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CORONAVIRUS: THE U.S. LEGAL FRAMEWORK SUPPORTING THE VALIDITY OF ELECTRONIC SIGNATURES

International businesses have been adopting technology in many aspects of their transactions to efficiently use their time and resources. This includes seeking to execute documents using electronic signatures. For parties to agreements with U.S.-based counterparties proposing to use electronic signatures, this article provides a brief overview of the legal regime applicable in the United States, generally, and in Delaware and New York, in particular. In addition, it provides practical guidance regarding the use of electronic signatures in the United States.

Highlights

- U.S. law broadly recognizes electronic signatures as valid and equivalent to manual signatures, with limited exceptions – most of which are of limited relevance to business transactions.
- "Electronic signature" is broadly defined in a technology-neutral manner.
- When all parties are business entities, consent to conduct a transaction via electronic means may be implied based on the facts and circumstances surrounding the transaction, and need not be express.
- Electronic signatures and records are generally admissible as evidence in Delaware and New York courts, subject to compliance with applicable rules of evidence.
- A Delaware business entity generally can use electronic signatures, unless the entity's organizational documents expressly prohibits their use.

LEGISLATIVE FRAMEWORK

In general, documents and records can be executed by electronic signatures in the United States. The Electronic Signature in Global and National Commerce Act ("ESIGN") took effect on October 1, 2000.[1] ESIGN is a federal law that generally permits electronic signatures in all U.S. states, with limited exceptions. ESIGN allows U.S. states to enact their own laws with respect to electronic signatures provided that such laws are consistent with ESIGN. Delaware, along with most other U.S. states (excluding New York, Illinois and Washington), have enacted the Uniform Electronic Transactions Act ("UETA"),[2] which provides substantially the same rules as ESIGN. Rather than UETA, New York has adopted the Electronic Signatures and Records Act ("ESRA").[3]

U.S. Federal Law – ESIGN

The basic principle of ESIGN is that electronic signatures and records are accorded equal status as manual signatures for transactions in or affecting interstate or foreign commerce. Under ESIGN:

1 15 U.S.C. § 7001 et seq.
2 Del. Code tit. 6, §§ 12A-101 – 12A-117.
3 NY State Tech L §§ 301 – 309.

- A document or signature may not be denied legal effect, validity or enforceability solely because the document is in electronic form.[4]
- Any law requiring a written record is satisfied by an electronic record.
- Any law requiring a signature is satisfied by an electronic signature.

Generally, parties must agree to conduct the transaction through electronic means. Consent to conduct one transaction electronically does not prevent a party from refusing to conduct a subsequent or separate transaction electronically. In business-to-business transactions, the agreement of a party to conduct a transaction electronically may be implied from the facts and circumstances surrounding the transaction and can be memorialized in an express statement of intent. For consumer transactions, ESIGN requires heightened consent requirements, for instance affirmative consent of the consumer and provision to consumers of a specific set of disclosures.

ESIGN does not apply to certain specific and limited documents, most of which are of limited relevance to corporate transactions, such as the execution of wills, codicils or testamentary trusts, foreclosure or default notices, court orders or documents, product recalls, and safety notices.[5] In addition, ESIGN excludes from its scope contracts or records that are governed by the Uniform Commercial Code ("UCC") of any state, other than Article 2 (sale of goods) and Article 2A (leases of goods). The UCC variants in effect in most states, however, permit the use of electronic signatures and records in many cases, such as for security agreements and letters of credit. While Article 3 of many states' UCCs could pose issues for executing negotiable instruments electronically, ESIGN provides that promissory notes relating to loans secured by real estate may be executed electronically as "transferable records" if they meet certain conditions.[6]

