

The Paperless Contract – It's Here But How Do We Sign?

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You hear it on the news daily, you read the articles, you probably experienced it – technology is restructuring the nature of business and the way business is conducted. It is now estimated that business-to-business e-commerce will surpass one trillion dollars annually by 2003 – and it will all be done with paperless contracts. The issue now at the forefront of this business transformation is how do you assure you have a signed enforceable contract?

The electronic transformation of business presents a host of new legal issues that must be addressed. As business moves into a paperless world, one of the significant legal points contained in e-commerce laws is whether an electronic signature has the same validity as a written signature. Additional issues are: (1) the legal recognition of an electronic signature; (2) the protection and regulation of data; (3) harmonization and cross-border recognition of international, regional, national and state e-commerce laws; (4) the relationship between licensing, accreditation and limitation of liability; (5) jurisdiction; and, (6) the legal foundation that a state or country adopts when it implements the law relating to an electronic signature.

In addition to such legal issues, a definitional problem exists within the realm of e-commerce. The terms “electronic signature” and “digital signature” are sometimes used interchangeably, but these terms are not one and the same. “Electronic signature” is the umbrella term that incorporates any electronic sound, symbol, or process attached to a contract or other record and is executed by a person with the intent to sign the record. A digital signature is not a conventional signature that has been scanned into a computer; it is an electronic identifier that utilizes cryptography to ensure the integrity and authenticity of the information to which it corresponds. A digital signature, however, is like a hand-written signature that allows the recipient of a digitally signed communication to determine whether the communication was changed after it was digitally signed and allows the recipient to know that the communication came from the sender

Legislative Foundation

In 1986, the American Bar Association Security Committee, Electronic Commerce and Information Technology Division, Section on Science and Technology, issued its Digital Signature Guidelines. The Guidelines explore legal and information security aspects of e-commerce and other issues related to information technology. Realizing that there was a need for uniformity for e-commerce, in 1999, the National Conference of Commissioners on Uniform State Law approved and recommended for enactment in all states, The Uniform Electronic Transactions Act (UETA). The core of UETA is Section 7, which provides that a record or signature may not be denied legal effect or enforceability just because it is in electronic format.

UETA also provides a suggested law for states to implement. Many states adopted UETA in its entirety and others adopted UETA with modification. Because of the various state modifications and differing state laws, the U.S. Congress passed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000, effective October 1, 2000.

E-Sign was enacted to provide a uniform national standard to: (1) strengthen consumer protection pertaining to e-commerce by mandating disclosures and retention of accurate records, and noting exceptions where signatures must be on paper for public policy reasons; (2) promote contractual efficiency for businesses; and, (3) permit citizens to use and sign legally binding contracts over the Internet and allay fears that electronic contracts will not have legal backing.

E-Sign eliminates legal barriers to the use of technology to form and sign contracts, collect and store documents and send and receive notices and disclosures. By enacting a federal law, Congress has mandated that all states and courts accept electronic signatures that meet certain requirements for most transactions. Businesses can enter binding agreements, store documents, send and receive notifications without having to rely on paper documents.

Exceptions to E-Sign Documents

For public policy reasons, some documents cannot be electronically signed and require a paper document and/or signatures. E-Sign does not apply to state statutes ruling:

- adoption, divorce and other matters of family law;
- creation and execution of wills, codicils or testamentary trusts;
- official court documents including briefs, pleadings and other matters, and court orders or notices;
- transactions affecting the sale, lease, exchange, licensing or other disposition of personal property, services, real property, or combination thereof;
- any notice of: (1) default, acceleration, repossession, foreclosure, eviction or right to cure, under a credit agreement secured by, or a rental agreement for, of a primary residence of an individual; (2) the cancellation or termination of health/life insurance (excluding annuities); (3) product recalls, or material failure of a product, that endangers health or safety; (4) the cancellation or termination of utility services;
- the Uniform Commercial Code, except §§1-107 and 1-206; and, Articles 2 and 2A;
- documents attached to the transport and handling of hazardous materials.

Consumer Transactions

E-Sign identifies special guidelines for transactions with consumers. A consumer must affirmatively consent to the use of electronic records and signatures before an electronic contract is enforceable. Prior to this consent, a consumer must receive an unambiguous statement that informs the consumer of:

- the right to have a paper record or a non-electronic form of the record;
- the procedures and applicable fees for obtaining a paper record or a non-electronic form of the record;
- the right to withdraw consent to electronic transactions and the consequences resulting from such withdrawals;
- the procedures the consumer must use to withdraw the consent;
- the hardware and software requirements for electronic record accessibility and retention;
- whether the consent applies to a particular transaction or multiple transactions;
- the procedure the consumer must use to update information and receive information electronically.

In addition, the consumer must provide consent by demonstrating that the information in the electronic form is accessible in the electronic format that will be used in the transaction.

Caveat Emptor

To ensure that an e-contract will be enforceable if it is later contested, parties to an electronic transaction must investigate the law of each state involved or potentially involved in the transaction. The list of states would include: (1) the state of incorporation of any corporate party; (2) the state of the corporation's home office; (3) the state where any individual party resides or does business; and, (4) the state where the transaction or service takes place. In essence, one must investigate any state where litigation about the transaction could possibly take place. In addition to UETA and E-Sign, all established laws and obligations remain in effect such as those pertaining to contract law, fraud, agency and negligence.

With all of these considerations, the choice of method of signature becomes as important as the choice of words within the document. A signature of any type should serve three functions: (1) prove authenticity – that the specific document and signature are not a forgery; (2) prove integrity – that the document and signature are accurate and not tampered or altered during the transition from the signer to the recipient; (3) inhibit repudiation – so that the sender cannot deny sending the document and signature or claim they have different content from what is sent. Different methods of electronic signature provide different levels of effectiveness regarding the three functions.

International Issues

Within the international context, there are few legislative agendas outside that United States. It is difficult to compare agendas because few countries view the purpose of their legislative standards in the same manner. No single technology will prevail as the sole means for electronic authentication. Different technologies will likely be used in different settings and for different purposes. The diversity of authentication techniques, while generally promoting the expansion of e-commerce, nonetheless, poses a significant challenge for legislation because not all technologies necessarily require the same legal infrastructure or may be accorded the same presumption of security. There is also the concern and the desire to avoid obsolescence in that a premature endorsement of a particular technology will set the country outside of the mainstream of international,

technological development. Although E-Sign is committed to fostering international acceptance of these standards, electronic signatures may not be an available, enforceable option until international consistency is achieved through treaty.

Conclusion

While E-Sign resolves a number of the issues arising from e-commerce issues, in the United States, other issues remain as this law is implemented and as states develop legislation to complement the provisions of this national act. Continuing concerns for security of data transmission and implications for fraud also warrant further analysis and perhaps further legislation. Because of the still to be resolved issues, it is imperative that you be knowledgeable of the state and national laws on electronic signatures and the use of paperless contracts in both your personal and business transactions.

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