

# The use of digital contracts and electronic signatures in the British Virgin Islands

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The enforceability of digital contracts and electronic signatures (e-signatures) in the British Virgin Islands (BVI) is presently governed by the Electronic Transactions Act 2001 (the Act).

The Act expressly states that "*information shall not be denied legal effect, validity or enforceability on the sole ground that:*

- (a) *it is in the form of an electronic record; or*
- (b) *it is not contained in the electronic record purporting to give rise to such legal effect, but it is merely referred to in that electronic record."*

'Electronic record' is defined under the Act as information generated, sent, received or stored by electronic means including electronic data interchange, electronic mail, telegram, telex or telecopy.

## Formation of a Contract

The Act provides that, unless otherwise agreed by the parties, an offer or the acceptance of an offer may, in relation to the formation of a contract, be recorded by electronic means.

Provided that the relevant documents meet the requirements of a binding contract under BVI law, the use of electronic records does not affect their legal effect, validity or enforceability as a contract.

## Electronic Signatures

The requirement for a signature (or seal) on a document can be satisfied by means of an electronic signature, provided that the electronic signature:

- adequately identifies the signatory;

- adequately indicates the signatory's approval to the information to which the signature relates or, in the case of the witnessing of a signature or seal, that such signature or seal has been witnessed; and
- is as reliable as is appropriate, given the purpose for which, and the circumstances in which, the signature is required; and
- has been consented to by the recipient of the information to which the signature relates (and the electronic signature of each witness (if any)).

An electronic signature is presumed reliable if:

- the means of creating the electronic signature is linked to, and under the control of, the signatory and no other person; and
- any alteration to the electronic signature made after the time of signing is detectable or, where the purpose of the signature is to provide assurance as to the integrity of the information, any alteration to that information after the time of signing is detectable.

## **Scope of the Act**

### ***Exclusions***

The Act does not apply to any rule of law requiring writing or signatures for any of the following:

- the creation, execution or revocation of a will or testamentary instrument;
- the conveyance of real property or the transfer of an interest in real property;
- any other thing required to be done by deed.

### ***Territorial***

The Act's territorial scope is not expressly confined to the BVI and so a party to a document does not need to be located or incorporated in the BVI at the time of execution for the Act to apply. For the purposes of BVI law, the provisions of the Act will apply to the execution of a contract governed by BVI law, irrespective of the location or incorporation of the parties. It will, however, be necessary to ensure that the law of the place of a company's incorporation permits electronic signatures and doesn't contain restrictions on the scope of documents that can be signed by electronic signature.

In the event that a document is governed by foreign law, but the statutory provisions of the foreign jurisdiction provide that the execution formalities of the jurisdiction of incorporation of the relevant company shall be followed in order to be valid, then the Act shall apply to the execution of such a document by a BVI company. In the case of a deed a BVI company will be required to apply a wet signature.

It should be noted that S103(4C) of the BVI Business Companies Act 2004 may allow a previously wet inked signature page to be validly electronically attached to a final document (whether or not a deed) under the appropriate authority of the executing BVI company.

### ***Further considerations***

Generally, an electronic signature will be effective to conclude a contract provided that:

- it is applied with the requisite intent and appropriate authority;
- in respect of a legal entity, there are no restrictions on the use of electronic signatures in its constitutional documents;
- as stated above, the law of the place of a company's incorporation permits electronic signatures; and
- there is nothing in the contractual terms that prohibits electronic signatures.

It is anticipated that the Act will be repealed and replaced later in 2020 by a new Electronic Transactions Act, with more modernised provisions, recognising and embracing new technological developments in digital transactions. The new act will only enhance the acceptance and use of electronic signatures and digital contracts under BVI law.

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## Meet the Author



Nicholas Burkill

Partner

British Virgin Islands

E: [nicholas.burkill@ogier.com](mailto:nicholas.burkill@ogier.com)

T: +1 284 852 7372

## Key Contacts



Michael Killourhy

Partner

British Virgin Islands

E: [michael.killourhy@ogier.com](mailto:michael.killourhy@ogier.com)

T: +1 284 852 7309



Brian Lacy

Partner

[British Virgin Islands](#)

[Jersey](#)

E: [brian.lacy@ogier.com](mailto:brian.lacy@ogier.com)

T: [+44 1534 514493](tel:+441534514493)

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