Delaware – UETA

Delaware is a popular state for incorporating or organizing a business entity, in part because this state's specialized Court of Chancery is highly regarded for its expertise in adjudicating corporate disputes. Delaware, like many other U.S. states, has adopted UETA. Much like ESIGN, UETA adopts the principle that electronic signatures and records should be accorded the same legal status as manual signatures and paper records. UETA differs from ESIGN in a few areas, including requiring less rigorous notice and consent procedures for electronic transactions with consumers and establishing rules for attribution and determining when an electronic record has been sent and received. It provides a slightly broader definition of "transferable records" than that provided by ESIGN.[7] Further, unlike ESIGN,

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4 Under Federal Rules of Evidence, electronic evidence is admissible if it complies with traditional evidentiary principles, *i.e.* it must be relevant, authenticated, and not subject to exclusion on hearsay or other grounds. See Lorraine v. Markel Am. Ins. Co., Inc., 241 FRD 534 (D. Md. 2007). *See also* Fed. R. Evid. 902(13) (a record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person, is self-authenticating and requires no extrinsic evidence of authenticity in order to be admitted); Fed. R. Evid. 803(6) (hearsay exception for business records).

5 15 U.S.C. § 7003. While ESIGN allows electronic transactions to be legally enforceable between the parties, many real estate transaction documents are still required to be recorded with local offices so as to create rights with respect to third parties. In order to address such requirements, many states including Delaware and New York have adopted the Uniform Real Property Electronic Recording Act ("URPERA") to permit the electronic signature, filing and recordation of real estate documents.

6 15 U.S.C. § 7021.

7 UETA § 116 ("transferable records" may include any UCC Article 3 note, not just those relating to loans secured by real estate, as well as documents of title under UCC Article 7).

UETA expressly provides for the admissibility of an electronic record or signature as evidence.[8]

In addition to exclusions that largely overlap with those under ESIGN, Delaware's UETA does not apply to transactions governed by the Delaware General Corporation Law (the "DGCL") and Delaware's alternative entity statutes (for instance the Delaware Limited Liability Company Act). In 2019, the Delaware legislature passed a number of amendments to the DGCL and Delaware's alternative entity statutes to establish non-exclusive safe-harbor methods for execution and delivery of electronic documents and records.[9] These amendments clarify the UETA's relationship with the DGCL and Delaware's alternative entity statutes. With respect to transactions governed by any of these Delaware statutes, such statutes – rather than UETA – govern the use of electronic signatures and records. Accordingly, merger agreements, purchase agreements, stockholders agreements, limited liability company agreements, partnership agreements, board, shareholder or member consents may be executed by means of electronic signatures, unless the use of such signatures is expressly prohibited under the organizational documents of the relevant entity.

New York – ESRA

New York is frequently chosen as the governing law for commercial agreements because of this state's well developed body of commercial law and a permissive choice of law statute.[10] While New York has not adopted UETA, ESRA similarly provides that electronic signatures and records have the same force and effect as ink signatures and paper records unless otherwise specifically provided by law (for example, by the New York UCC).[11]

Also similar to UETA, ESRA specifically provides that electronic signatures and records are admissible in a court of law, subject to compliance with the New York rules of evidence.[12] Further, New York courts have confirmed that electronically signed documents can be used to satisfy requirements imposed by the New York General Obligation Law that certain agreements be memorialized by a signed writing.[13]

PRACTICAL GUIDANCE REGARDING ELECTRONIC EXECUTION

ESIGN, UETA and ESRA all provide the same broad definition of an "electronic signature":[14]

> *"An electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."*

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8 Del. Code tit. 6 § 12A-113.
9 *See* Delaware Senate Bill Nos. 88 and 89 (June 19, 2019).
10 NY GOL §5-1401 (parties to a contract that involves at least $250,000 may select New York law to govern their rights and duties under such contract, without requiring any other connection to New York).
11 NY State Tech L §§ 304(2), 305(3).
12 NY State Tech L § 306.
13 *See, e.g.,* Naldi v. Grunberg, 80 A.D.3d 1, 11 (N.Y. App. Div. 1st Dept. 2010) (holding an email to be capable of satisfying the statute of frauds contained in New York General Obligations Law § 5-703); Newmark & Co. Real Estate Inc. v. 2615 East 17 Street Realty LLC (N.Y. App. Div. 1st Dept 2011) (holding an email to be capable of satisfying the statute of frauds contained in New York General Obligations Law § 5-701).
14 15 U.S.C. § 7006; Del. Code tit. 6 § 12A-102; NY State Tech L § 302.

