model—i.e., for both the Classic Global Note ("**CGN**") and the New Look Global Note ("**NGN**") structures, a bearer security needs to exist in physical form to be considered valid and it needs to be safekept (there has been no change to the existing issuance requirements in this respect). Recognising the extraordinary contingency situation with Covid-19, the ICSDs authorized, exceptionally, CDs and CSKs to safekeep physical CGNs and NGNs electronically during the Covid-19 contingency period. All CGNs and NGNs must be signed either electronically or with "wet ink". CDs and CSKs need to certify that:

a) they have checked: (1) the legal validity of electronic signatures of global notes under the issuing laws of the global notes they hold for the ICSDs; (2) the capacity of each issuer and each IPA to use Electronic Signatures; and (3) the legal validity of the CGN/NGN (if temporarily safekept electronically), under the governing law of the security;

b) they have put all necessary controls in place to ensure there is no risk associated to the electronic storage/safekeeping of the global notes in their systems and that such electronic storage brings as much protection as safekeeping in the CD/CSK physical vault to protect the global notes from alteration, mutilation, loss, theft, fraud and destruction;

c) they are capable of printing the global notes exactly as stored digitally if and when required; and

d) they will indemnify the ICSDs accordingly.

Once the Covid-19 contingency period is over, the global notes will have to be printed and safekept by the CD/CSK, in line with the existing CD/CSK agreements. Euroclear has also communicated that it reserves the right to request copies of the related legal opinions obtained by the CD/CSK. As long as the CD and CSK have completed the checks described above, they may accept electronic signatures by the issuers and agents. For effectuation, the CSK may use any type of signature as is defined and valid under the relevant applicable law(s).

2.3. Given the dependence on electronic signatures, and the need, as per the ICSD's amended temporary procedures, to check the validity of electronic signatures under the jurisdiction of the global note, the FMLC has surveyed the position under the main jurisdictions which govern global notes.[4]

3. THE VALIDITY OF ELECTRONIC EXECUTION

3.1. It is generally accepted that a signature that purports to bring legal rights into effect will be valid or invalid according to the law of the place where it is made. This principle is set out in Regulation (EC) No 593/2008 on the law applicable to contractual

[4] The contents of this report are for information purposes only. Nothing in this report constitutes legal advice. The FMLC is a research organisation which considers abstract issue. It is not in a position to offer legal advice on these (or any) questions as they may arise on the particular facts of a matter or in a specific context.

obligations (the "**Rome I Regulation**"), Article 11 of which relates to the formal validity of contracts. According to that provision, a contract is formally valid if it satisfies the formal requirements of the law of the place where it is concluded, although it will also be recognised as formally valid if it satisfies the formal requirements of the (substantive) applicable law. The formal requirements of each jurisdiction depend on a combination of regulations, statute and case law and they vary from country to country. The formalities under each of the key jurisdictions are described below.

European provisions

3.2. Each of the jurisdictions examined below are subject to overarching European legislative provisions which govern the use of electronic signatures. Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("**eIDAS Regulation**"), which came into force in July 2016 and much of which is devoted to setting up a system for the regulation of qualified trust service providers at Member State level, so as to ensure that their certification of electronic signatures can be relied upon. The eIDAS Regulation makes a distinction between three types of electronic signatures:

- A simple e-signature is a typewritten reproduction of the signatory's name.
- An advanced e-signature is a mark that uniquely identifies the signatory and ensures that the signatory is the originator of the signed data content; in particular, subsequent changes to the content must remain recognisable.
- A qualified e-signature is an advanced e-signature based on a qualified certificate and generated by means of a particularly secure signature creation device.

