

## How to Duly Execute Contracts in a Remote Working Environment

***Permissibility of electronic signatures often depends on the governing law and subject matter of the contract.***

Dramatic changes in working patterns are underway in the United States and around the world, with public health considerations amid the COVID-19 outbreak leading nearly every large business in the US to implement remote work environments. For financial institutions and other enterprises seeking to continue operations, the rapid, widespread change from working in an office atmosphere to dispersed home office and other locations poses challenges to processes previously taken for granted. One of those processes is contract execution.

Contract execution is how a handshake deal is transformed into a legally binding agreement. Lawyers typically handle contract execution without much discussion or legal analysis. But a seamless process of contract execution is based on most of the relevant parties operating under normal conditions, which may not be the case in the United States and much of the world in the near future. This *Client Alert* addresses considerations for executing contracts if parties cannot access customary office infrastructure.

### How do parties customarily execute a contract?

Traditionally, parties indicate their consent to a contract by manually signing in the presence of the counterparty, with each party retaining a fully executed copy for their records (the “wet ink” approach). This approach ensures that neither party can later challenge the formation or enforceability of the contract by claiming that it was someone else that signed (*i.e.*, that the contract had not been “duly executed”). This approach has the drawback of requiring the counterparties to convene in the same physical space or mail physical signed copies over distances, which has become particularly problematic as commercial transactions became more global.

For significant commercial and financial transactions, the wet ink approach has in many cases been supplanted in recent years by parties manually signing, scanning, and emailing a signature page to be affixed to a contract once in final form (the “sign and scan” approach). Parties have come to rely on email delivery as sufficiently ensuring the fidelity of a signature page to its purported author, notwithstanding risks of email fraud. The sign and scan approach facilitates efficient global transactions with the minimal logistical burden of access to equipment common in most modern offices: a printer, a pen, and a scanner.

But in some cases, even access to these rudimentary tools cannot be assured, such as when large parts of the workforce work remotely — creating potential challenges for executing commercial and financial contracts.

## What are the other options to duly execute a contract?

There are several common alternatives to manual signature, including, but not limited to DocuSign, inserting an image of a manual signature, and typed signatures.

- DocuSign involves a third-party application collecting signatures from the parties and storing a retrievable version of the fully executed document. DocuSign requires signatories to input identifying information and indicate their consent to be bound online, providing support in the event of a subsequent challenge to due execution.
- Inserting an image of a manual signature into a document can be done through multiple document editing applications, but does not require that a signatory confirm their identity in applying the signature image.
- Typed signatures involve a signatory typing their intention to be bound by a contract over email or other electronic communication platform.

The above are examples of “electronic signature,” which is defined broadly to include any “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.” Although options for electronic signature are evolving rapidly, DocuSign (or alternatives with similar indicia of reliability) is a preferred option at this time for purposes of obtaining “due execution” legal opinions.

## Are electronic signatures sufficient to duly execute an enforceable contract?

The efficacy of an electronic signature depends on several factors, including the law governing the contract, the terms of the contract itself, the subject of the contract, and where the contract is to be filed (if applicable).

- **What law governs?** To determine whether electronic signature is sufficient to duly execute, the first question is what law governs that determination. In the United States, due execution is ordinarily a question of state (not federal) law; however, the federal Electronic Signatures in Global and National Commerce Act (ESIGN) may preempt state law in many states with respect to electronic signatures. Due execution is generally a combination of the law governing the contract and, to the extent that the signer is executing on behalf of an entity, the law governing the internal affairs of the entity. Most significant commercial and financial contracts include a clause specifying which state’s law will govern (e.g., this contract will be governed by the law of New York). The law in all states (either as a result of that state’s law or as a result of ESIGN) is that contracts generally cannot be denied legal effect due to the use of electronic signatures.<sup>1</sup> The precise scope of this rule depends on the individual state, but in each case the rule is limited and subject to certain exceptions, as further discussed below.
- **What does the contract say?** In cases in which applicable law would otherwise permit electronic signatures for the contract in question, parties retain the freedom to accept electronic signatures or require traditional wet ink signature and, accordingly, the parties should specify in their agreement whether electronic signature constitutes due execution. The parties can do so by including within the

contract an agreement that electronic signatures and records have the same legal effect as manual signatures and paper-based recordkeeping systems.

- **What is the subject matter of the contract?** The legal status of electronic signatures varies depending on type of transaction being effectuated by the contract.
- **Will the contract be filed with a governmental office?** Different filing destinations have different requirements as to whether electronically signed documents will be accepted for filing or recordation.

## What is the subject matter of the contract?<sup>2</sup>

### US federal law

Although due execution and enforceability of contracts are traditionally governed by state law, E-SIGN established a nationally applicable baseline from which states were permitted to deviate under some circumstances. E-SIGN defers to state law where that state has enacted either (1) the uniform version of the model Uniform Electronic Transactions Act (the UETA) (discussed below) or (2) specifies alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures that are consistent with E-SIGN and such alternative procedures or requirements do not accord greater legal status or effect to specific technology or technical specifications.<sup>3</sup> E-SIGN would preempt and govern in the event of inconsistent state law.

By its terms, E-SIGN does not apply to any transactions governed by the Uniform Commercial Code (the UCC) other than:

- Transactions for the sale of goods that would be governed under Article 2 of the UCC
- Creating leases that would be governed under Article 2A of the UCC
- Waiving rights after a contractual breach by a counterparty

E-SIGN also excludes from its coverage official court documents (including briefs, pleadings, and other writings in connection therewith and various consumer-related matters, including testamentary matters, family law, and certain notices relating to utilities and insurance.

