Twitter Thread by Jack Shepherd



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Law society published some guidance recently on e-signatures...https://t.co/g70MUWg6K0 - some thoughts and comments...

■■■ Witnessing...they conclude that witnesses have to be "physically present" and you cannot witness somebody by video link. Probably correct as a matter of case law. It's a shame they aren't more forceful in their urge for change here...

The point in witnessing has always been evidential. So that if one person claims they didn't actually sign a document, you have somebody you can call upon to attest evidence that they did or did not. Also adds some formality to the process to make people think

When you're using e-signature, people's email addresses are being put into a system. You also have IP addresses, geolocations, timestamps all recorded when people actually go on to sign the document. Doesn't this add quite a lot of evidential value?

Physical presence would help avoid a scenario where somebody gains access to somebody else's email account, signs a document and then gets somebody to witness. If that witness were virtual, they wouldn't see the mischief that has occurred...is this not quite a remote risk though?

I'd love to have seen people go further and conclude that with e-signature platforms, witnessing is only really a secondary form of evidence and we should consider ditching the requirement altogether when e-signatures are used...probably issues there outside the commercial world

■ Digital certificates..."[an e-signature platform] is evidentially strong as it is secure, resilient to fraud, and typically generates a tamper-proof completion certificate containing the signing information at the end of the process"

There still seems to be loads of people trying to encourage the use of QES and AES in commercial transactions because it increases security...personally I am completely against that, for two reasons...

First, in #biglaw transactions (different in other contexts perhaps, but am still doing research here), evidence has never been a problem. I've never come across a signatory who refutes that they signed a document...probably because law firms get client sign offs before release

Second, documents often require many many signatories, and documents are negotiated right down to the wire under huge time pressure. It's not always practical to wait until the document is final before sending through an e-signature platform...

...so most of the time, all people want is a way of *collating* signatures and running the signing *process* more efficiently, rather than having more evidential weight to solve a problem they don't believe exists...

Third, it's too much for people to get their heads around. Some jurisdictions require QES and AES. Whenever I have explained what this means and how to do it through a platform, they usually say "sounds too complicated, I'm just going to do pen and paper". I don't blame them.

✍■ Methods of signing. It is GREAT that the report talks about other ways of signing other than e-signature platforms. You might not actually need the powerhouse of an e-signature platform if you don't do signings that often

Too often I find people think e-signature = DocuSign = e-signature. That's not the case. There are other ways of doing e-signature, like using an iPad, using built in tools in PDF Readers etc. Those might do the job perfectly well.

■ Process. This was a great opportunity for the law society to lay out best practice when using e-signature platforms and answer the more practical questions. Most law firms have probably got their heads around the legal issues of e-signature by now...

What lawyers are crying out for is guidance on how to use the tools available...what kind of situations require an e-signature platform? can you date things through an e-signature platform?

...what if you need to make small amendments to the PDF afterwards, and corrupt the digital certificate? Does one law firm take control of the platform, or does everybody use individual platforms and combine into one afterwards? (etc).

These are the real questions that bother people, and a lack of answers to them leads to a lack of adoption of e-signature technology. And usually it's a "lowest common denominator" kind of issue, where it only takes one law firm in the process to raise a silly query...

Lots of room for improvement here and collaboration between law firms in terms of how they conduct signings and closings in practice...hopefully we will see a bit more of that to give comfort to the individuals who have to actually run signing processes on the ground...