E-Contracting: What Corporate Counsel Need to Know

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Introduction

With the rapid increase in the use of computers, tablets, mobile phones, wearable devices, and other electronics in general, it is likely that your company—or corporate clients—are already considering ways to take advantage of new technologies. One of the many ways in which companies, both large and small, can do exactly that is through electronic contracting ("e-contracting")—i.e., the creation and execution of valid and enforceable agreements in electronic, rather than traditional paper, format.

Indeed, the potential benefits of e-contracting are vast. Some of these benefits are obvious, including the ability of parties to bind themselves to the terms of an agreement from anywhere in the world without the extra time and effort required to print, sign, mail, fax, scan, and/or e-mail the "original" documents. Some of the other benefits may be less obvious, including the cost savings associated with eliminating the need for physical storage and retrieval of traditional paper documents. Of course, all of these things will ultimately affect the company's bottom line.

To take full advantage of e-contracting opportunities, however, companies need guidance from in-house and corporate counsel to ensure that the contracts they enter into are legally binding and enforceable. The laws and requirements governing e-contracts may vary from state to state and understanding them, in advance of execution, may be crucial to protecting the underlying transactions from legal challenges.

This article aims to provide in-house and corporate counsel with an overview of the current state of the law on e-contracting in New York, New Jersey, and Connecticut and some tips for helping develop sound e-contracting policies, practices, and procedures.

The Law on E-Contracting

In 2000, Congress enacted the federal Electronic Signatures in Global and National Commerce Act (the "ESIGN Act"). The ESIGN Act provides that "a signature, contract, or other record relating to [any transaction in or affecting interstate commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form."[1] With respect to e-contracts, in particular, the ESIGN Act provides that "a contract relating to [any transaction in or affecting interstate commerce] may not be denied legal effect, validity, or enforceability solely because an electronic signature [("e-signature")] or electronic record was used in its formation."[2]

To date, 47 states and the District of Columbia have also enacted some version of the Uniform Electronic Transactions Act (the "UETA"). Both New Jersey and Connecticut are among those states that have adopted a version of the UETA.[3] New York, on the other hand, is not. Instead, New York has enacted its own law—i.e., the Electronic Signatures and Records Act (the "ESRA").[4]

Generally speaking, the New Jersey UETA, the Connecticut UETA, and the New York ESRA are all designed to give legal effect to both e-contracts and e-signatures.[5] Like the ESIGN Act, each of these state laws broadly defines "electronic signature" to include not only electronic forms of a handwritten signature (e.g., a scanned copy) or the typewritten name of the signatory, but also any "electronic sound, symbol or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."[6] Given this broad definition, there are countless ways in which a potential signatory can provide an electronic indication of assent to be bound by an e-contract, including checking a box or clicking an "I Agree" button on an Internet site, entering a unique personal identifier, or typing his or her name at the bottom of an e-mail responding to an offer.[7]

Regardless of the method of assent, however, an e-signature is generally not attributable to a particular individual—and, therefore, not legally binding—unless it can be shown that the e-signature was the act of that same individual through the use of an adequate "security procedure."[8] Under both the New Jersey and Connecticut versions of the UETA, "security procedure" is defined as a procedure used "for the purpose of verifying that an electronic signature, record or performance is that of a specific person or for detecting changes or errors in the information in an electronic record," including procedures that require "the use of algorithms or other codes, identifying words or numbers, encryption, callback, or other acknowledged procedures."[9]

As a result of these laws, e-signature software—such as Adobe, DocuSign, and RightSignature—typically includes one or more standard security measures designed to authenticate the identity of the purported signatory and to verify that a document has not been changed since it was signed. Audit trails, for example, are used to demonstrate when and by whom a document was sent, viewed, and signed.[10]

Despite these security measures, however, e-contracts and e-signatures are still subject to legal challenges on the same grounds as paper contracts and "wet ink" signatures. These grounds include forgery, mistake, and duress. In addition, although the federal and state laws discussed above allow for e-contracting and the use of e-signatures in most commercial contexts, there are still some circumstances in which an e-signature will not suffice, including in the execution of a will, trust, or power of attorney.[11] In some states, certain real estate transactions also cannot be consummated by electronic means, although, in September 2012, New York's ESRA was amended to allow for the use

of e-signatures on conveyances and other instruments recordable under Article 9 of New York State Real Property Law and to allow state, county, and municipal officials to accept real property instruments, such as deeds and mortgages, in electronic format.[12]

Notably, companies are not *required* to use e-contracts or to accept e-signatures.[13] Nor can a consumer be required to contract electronically without consent.[14] Accordingly, potential signatories should generally be given the opportunity to opt-out and elect to use traditional paper versions of the contract documents.