English law

3.3. As a preface to what follows, the FMLC notes that, while the English law on the execution of documents is generally robust and efforts have been made to provide for a method of electronic execution, there has been no systematic effort to date to make the

"traditional" provisions on the execution of documents assumed to be written on paper and the newer rules on electronic execution consistent.[5]

3.4. The legislation on electronic signatures in the U.K. consists of:[6]

a) The Electronic Communications Act 2000 (the "**ECA**");

b) The eIDAS Regulation; and

c) The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (SI 2016 No 969) ("**U.K. eiDAS Regulations**") which, amongst other things, nominate the Information Commissioner's Office (the "**ICO**") as the U.K. body charged with the supervision of qualified trust service providers operating in the U.K.[7]

3.5. On the basis of these pieces of legislation, and provided that (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied, an electronic signature is capable in law of being used to validly execute a document. In particular, Article 25(1) of the eIDAS Regulation provides that electronic signatures cannot be denied legal effect (either in terms of legal validity or admissibility as evidence) solely because of their electronic nature. Article 25(2) of eIDAS provides that a qualified electronic signature "shall have the equivalent legal effect of a handwritten signature". The underlying principle that an electronic signature is capable in law of being used to execute a document, including where there is a statutory requirement for a signature, has also been established in the relevant case law.

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5 The Scottish Regulations do make a cohesive effort to link up electronic execution with the main Scottish law on the execution of documents, The Requirements of Writing (Scotland) Act 1995. For a document specified in Section 1(2) of that Act to be valid, the electronic signature(s) of the persons signing need to be advanced electronic signatures (Section 1(2) deals with documents dealing with interests in land, trusts, wills and gratuitous unilateral obligations otherwise than in the course of a business). Additionally, for a document to be presumed to be authenticated by a granter under Section 9C of that Act (a self-authenticating document), then an advanced electronic signature certified by a qualified certificate is needed. There are also special rules for identifying annexes to electronic documents, which, inter alia, require them to be annexed before signature. These allow commercial agreements, which are not required to be in writing, effectively to be executed using more basic forms of electronic document, but all those which perform functions similar to those of an English deed require at least an advanced electronic signature.

6 The U.K. has enacted a number of pieces of legislation on electronic signatures, originally designed to work with Directive 1999/93/EC on a Community Framework for Electronic Signatures, which has been repealed. Some guidance on the legislation on electronic execution has been published by the Department of Business, Energy and Industrial Strategy published in August 2016 the Electronic Signatures and Trust Services Guide, August 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545098/beis-16-15-electronic-signatures-guidance.pdf. The eIDAS Regulation should remain in effect once the U.K. withdraws from the E.U. as "retained E.U. law", in accordance with the E.U. (Withdrawal) Bill [currently in Parliament].

7 See Reg 3 of the eIDAS Regs.

3.6. The Law Commission, in a report published in September 2019, expressed the view that electronic signatures would be valid under English law.[8] The Law Commission noted that any formalities relating to execution of that document as required by law also have to be satisfied.[9] If a document was signed with an electronic signature but the formalities were not complied with, it would not be validly executed.

3.7. The Law Commission's report was welcomed by HM Government in March 2020.[10] The execution of deeds documenting transactions with an international element (e.g., involving a foreign party and/or a subject matter located outside the U.K.), however, present additional difficulties, particularly in respect of conflicts of laws and enforcement. Some of these difficulties are discussed in the subsections below.

Irish law

3.8. Under Irish law, e-signatures are governed and recognised by the eIDAS Regulation and the Electronic Commerce Act 2000.[11] This includes the recognition of electronic originals for the purposes of admissibility into evidence, which is separate to any requirement that global notes ultimately be printed. While some categories of documents—including those used for the creation of interests in real estate, the creation of trusts and other similar documents—cannot be e-signed, these restrictions do not apply to global notes. Irish law is technology-neutral as to the type of e-signature that can be used. An individual (whether signing in his/her own right, or on behalf of a company) can use a simple, advanced or qualified electronic signature and, although parties may have particular preferences, Irish law does not prescribe that a particular format be used for a particular document. Any form of e-signature may be used to execute an instrument that is not a deed. Where that instrument is a deed, again the individual can use any form of e-signature, but the individual's signature must be witnessed.[12] In the case of a company, there is currently no mechanism under Irish law

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8 Law Commission, *Electronic Execution of Documents* (Law Com No 386), (3 September 2019), available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf

9 *Ibid.*, paragraph 3.32.

