ABSTRACT

The past decade has seen a rapid pace of development in ecommerce. There is an increased utilisation of internet communication to carry out business transactions and internal management electronically. A considerable portion of business’ communication involves acceptances of legal undertakings and obligations. Traditionally, acceptance of responsibility for certain obligations is indicated by placing a manuscript signature on documents. With the growing use of internet communication to carry out business and internal management, the traditional manuscript signing is now done through electronic signature. This raises concerns pertaining to the capability of the existing laws in accommodating new signature technology, resulting in some business taking a reserved approach in using electronic signatures. This paper examines the extent to which the position under the common law supports the policy accepting the usability of all types of electronic signatures. It attempts to answer whether the signature requirement under the common law poses any obstacles to electronic signatures.

Key words: signature, electronic signature, form requirement.

Introduction


Manuscript signature at common law:

The common law has long resolved that no particular form is necessary for a valid signature. Since Phillimore v. Barry (1818) 1 Camp. 513, a case decided almost 200 years ago, the word signature has been given a loose interpretation (Furmston, 2006, Bradgate, 2003). Signature is not confined to a handwritten name signature, but also includes a printed name and the mark. It has been established in case decisions that a simple initial (Phillimore v. Barry (1818) 1 Camp. 513, Chichester v. Cobb (1866), 14 LT 433), a printed name (Brydges (Town Clerk of Cheltenham) v. Dix (1891) 7 TLR 215), a typewritten name (Newborne v. Sensolid (Great Britain) LD (1954) 1 QB 45), a stamping mark (Baker v. Dening (1838) 8 A & E 94) and the use of words (Cook, In the Estate of (Deceased) Murison v. Cook and Another [1960] 1 WIR 353 with 'your loving mother' as a signature) are all acceptable signatures.

The validity of manuscript signatures could be discerned with reference to the recognised forms of signature as well as through the analysis of the functions of signature. The issue of form was raised in Firstpost Homes Ltd v. Johnson (1996) 13 EGLR 125. The case involved the signing of memoranda of contracts for the sale or disposition of interests in land under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It was held that the signature requirement of section 2(3) of the Act was not satisfied where the purchaser's name had been typed at the top of the letter as addressee and he had not otherwise signed the letter. Counsel for the plaintiff argued that the signature should have been acceptable in terms of its form. The argument was rejected and court emphasised that signature should be understood in the form of a handwritten name signature. The rejection of the writing of the purchaser’s name at the top of the letter as addressee, as signature, was to exclude any extrinsic evidence in determining whether the alleged signatory intended to
authenticate the document. It is not clear if the decision implied that mark signature was equally not acceptable, as mark signature is likely to require extrinsic evidence pertaining to the intention of the alleged signatory as well as his identity. The rejection of mark signature would apparently contradict section 1(4) which clearly accepts a mark as a good signature. Section 1(4) provides:

“In subsections (2) and (3) above "signature", in relation to an instrument, includes--
(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and
(b) making one's mark on the instrument, and "signature" is to be construed accordingly”.

The Court of Appeal decided that the old rules relating to typewritten “signatures” were inapplicable to the LP(MP)A 1989. Lord Justice Peter Gibson took the view that “in modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it” (Firstpost Homes Ltd v Johnson [1995] 4 All ER 355).

The acceptability of a mark signature indicates that court acknowledges that the underlying purpose of signature is to provide evidence of a person’s intention to be bound by what he signs. In determining the validity of the method of signature, courts gave effect to this basic function of signature and did not base their decisions on whether the form of signature used was one which was commonly recognised, such as a handwritten name signature.

The identification function was considered in In re a debtor Ex p. Inland Revenue Commissioners, where the issue was whether a copy of a signature made by a fax machine could amount to a signature for the purposes of the Insolvency Rules 1986. Rule 8.2(3) requires a form of proxy to be signed by the creditor. Laddie J. said:

“...The requirement of signing in r 8.2(3) is to provide some measure of authentication of the proxy form. Of course even if the rule were strictly limited to signature by direct manual marking of the form, the authentication is not perfect. Signatures are not difficult to forge. Furthermore, in the overwhelming majority of cases in which the chairman of a creditors’ meeting receives a proxy form, the form will bear a signature which he does not recognise and may well be illegible. Authenticity could only be enhanced if the creditor carrying suitable identification signed the form in person in the presence of the chairman. Even then there the possibility of deception exists”.