Developing Sound Policies, Practices, and Procedures for E-Contracting

By following these tips, in-house and corporate counsel can help the companies they work for develop sound policies, practices, and procedures for e-contracting:

- **Know the Law.** As noted above, even states that have adopted the UETA may have made significant changes to the original "model" language. Courts in various jurisdictions may also be inclined to interpret the statutes differently based on applicable precedent or public policy. In-house and corporate counsel should make sure they know the laws that apply to their companies and clients and how courts in the relevant jurisdictions are currently dealing with e-contracting in litigation.
- **Be Cautious.** In helping develop a method for e-contracting within a particular company, make sure to include one or more ways to authenticate signatories, identify alterations of the underlying e-contract documents, and address claims that such documents were signed or transmitted by mistake. The method used should be specifically tailored to the company's business needs, such that the resulting e-contracts will be legally valid and admissible in court without the process being so cumbersome as to dissuade usage.
- **Get Non-Legal Experts Involved.** When implementing e-contracting policies, practices, and procedures, be sure to enlist assistance from business and marketing professionals, as well as technical experts. In addition to the bottom line, security, software, and programming issues are of the utmost importance.

Endnotes

1. 15 U.S.C. § 7001(a)(1) (2015).
2. *Id.* § 7001(a)(2).
3. *See* N.J. Stat. Ann. §§ 12A:12-1 to -26 (2015); Conn. Gen. Stat. §§ 1-266 to -286 (2015).
4. *See* N.Y. Tech. Law §§ 301-309 (McKinney 2004). The only other states which have not adopted a version of the UETA are Washington and Illinois. Both states, however, have similar state laws giving legal effect to e-contracts and e-signatures.
5. N.Y. Tech. Law § 304(2) (stating that, "unless specifically provided otherwise by law, an [e-signature] may be used by a person in lieu of a signature affixed by hand," and the use of such e-signature "shall have the same validity and effect as the use of a signature fixed by hand."); N.J. Stat. Ann. §§ 12A:12-7(a)-(d) ("A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.…A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.…If a law requires a signature, an electronic signature satisfies the law."); Conn. Gen. Stat. § 1-272(a)-(d) ("A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.…A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract.…If a law requires a signature, an electronic signature satisfies the law."). Each of the state laws also provides for admission into evidence of e-signatures in legal proceedings. *See* N.Y. Tech. Law § 306 ("In any legal proceeding where the provisions of the [CPLR] are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of [CPLR Article 45]."); N.J. Stat. Ann. § 12A:12-13 ("In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."); Conn. Gen. Stat. § 1-278 ("In a proceeding, evidence of a record or signature may not be excluded solely because such record or signature is in electronic form.").
6. N.Y. Tech. Law § 302(2); *see also* N.J. Stat. Ann. § 12A:12-2; Conn. Gen. Stat. § 1-267(8).
7. *See, e.g.*, Berkson v. Gogo LLC, No. 14-cv-1199, 2015 WL 1600755, at *26-33 (E.D.N.Y. Apr. 9, 2015) (discussing validity and enforceability of various types of "internet agreements"); Stevens v. Publicis, S.A., 50 A.D.3d 253, 254-55, 854 N.Y.S.2d 690, 692 (1st Dep't 2008) (citations omitted) ("The e-mails from plaintiff constitute 'signed writings' within the meaning of the statute of frauds, since plaintiff's name at the end of his e-mail signified his intent to authenticate the contents.").
8. *See* N.J. Stat. Ann. § 12A:12-9 ("An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."); Conn. Gen. Stat. § 1-274 (same).
9. N.J. Stat. Ann. § 12A:12-2; Conn. Gen. Stat. § 1-267(14) (same).
10. Depending on the needs of your company or client, even greater security—in terms of authenticating signatures and preserving the integrity of contract documents—may be provided through the use of digital signatures. Note, however, that administration of digital signatures will come with a corresponding increase in time and cost.
11. *See* N.Y. Tech. Law § 307; N.J. Stat. Ann. § 12A:12-3 (excluding, *inter alia*, transactions governed by "the law governing the creation and execution of wills, codicils, or testamentary trusts"); Conn. Gen. Stat. § 1-268 (excluding, *inter alia*, "execution of wills, codicils or testamentary trusts").
12. *See* N.Y. Tech. Law § 307.
13. N.J. Stat. Ann. § 12A:12-5a. to 5b. (providing that New Jersey UETA does "not require a record or signature to be created, generated, sent, communicated, received, stored or otherwise processed or used by electronic means or in electronic form" and applies "only to transactions between parties each of which has agreed to conduct transactions by electronic means"); Conn. Gen. Stat. § 1-270(a)-(b) (same with respect to Connecticut UETA); N.Y. Tech. Law § 309 ("Nothing in this article shall require any entity or person to use an electronic record or an electronic signature unless otherwise provided by law.").
14. *See id.*

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