10 Government response to the Law Commission report Electronic Execution of Deeds: Written statement - HCWS143 (3 March 2020), available at: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-03/HCWS143/

11 The Law Society of Ireland has also published a practice note on E-Signatures, Electronic Contracts and Certain Other Electronic Transactions, available at: https://www.lawsociety.ie/globalassets/documents/committees/business/e-signatures-electronic-contracts-other-electronic-transactions.pdf.

12 The witness should be physically present in the same location as the signatory and observe their signature. A witness must not be party to the document, and while it is regarded as best practice for a witness to be unconnected with the signatory, that may not be practical in the current environment in light of public health recommendations regarding social distancing. In respect of the execution of documents where signatures must be witnessed, where a signatory uses an electronic

whereby a company's common seal can be affixed electronically to a deed, so the practice is for a company to appoint one or more individual attorneys to execute deeds on its behalf (and the signatures of those individual attorneys to those deeds must be witnessed). Irish law places emphasis on the party using an electronic signature obtaining the consent of its counterparty. Finally, for any transaction where the parties are not physically together and the executed documents are to be circulated electronically (regardless of whether documents are executed electronically, or comprise scanned copies of "wet ink" documents) parties are required to comply with guidance on the 'virtual' execution of documents issued by the Law Society of Ireland.[13]

3.9. Global notes are not deeds, so do not need to be executed as such. As a result, where a global note is being executed electronically by a company:

- it can be e-signed by the signatories appointed by the company for that purpose;
- those signatures do not need to be witnessed for the global note to be executed effectively;
- there is no electronic seal available at the moment, but in any event the company's seal does not need to be affixed.

German law

3.10. Under German law, e-signatures are governed and recognised by the eIDAS Regulation, the German eIDAS Implementation Act, the German Trust Services Act (*Vertrauensdienstegesetz*) and section 126a of the German Civil Code (*Bürgerliches Gesetzbuch* or the "**BGB**"). Generally, the conclusion of a contract or the signing of another document does not require a particular form under German law. In principle, an e-signature is not mandatory, but may be useful as evidence.

3.11. There are, however, exceptional cases in which an e-signature is mandatory in order to comply with certain legal form requirements. Contracts (or other documents) which have to comply with "written form" requirements, arising from mandatory law or

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signature (e.g. an individual executing a deed on his/her own behalf, or an attorney executing a deed on behalf of a body corporate), the witnessing requirement is met where either: (a) the witness is physically present when the signatory applies his/her electronic signature, and the witness then applies his/her electronic signature underneath as witness; or (b) the witness is physically present when the signatory applies his/her electronic signature, but does not have his/her own electronic signature, and therefore prints the electronically-signed document and witnesses using a wet-ink signature.

[13] Law Society of Ireland, *Guidance on the 'virtual' execution of documents*, (3 June 2011), available at: https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Guidance-on-the-virtual-execution-of-documents/#.X2tWo2y7roB.

(unambiguous) contractual provisions, need to be signed by a "wet ink" signature. The requirement may be satisfied, however, by using the "electronic form" instead. Examples of mandatory requirements in law requiring the "written form" include securities transactions—for example, the issuance of a bond, which requires a note to be signed by "wet ink" signature (see section 793 of the German Civil Code). Likewise, the issuance of new shares by a German stock corporation requires that the issuer's management board and the chairman of the supervisory board sign a global share certificate using a "wet ink" signature. Another example is lease agreements for residential and (above all) commercial premises.

3.12. There are certain other provisions that require a signature in "written form", which can be satisfied by "electronic form", as per section 126a of the BGB. The conditions of the "electronic form" are quite stringent: the document needs to feature a so-called qualified electronic signature, which is an advanced e-signature based on a qualified certificate and generated by means of a particularly secure signature creation device. An email or other electronic communication will not suffice to satisfy the "written form" requirement; these are only accepted only where the law requires the so-called text form. This is however not the case for securities transactions.