In substance Laddie J. admitted that the purpose of signing was to provide authentication to the proxy form. This purpose could only be realised when the proxy form is signed in the chairman’s presence and the signatory provides evidences of identity. Without these measures, a signature may be vulnerable to forgery. For example a signature could be imitated. Nonetheless, it must be admitted that even the personally made handwritten signature is not absolutely perfect; for example, the chairman may not be familiar with the true handwriting of the signatory. Hence, he said:

“...from the chairman’s point of view, there is nothing about a received fax which puts him in a worse position to detect forgeries than when he receives through the post or by hand delivery a document signed by hand by a person whose signature he has never seen before or one signed by stamping. The reality is that fax transmission is likely to be a more reliable and certainly is a more speedy method of communication than post. It would be a pity if r 8.3 (3) required creditors to convey their views to the chairman by the older, slower and less reliable form of communication”.

Emphasis on the identification function of signature can be seen in Goodman v. J Eban Ltd where the suitability of a rubber stamp as a means of affixing a signature was questioned. It was a case concerning section 65 of the Solicitors’ Act 1932 which requires that a bill delivered by a solicitor to a client be signed. The issue was the acceptability of the signature which had been applied by a rubber stamp rather than by a personal signature. Evershed M.R felt that as a matter of good practice the use of a rubber stamp was undesirable, as that was against the intention of the Parliament. The aim of the Act in requiring the signature was to ensure that the solicitors had personal responsibility in the bill, and as a matter of common sense signature denotes the writing of a name or the name of the firm in handwriting; hence, the use of a rubber stamp was quite improper to effect such a purpose. Despite this view, his Lordship felt that he was not free to depart from the authorities which permitted the use of a rubber stamp as a signature. Denning LJ dissented from the majority judgement, finding that signature should be done in writing or at least a mark made by the signatory’s hand, and not with a rubber stamp etc. The reasoning behind his argument was based on the need to safeguard the authenticity of signature. In this respect he said:

“the virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document. A rubber stamp carries with it no such guarantee, because it can be affixed by anyone. The affixing of it depends on the internal arrangements with which the recipient has nothing to do. This is such common knowledge that a ‘rubber stamp’ is contemptuously used to denote the thoughtless impress of an automation, in contrast to the reasoned intention of a sensible person”.

Denning’s argument demonstrates the need for signature to secure the function of identification as an important function to be recognized. The need for signature to perform this function is especially prevalent in situations without the additional corroboration of a witnessing requirement. A rubber stamp signature identifies
the signatory only through the name and it could possibly be applied by an unauthorised person. Nonetheless, the majority judgement that a rubber stamp constitutes a good signature raises a question as to the extent to which the identification function is required under the common law. The acceptability of a mark as signature in case decisions referred to above also indicates that this function is not necessary for the validity of a signature. The correct view is probably that in general cases, the common law are less concerned to achieve the identification function.

The content authentication function:

In the paper context, the function could be achieved by signing each page. There is no such requirement under the common law that signature is to be applied on each page. In fact, signatures in pencil have been held valid for such important commercial documents as bills of exchange and guarantees. The meaning of signature in terms of the authentication function can only be invoked if relevant laws define the validity of signature in those terms (Reed, 2000), such as the Land Registration Act 2002 which defines signature in the context of electronic conveyancing in terms of the use of certified electronic signatures.

In relation to cautionary function, some attempt to uphold the function may be seen in Denning’s dissenting judgement in Goodman v. J Eban Ltd mentioned above. Denning noted the value of a personal signature which lies in the reasoned attention of the signatory in making the signature. Nonetheless, given the majority judgement in the case, a personally signed document or personal participation of a signatory in the creation of his or her signature is not required at common law. Although the function is desirable, as reflected in Denning’s dissenting judgement, it is less efficient in mass transactions. Given the volume of business, reliance on the ability of human agents to make signatures is no longer practical. The needs of modern day life where signatures may be done in automated form to facilitate voluminous business outweigh and prevail over the insistence on personal participation in the making of signatures as advanced in Denning’s argument in Goodman.

