



# FIVE THINGS TO KEEP IN MIND WHEN CONCLUDING CONTRACTS IN THE AGE OF TECHNOLOGY

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In today's digital-first economy, technology is not just a business enabler – it's the backbone of operations, communications, and innovation. As technology continues to transform how businesses operate, it is also reshaping the legal landscape – specifically how and where contracts are being concluded and enforced. Disputes regarding breach of contract, specifically contracts not concluded in the traditional manner, are on the rise and are presenting increasingly complex challenges that test the boundaries of existing legal frameworks.

Below, we will briefly explore how the legal concept of breach of contract is adapting in response to modern technologies, and how businesses can better protect their interests in a rapidly changing digital landscape.

At Spencer West LLP, we can assist with any issues that businesses might have in respect of the above as we have a multidisciplinary team, with dedicated experts who focus on contract law and dispute resolution. We work closely with clients to proactively manage risk, resolve disputes efficiently, and stay ahead of legal developments in the tech sector.

## CONTENTS

- ★ E-Signing Contracts: Legal Validity, Risks, and Best Practices for Businesses
- ★ Technical Performance and Cybersecurity Failures as a Breach of Contract
- ★ How Businesses Can Mitigate Risk

## E-SIGNING CONTRACTS

The way in which contracts are entered into has changed dramatically and electronic signatures / e-signing of contracts have become the norm rather than the exception. While the convenience is self-evident, the legal validity and risks involved must be kept in mind.

In this section, we will explore the following in respect of e-signing contracts, specifically in relation to English law:

- ★ Legal Validity
- ★ Risks
- ★ Best Practices for Businesses

### Legal Validity and Risks

Provided certain conditions are met and there are no exceptions to the document being signed, e-signing is legally recognised and enforceable under English law.

E-signing is primarily governed by:

- ★ The Electronic Communications Act 2000
- ★ The Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market
- ★ The Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019
- ★ The Electronic Identification and Trust Services for Electronic Transactions Regulation 2016 (2016 No.696)

Although legally recognised, just as a wet ink signature, an e-signature can be challenged based on, inter alia, the following:

- ★ Did the person who signed actually have authority?
- ★ Was the signature obtained through fraud, duress, or error?
- ★ Is there an audit trail proving who signed, when, and how?

Businesses can also run into some issues if a document is e-signed, but the process followed or the e-signatures are non-compliant with the requirements of the industry best practices / the above legislation / regulations.

## Best Practices for Businesses

E-signatures can take a number of different forms, including:

- ✦ Typed in name
- ✦ Inserting a signature image
- ✦ E-signing platform signature
- ✦ Touchscreen signature using a stylus or finger to sign
- ✦ Clicking an “I accept” or “I agree” button on a website

Some contracts may not be suitable for e-signing due to legal or regulatory requirements. In order to protect your business, it is imperative to confirm whether contracts may be executed electronically or whether it must be executed in physical form, especially in cross-border transactions.

To further protect your business and ensure enforceability:

- ✦ Verify the identity and the authority of the signatory before signing
- ✦ Verify that the the signatory intended to authenticate the document being signed
- ✦ Be clear in the contract terms that e-signing is acceptable and enforceable
- ✦ Choose a reputable e-signing platform with secure authentication and time-stamped audit trails, such as DocuSign or Adobe Acrobat Sign
- ✦ Use an “advanced electronic signature” which meets the following requirements:
  - ✦ it is uniquely linked to the signatory
  - ✦ it is capable of identifying the signatory
  - ✦ it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under their sole control
  - ✦ it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable
- ✦ Maintain detailed records of all electronically signed documents
- ✦ If a witness is required, the witness must still be physically present when the document is signed, even in the instance where it is e-signed

## BREACH OF CONTRACT

The way in which contracts can be breached has changed dramatically and provision needs to be made for breaches involving tech failures and cybersecurity issues.

In this section, we will explore the following in respect of e-signing contracts, specifically in relation to English law:

- ★ Technical Performance as a Breach of Contract
- ★ Cybersecurity Failures as a Breach of Contract

### Technical Performance and Cybersecurity Failures as a Breach of Contract

In tech-based agreements, breaches may not involve a party's direct action or inaction, but rather a system's failure – such as downtime, data loss, or other technical errors not necessarily caused by human error.





Examples of tech related breaches include:

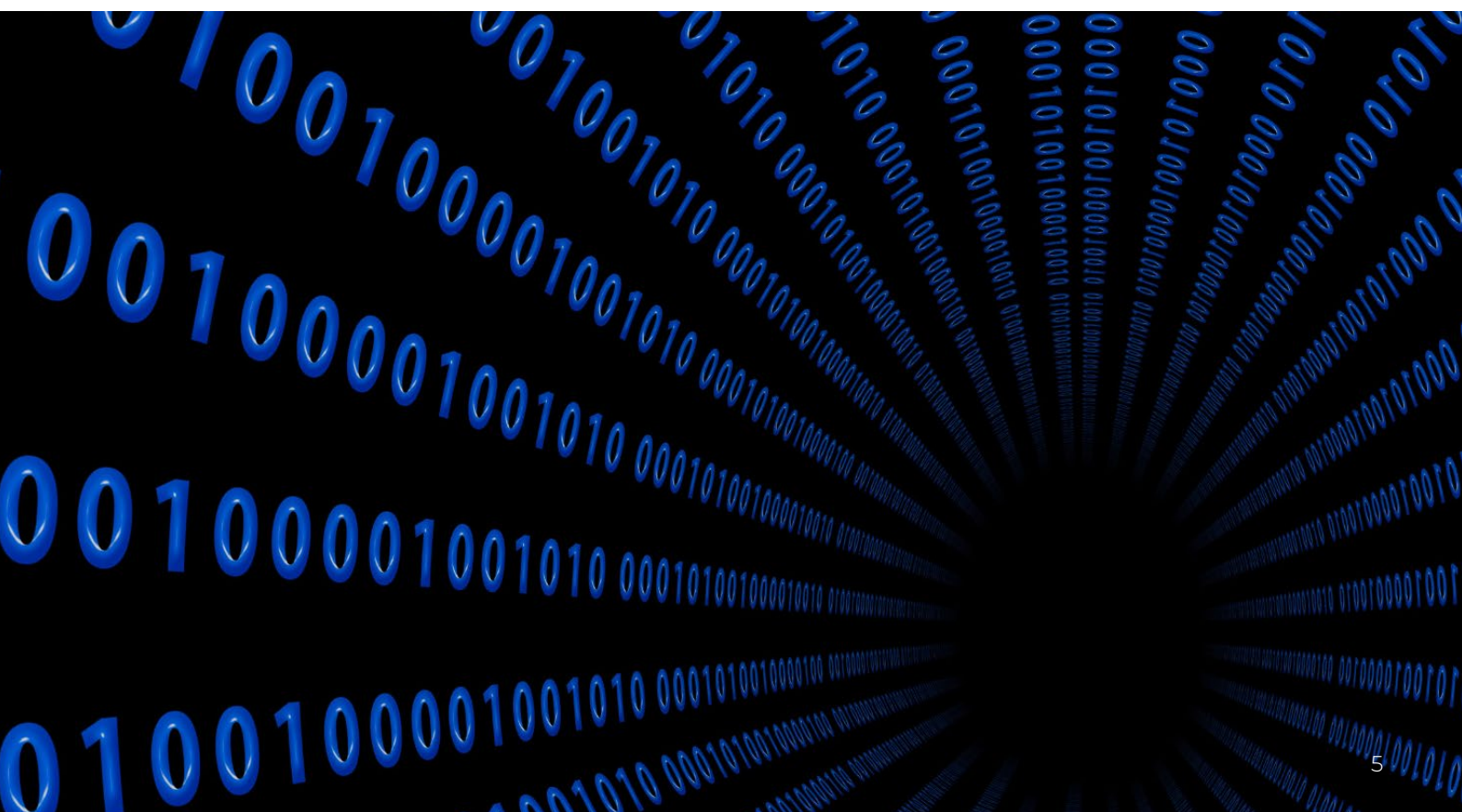
- ✧ Excessive downtime and failure to meet uptime guarantees under a Service Level Agreement
- ✧ Loss of client data / other data due to inadequate security protocols / inadequate back-up systems
- ✧ Software bugs that impact end-user functionality

With rising cyber threats, many commercial agreements now include data protection obligations, including compliance with data protection laws and regulations. Failure to implement appropriate cybersecurity measures can give rise not only to regulatory penalties but also to contractual liability

Examples of cybersecurity breaches include:

- ✧ Data breaches due to inadequate encryption, compromising client data / other data
- ✧ Lack of response / delayed response to incidents of data breaches

Proving a breach in such cases often poses difficulties as it requires expert technical evidence and careful contract drafting to define metrics, service levels, data protection, incident response protocols and remedies – it is thus imperative to ensure that tech-based agreements contain specific clauses addressing the above.



## MITIGATION OF RISKS

To navigate the evolving landscape of breach of contract in tech-related matters, it is imperative for business to mitigate their risks

The following can be implemented to mitigate such risks:

- ★ Draft precisely: Use clear, tech-savvy language that anticipates performance failures
- ★ Define breach triggers: Establish measurable standards for performance, security, and availability
- ★ Clear scope and deliverables: Define detailed services, products, milestones, and deadlines, include change management procedures for scope changes
- ★ Indemnity and liability clauses: Cap liability and include mutual indemnity
- ★ Data protection and privacy: Add data handling, storage, and access control, include data breach notification obligations, ensure that data is processed in line with all applicable laws
- ★ Service levels and supports: Include uptime commitments, response times, and penalties, specify maintenance windows and downtime allowances
- ★ Third-Party dependencies: Disclose third-party services, ensure back-to-back obligations and include contingency plans
- ★ Include escalation and dispute resolution mechanisms: Particularly for cross-border transactions
- ★ Plan for enforcement: Choose appropriate governing law and jurisdiction clauses



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## CONTACT US

If you are facing a tech-related contract dispute, or want to future-proof your agreements, contact Spencer West LLP for strategic legal support tailored to your needs and the digital age.



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