This definition is technology-neutral and affords the parties to a transaction great flexibility in selecting an appropriate electronic signature solution. There is no prescribed form that electronic signatures must take in order to be valid. For example, New York courts have held that contracts executed by Docusign,[15] .pdf scans of wet-ink manual signatures,[16] facsimile,[17] and even email[18] were validly signed.

This definition provides **intent** as a key requirement for electronic signatures. Failure to establish intent to sign would mean that while an electronic record may exist, such record was not properly executed or adopted. As a result, the agreement it purports to memorialize would not be enforceable.[19] Additionally, the ability to securely retain and accurately reproduce both the electronic signature and the agreement to which such signature is associated is important to an agreement's enforceability in court.[20]

Agreements between sophisticated parties often include a provision confirming that the exchange of electronic signature pages (or .pdf or facsimile reproductions of executed signature pages) is sufficient for execution in the "Counterparts" (or other similarly captioned) section of the agreement. Such provisions are helpful to establish intent to sign electronically. If parties to an agreement omit such a provision, however, intent to execute the agreement electronically may still be inferred based on the facts and circumstances surrounding the transaction.

It is also common in the United States for parties to share electronic copies of their signature pages in advance of the execution of transaction documents between outside counsel, with the specific proviso that they are to be held in escrow pending release. Once the parties agree that all documents are ready for release, the parties can mutually release their signature pages, thereby manifesting the intent that their respective electronic signatures be "attached to or logically associated with" the transaction documents. Upon release of such signature pages, the signed execution copies (i.e., the executed signature pages together with the full text of the relevant transaction documents in .pdf form) are circulated to and retained by all relevant parties for record keeping purposes.

Certain business transactions may require the verification of signatures and the signatories who are authorized to execute the related documents. While manually signed incumbency certificates have customarily been used in the United States for such purpose, software solutions for electronic signing can potentially perform a similar function through the use of encrypted digital certificates that authenticate the signer, audit trails that log the precise circumstances of the signing, and other similar security features.[21]

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15 ADHY Investments Properties, LLC v. Garrison Lifestyle Pierce Hill LLC, 41 Misc.3d 1211(A) (Sup. Ct. New York Cty. 2013).

16 *See, e.g.,* Ceglia v. Zuckerberg, 2013 WL 1208558, at *4-6, *16, *73 (W.D.N.Y. Mar. 26, 2013) (holding a contract with a handwritten signature, later scanned and emailed as a .pdf file, to be valid)

17 *See, e.g.,* People v. Johnson, 31 Misc.3d 145(A) (Sup. Ct. App. Term 2011) (holding that a police officer's electronic facsimile signature was valid and admissible in court).

18 *See, e.g.,* Naldi v. Grunberg, *supra.*

19 Solartech Renewables LLC v. Vitti, 66 N.Y.S.3d 995 (3d. Dept. 2017) (finding that intent to sign was absent where a party declared in an email that it was "prepared to accept the terms of [the] offer" and enclosed a side letter with only a blank, un-signed signature line, underneath which the party's name was typed).

20 15 U.S.C. § 7001(d); Del. Code tit. 6 § 12A-112.

21 If an agent is placing an electronic signature through a dedicated electronic signature software platform on behalf of an authorized signatory, such agent generally requires proper authorization. *See* ADHY Investments Properties, LLC, *supra*.

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A number of software solutions for electronic signing are available to expedite execution arrangements, but parties should be familiar with such platforms and ensure that the software solution they adopt satisfies the applicable legal concerns. By utilizing a format that meets the parties' cyber security needs, employing language of intent and keeping proper records, parties conducting transactions electronically can optimize the effectiveness as well as enforceability of electronic documents.

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