The validity of electronic signatures under the common law:

Analysis of the acceptability of electronic signatures can be made with reference to the loose form of signature and the demonstration of intention function under the common law discussed above. In relation to the form, all types of electronic signature should find no difficulty in being accepted as good signatures, given the recognition of a mark as signature under the common law. With regard to the function of signature in attesting the signatory’s intention, which is stated above to be the function of the signature that the common law is mainly concerned with, all types of electronic signature readily meet this function. The low technology electronic signatures such as the placing of a printed signature on an electronic mail, the typing of a name at the end of a text message, or the clicking of a ‘sign’ button would have the effect of signifying recognition or approval of the contents of the communication. They undoubtedly indicate the manifestation of intention to be bound. Intention is also indicated in the signing of a document via high technology electronic signatures such as by digital signature, where intention is prima facie evidenced by the application of the encryption process. The Law Commission confirmed this point when it came to the conclusion that digital signatures, scanned manuscript signatures, typing one's name (or initials) and clicking on a website button are generally capable of satisfying the main aim of demonstrating and authenticating intention.

As opposed to the other types of electronic signatures, the automatic insertion of a person’s electronic mail address after the document has been transmitted by the sending/receiving of the internet service provider is not a signature, as the insertion of the address is not intended to be a signature. The issue arose in J Pereira Fernandes SA v. Mehta. Court was asked to decide whether an unsigned message sent electronically was sufficient to constitute a note or memorandum of agreement under section 4 of the Statute of Frauds (1677). It was decided that the automatic insertion of the electronic mail address was not a signature as it was not inserted by the sender; hence, there was no accompanying intention. Court held that the inclusion of an electronic mail address in such circumstances was incidental, which was evidenced by its appearance, which was divorced from the main body of the text of the message. Nevertheless court anticipated that it would be possible to construe the automatic insertion as signature if the sender knew that the address would appear on the recipient’s copy. Pelling QC remarked that:

“What is relied upon is an electronic mail address. It is the electronic mail equivalent of a fax or telex number. It is well known that the recipient of a fax will usually receive a copy that has the name and/or number of the sender automatically printed at the top together with a transmission time. Can it sensibly be suggested that the automatically generated name and fax number of the sender….would constitute a signature for these purposes?...The answer depends solely upon whether the sender knew that the number or address would appear on the recipient’s copy”.

It is thought that the qualification represents the correct position. If the sender intended to adopt the content of the document, but left the message unsigned because he knew that the electronic mail address would appear in the receiving computer, and he intended that to be his signature, there would not be any harm in the recognition of the automatic insertion of the electronic mail address as a good signature.

Electronic signatures under the Electronic Communication Act 2000:

The Electronic Communications Act 2000 which came into force on 25 May 2000 was prepared in part in response to the EU Electronic Signatures Directive. It addresses the issues regarding the legal effect and enforceability of electronic signatures. Electronic signatures and the certificates that support them are not to be denied admissibility as evidence in legal proceedings solely on the ground that it is in an electronic form. Section 7(1) states that in any legal proceedings:

“(a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
(b) the certification by any person of such a signature,
shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data”.

The effect of section 7 is that all electronic signatures, the low technologies as well as the high technologies, can satisfy the signature requirement.

Thus the Act does not change the position under the common law with regard to the acceptability of all types of electronic signature.

Electronic signatures under the Electronic Signature Regulations 2002:

The issue is discussed with a view to see the extent to which the Electronic Signature Regulations 2002 recognise the acceptability of electronic signatures. The Regulations have a two tier approach due to its recognition of both electronic signatures and advanced electronic signatures. An electronic signature under the first tier is defined in the Electronic Signatures Regulations 2002 as:

“Data in electronic form which are attached or logically associated with other electronic data and which serve as a method of authentication”.