### New York state law

To the extent not preempted by E-SIGN, the use and validity of electronic signatures under New York law are governed by the New York State Signatures and Records Act (the ESRA) and regulations promulgated thereunder.

The ESRA permits electronic signatures to be used for all subject matter contracts other than:

- Certain estate planning documents, appointments of fiduciaries, and certain health-care related consents
- Instruments of title (e.g., promissory notes, certificated securities, and tangible chattel paper) wherein possession of the instrument is deemed to confer title (see below regarding real estate mortgages and security agreements), unless an electronic version of such record is created, stored, or transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable version that cannot be copied except in a form that is readily identifiable as a copy

While the above would not permit electronic signatures for promissory notes governed by Article 3 of the UCC, the ESRA does not have the same broad exclusion for matters governed by the UCC that ESIGN and the UETA have.

### **State laws based on the UETA**

The UETA is a model law promulgated by the Uniform Law Commission that has been enacted with some variations in Washington, D.C. and all states, other than the states of New York, Illinois, and Washington.

Laws based on the UETA have the same exclusions as ESIGN for matters governed by the UCC and testamentary matters. Unlike ESIGN, the UETA also excludes transactions subject to the Uniform Computer Information Transaction Act, which has been enacted in only Maryland and Virginia.

How states enact the UETA may differ, and parties should review the specific implementing laws and regulations for each state. In particular, California has several non-uniform exceptions primarily with respect to consumers. To the extent that a particular state's version of the UETA is non-uniform, it is unclear the extent to which it may be preempted by ESIGN as case law interpreting ESIGN's preemption is sparse.

### **State laws based on the UCC**

Another model law enacted in most states, the UCC, includes several articles with provisions specifying the validity of electronic signatures in circumstances where the UETA-based law does not apply. These include:

- Article 9 of the UCC governing secured transactions, Article 5 governing letters of credit, and Article 7 governing documents of title, each of which has provisions that **do** permit electronic signatures
- Article 3 of the UCC governing negotiable instruments, which has provisions that **do not** permit electronic signatures

### **Illinois**

The use and validity of electronic signatures under Illinois law are governed by Illinois Electronic Commerce Security Act (the ECSA).

The ECSA permits electronic signatures to be used for all subject matter contracts other than instruments of title wherein possession of the instrument is deemed to confer title, unless an electronic version of such record is created, stored, or transferred in a manner that allows for the existence of only one unique, identifiable, and unalterable version that cannot be copied except in a form that is readily identifiable as a copy.

### **Where is the document being filed?**

For documents that are required to be filed or recorded with a governmental authority, the best practice is to continue to follow the wet ink approach to the extent the applicable recording destination so requires. In this regard, the UETA gives governmental authorities complete control over when electronic records and signatures may be used in documents filed with, or issued by, such authorities — which generally include real property mortgages and deeds to trust, as well as copyright security agreements and copyright mortgages. The US Patent and Trademark Office, by contract, accepts electronic signatures for patent and/or trademark security agreements, as does the Federal Aviation Authority with respect to aircraft security agreements or aircraft mortgages.

The general rules of a state with respect to electronic signatures apply to corporate or business entity actions, with the important exception of Delaware. In Delaware, the general authorization of electronic signature under Delaware's version of the UETA generally does not apply to matters governed by their entity laws such as the Delaware General Corporation Law, the Delaware Limited Liability Company Act, or the Delaware Revised Uniform Limited Partnership Act. Each of these statutes have their own provisions that generally authorize the use of electronic signatures, subject to certain requirements and limitations and any restrictions expressly set forth in the organic entity documents.<sup>4</sup>

## Key takeaways

The ongoing disruption to working conditions raises new hurdles in the ordinary process of contract execution. But, as described above, those hurdles can usually be surmounted with DocuSign and appropriate contractual agreements permitting electronic signature.

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## Endnotes

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- <sup>1</sup> If the contract is governed by non-US law or any of the parties are organized under non-US law, then foreign law will also need to be considered.
- <sup>2</sup> Each of the electronic signature laws briefly summarized herein have certain exclusions and special requirements relating to consumers that are beyond the scope of this *Client Alert*, which focuses solely on commercial transactions among businesses.
- <sup>3</sup> If enacted after June 30, 2000, such state statute, regulation, or rule of law must also make specific reference to ESIGN.
- <sup>4</sup> 8 Del. C. § 116(a) (for corporations); 6 Del. C. §§ 17-113(a) (for LPs), 18-113(a) (for LLCs). The legislative synopsis accompanying the amendments for each of the Delaware business entity acts emphasizes that any restrictions contained in organic entity documents regarding the use of electronic transmission and electronic signatures must be “expressly stated” to be effective. “A provision merely specifying that an act or transaction will be documented in writing, or that a document will be signed or delivered manually, will not prohibit” application of the broad authorization contained in DGCL § 116(a), DRULPA § 17-113(a), and DLLCA § 18-113(a). Del. S.B. 88 syn. § 2, 150th Gen. Assem. (2019) (DGCL amendments); Del. S.B. 89 syn. § 7, 150th Gen. Assem. (2019) (DRULPA amendments); Del. S.B. 91 syn. § 4, 150th Gen. Assem. (2019) (DLLCA amendments).