

## **PANDEMIC AND RECESSION: WHAT IS A WITNESS WORTH?**

Laws that force parties to congregate to accomplish certain legal actions increase the risk of disease transmission in times of pandemic. Outside of such unique, but not unprecedented, circumstances, compliance with those laws often requires otherwise unnecessary travel. Waste, therefore, arises, and environmental, social, and governance trends including, where applicable, compliance with the Paris Agreement, may be undermined.

Traditionally, witness attestation of legal instrument execution achieves a heightened level of certainty as to the facts asserted in connection with that execution, and laws required witnesses to perform their obligations while physically present with the principals at the time of execution. Some laws may be changing to permit remote witnessing. This article focuses on English and U.S. law due to their prevalent use to govern cross-border commercial transactions.

This article considers: attestations by witnesses (an individual who, ideally, is independent of the principal) of the execution certain kinds of English law deeds; and attestations by notaries in the U.S. (generally, a notary is an impartial individual who has a commission from a particular State to witness the execution of documents). This is appropriate because the processes of both are similar: the witness or notary must observe the principal's execution of a document.

### **Witnesses under English law**

Under English law, principals may execute contracts and deeds electronically. The convenience of electronic execution of some deeds, however, can be frustrated by the requirement that the witness to the execution of the deed be physically present at the time of execution.

Deeds are a form of legal instrument whose validity depends on satisfying certain formalities. Deeds must be used for prescribed reasons, and they may be used to create legally binding agreements. Deeds must be written, and some deeds must be executed in the presence of a witness who performs her obligations by executing a witness block. The purpose of the witness is to attest that the principal executed the deed. Market participants use deeds to form agreements without consideration and, to a lesser extent, because the statute of limitations for breach of contract is twelve years, instead of six years. Deeds are frequently used in commercial transactions to encumber collateral and grant guarantees.

In September 2019, the Law Commission, an independent body that reviews English law and makes suggestions to improve it, published a report reassuring the English bar that electronic signatures on both contracts and deeds are valid. It also endorsed the execution process defined by the Law Society's 2009 guidance, as amended in 2010 (non-binding, but highly persuasive), to facilitate compliance with the *Mercury* decision. With respect to deeds, the Law Commission concluded, among other things, that: *Mercury* deprives parties to English law deeds of the ability to pre-position their signatures; and English law requires the witness to the execution of a deed to be physically present to witness the principal's execution by electronic means. The Law Commission recommended that the Government consider permitting video witnessing by enacting applicable legislation. Subsequent English case law has followed the Law Commission's recommendations. Uncertainty continues, however, because the witness may observe the execution of a deed but complete the attestation at a later time. Since the publication of the Law Commission's report, no further Government action seems to have occurred.



### **Witnesses under U.S. State and Federal Law**

The position of the electronic execution of documents governed U.S. State law (the Uniform Electronic Transactions Act proposed in 1999 formed the basis for the laws of Washington, D.C., Guam, Puerto Rico and all of the States other than Illinois, New York and Washington, which have enacted their own laws) and Federal law (in 2000, Congress passed the Electronic Signatures in Global and National Commerce Act) that are used in commercial transactions is settled. E-notarization and, when authorized, Remote Online Notarization will continue the trend of simplifying the logistics of complying with requirements to facilitate commercial transactions governed by U.S. law.

Before Covid-19, all U.S. States already permitted E-notarization. E-notarization requires the notary and principal to be physically present in the same place; however, the signature and affixing of the notary's seal can occur using tools provided by a digital execution platform. Each State's laws are different, but a notary's presence is generally not required to form commercial contracts. Instead, in the context of a commercial transaction, notaries may witness the execution of documents to render those documents self-authenticating.

As of 2019, twenty-three U.S. States had authorized Remote Online Notarization which permits a notary to perform her obligations remotely by videoconference when the notary and the principal are in different locations. With the advent of Covid-19, in March 2020, a bipartisan bill to authorize every notary in the United States to perform remote online notarization was introduced in the U.S. Senate. This bill is expected to continue through the committee process. At the same time, a number of States have issued emergency legislation to permit Remote Online Notarization.

### **The future belongs to responsive and pragmatic legal systems**

Taking political rhetoric at face value, the world is entering a period of increased balkanization with decreased cooperation. Many countries have entered deep recessions with no certainty as to the timing of recovery. Air travel is expected to be significantly more expensive once it returns. When these issues are considered alongside environmental, social, and governance initiatives, remote execution of cross-border commercial transactions is the only solution that makes sense for the foreseeable future. Legal systems that respond quickly to business concerns by defining flexible and clear rules that business-people can follow with minimal resource utilization will have a competitive advantage in the global marketplace.

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