Electronic signature of the first tier is equivalent to the position under the common law, where the principal function of signature is to demonstrate the intent of the signatory. As far as the recognition of any electronic signature in the first tier is concerned, the Regulations do not bring about any change to the position at the common law pertaining to the capability of electronic signature to satisfy the signature requirement. The definition of signature in terms of the second tier, where the advanced electronic signature seeks to achieve the identification and the authentication functions of signature, constitutes a difference from the common law; the above discussion indicates that the identification and the authentication functions are not at all addressed by the common law. As seen below, the definition of signature in terms of the second tier answers to the needs of internet contracting.

The advanced electronic signature of the second tier is defined as:

“(a) which is uniquely linked to the signatory,
(b) which is capable of identifying the signatory,
(c) which is created using means that the signatory can maintain under his sole control, and
(d) which is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable”.

It may be noted that although the Electronic Signature Directive provides that the advanced electronic signatures are akin to a handwritten signature, the Electronic Signature Regulations 2002 do not yet go this far. The legal effect of electronic signatures, as provided under section 7 of the Electronic Communications Act 2000 only refers to the admissibility of the signature as evidence. Presumably, in the light of the Electronic Signature Directive which assimilates the advanced electronic signatures to handwritten signatures, the advanced electronic signature would likely be given great weight by the courts in the UK.

In contracts of high value, the advanced electronic signature of the second tier may be adopted for contracts via the internet to reduce the risk of forgery. In such contract signatories may well require confirmation of identity by a third party and identification through electronic mail or a web page order form alone may not be sufficient. The Electronic Signature Regulations 2002 seeks to answer to this need of internet contracting through the second tier which requires fulfilment of the two important functions of signature, i.e. identity
identification and content authentication, by means of the advanced electronic signatures. Identification is done by a certification authority and content authentication is achieved through the technical instrument of dual keys. An example of the application of the second tier approach is electronic conveyancing.

The Electronic Signature Regulations 2002 facilitates the fulfilment of the two functions of identification and authentication by setting some uniform standards for certification authorities and by setting uniform requirements for secure signature creation devices. These uniform standards and requirements are spelled out in Annex I and II of the Regulations. The Regulations require certification service providers to ensure the operation of a prompt and secure directory and a secure and immediate revocation service. Service providers are further required to use trustworthy systems and products which are protected against modification and ensure the technical and cryptographic security of the process supported by them. They have to take measures against forgery of certificates and in cases where the certification service provider generates signature creation data, guarantee confidentiality during the process of generating such data. Service providers are further required not to store or copy signature creation data of the person to whom the certification service provider provided key management services, and to use trustworthy systems to store certificates in a verifiable form.

The identification function of the digital signature is achieved through the certification authority, who authenticates the identity of the signatory and certifies that the signature belongs only to the signatory by issuing a secret key which is linked only to a particular signatory. The authentication function, on the other hand, is inherent in the technology of asymmetric cryptography; if anyone tampers with the document, the digital signature will become corrupted or changed and the tampering can be detected.

Concluding remarks:

The common law loosely defines signature as the name and mark signatures. The functional analysis of these two forms of signatures indicates that the common law is merely content with the demonstration of intention function, where signature serves as an instrument to indicate the presence of intention. The identification and the authentication functions would be relevant if the law defines signature in that manner, as with the case of the Land Registration Act 2002.

This paper demonstrates that the signature requirement under the common law by and large does not pose obstacles to electronic signatures. This is because the common law’s definition of signature in terms of the name and the mark is solely concerned with the demonstration of intention function of signature, and such function is capable of being met by all types of electronic signature.

The capability of all types of electronic signature to satisfy the signature requirement is not affected by the coming into force of the Electronic Signature Regulations 2002. All electronic signatures including the low technologies, i.e. the typing of a name, the clicking of a button and the scanned manuscript signature, would qualify as signatures under the first tier of the Regulations, and they would be valid signatures in so far the legislation or parties do not require the use of the advanced electronic signatures. When the advanced electronic signatures are required, the requirement would only be satisfied by the high-technology electronic signatures.

References