Luxembourg law

3.13. Electronic signatures are considered to be a valid means of signing private deeds under Luxembourg law. If, however, the validity of the electronic signature—and therefore the validity or enforceability of the contract or its formation—is challenged, the burden of proof will depend on the type of electronic signature used. The Luxembourg Civil Code defines an electronic signature as a set of data, inseparably linked to the deed, which guarantees its integrity, identifies the signatory and expresses their adherence to the content of the deed. In the absence of any additional requirements, the general principles on proof apply according to which the burden of proof that the requirements of the electronic signature are met lies with the person wishing to avail themselves of the signature. The burden of proof is different in relation to a qualified signature as defined by the eIDAS Regulation, which has the same legal effect as handwritten signatures; in the event of a dispute, the party challenging the validity of the qualified signature must prove its invalidity.

3.14. A number of documents cannot, in principle, be concluded electronically including, for example, notarial deeds, contracts transferring ownership of (Luxembourg) real property, contracts which require the intervention of the courts, public authorities or

public officers, guarantees and collateral guarantees provided by non-professional persons. In addition, in relation to those contracts which are required to be kept at the registered office of the company, it is advised that, in addition to the electronic version, to keep a paper version in case the information system hosting the electronic version is temporarily or definitively unavailable. Such paper version would however not be considered an original.

Dutch law

3.15. Under Dutch law, subject to certain exceptions, the intention of a party to enter into an agreement and be bound by the terms thereof can in principle be expressed by a statement in any form. If the agreement is entered into through electronic means, such form could be an electronic signature. There are however certain agreements that are by law excluded from the possibility of being entered into by electronic means and are thus by definition also excluded from the use of electronic signatures. These include agreements for which the law requires the intervention of a court, a public authority or a person whose profession it is to exercise a public responsibility, such as a civil law notary. On the other hand, the use of an electronic signature will essentially be mandatory if it is envisaged to create an electronic deed, as signing is one of the conditions applicable to an electronic deed. For (only) certain types of deeds, Netherlands law prescribes which type of electronic signature is required for such deed to be validly signed electronically. Otherwise, any type of electronic signature may be used, but whether it has the intended legal effect may have to be assessed against the reliability-norm that applies under Dutch law. This norm will be discussed below.

3.16. By virtue of the eIDAS Regulation, a qualified electronic signature will have the same legal effect as a handwritten signature. A simple electronic signature and an advanced an electronic signature can also have the same legal effect as a handwritten signature, but this requires that the method used for signing is sufficiently reliable, taking into account the purpose for which the electronic signature is used and all other circumstances of the case (Article 3:15a of the Dutch Civil Code). Relevant circumstances may include the nature of the agreement and the interests associated with the agreement or the transactions laid down therein. Parties are permitted to (pre-)contractually agree on the (required level of) reliability of the electronic signature used. It is however ultimately up to a Dutch court to assess the effects of such an agreement with a view to the signature's reliability.

3.17. Finally, it should be noted, that the Dutch rules of evidence provide that evidence can in principle be provided by all means, including by mean of electronic records. According to the eIDAS Regulation, an electronic signature shall not be denied admissibility into evidence solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures. Any type of electronic signature or any other electronic record purporting to have similar effect will in principle be admissible into evidence, regardless of whether it satisfies the reliability-norm discussed above, although it will ultimately be up to the Netherlands court to determine its evidentiary value.

4. CONCLUSION

4.1. As set out above, the general rule in relation to electronic signatures is that a signature that purports to bring legal rights into effect will be valid or invalid according to the law of the place where it is made. This paper has briefly surveyed the current state of the law in a number of jurisdictions and has concluded that the law in these jurisdictions supports electronic signatures subject to the specific formal requirements set out at the European level in the eIDAS Regulation and those prescribed in the law of each jurisdiction.

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