



PROGRAM MATERIALS

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E-Signatures and Electronic Documents in Commercial Lending: Complying With ESIGN, UETA, Interplay with the UCC - An Update

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Electronic Contracts and Electronic Signatures Under E-Sign, UETA and the UCC - An Update

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Introduction

- Difference between e-signature and online agreements
- Relationship of UETA and E-SIGN
- Scope of UETA and E-SIGN
- UCC rules
- Electronic signatures generally
- Formation of contracts online
- Terms of contracts formed online
- Post-formation terms and amendments
- ‘Smart’ Contracts
- Other scope exclusions from UETA and E-SIGN



Difference between e-signature and online agreements

- E-signature is manner of ‘signing’ an agreement
- An e-signature can apply to a paper agreement or an agreement formed online
- An online agreement raises the additional question of whether an *agreement* has been formed online



Electronic Records Signatures Generally — effect of e-signature

- The Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 USC §§ 7001 *et seq.*, are enabling statutes that place electronic records and signatures on a legal par with their paper and ink counterparts.
- They provide that records and signatures ‘may not be denied legal effect, validity or enforceability solely because [they] are in electronic form.’



Relationship between UETA and E-SIGN

- E-SIGN defers to state law if the state has adopted the substance of the official version of UETA or has adopted comparable ‘alternative procedures or requirements’ for the use or acceptance of E-Records and E-Signatures, provided that they satisfy certain conditions including that they are ‘consistent with’ Titles I and II of E-SIGN.
- 49 states plus DC and the USVI have adopted UETA, with revisions that are generally consistent with the official version of E-SIGN.
- New York did not adopt UETA and instead created and adopted the Electronic Signatures and Records Act (ESRA).
- ESRA validates e-records and e-signatures in a manner that is similar to E-SIGN and UETA. However, it is not clear that the New York statute is similar enough to UETA to qualify for E-SIGN’s deferral to state law.
- Even if the NY statute is not similar enough to UETA to qualify for E-SIGN’s deferral, the application of E-SIGN yields an ultimate result is generally the same as UETA
- Because E-SIGN will apply if a state has not adopted UETA (or its equivalent), at least one of those laws will always apply.



What is an ‘electronic record’?

- UETA and E-SIGN define ‘electronic record’ to mean ‘a [*In E-SIGN only*: contract or other] record created, generated, sent, communicated, received or stored by electronic means.’
- Both define ‘record’ to mean ‘information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is *retrievable in perceivable form*’
- UETA § 2, Comment 6 explains that ‘information stored on a ... disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.’
- UCC equivalent discussed below



Technology requirements?

- Each statute is technology-neutral.
- Unlike earlier ‘digital signature’ laws, these statutes do **not** require the use of technologies to help verify either the identity of the signing party or the integrity of the record (document) itself. Similarly, they do not accord any preferred status to e-records or e-signatures created using technologies that do so.



Application to a ‘transaction’

- Subject to certain exclusions (such as wills and most of the UCC), UETA applies to E-Records and E-Signatures ‘relating to transactions,’ with
 - ‘transactions’ defined to include any action “between two or more persons relating to the conduct of business, commercial or governmental affairs.”
- Subject to substantially the same exclusions as UETA, E-SIGN covers ‘any transaction in or affecting interstate or foreign commerce,’ with
 - E-SIGN defining ‘transaction’ to include any action ‘relating to the conduct of business, consumer or commercial affairs between two or more persons.’



Need for an ‘agreement’ to conduct transaction by electronic means

- UETA only applies to ‘transactions between parties each of which has *agreed* to conduct transactions by electronic means.’
- The agreement can be inferred – it is to be ‘determined from the context and surrounding circumstances, including the parties’ conduct.’ UETA § 5(b)
- UETA § 6(1) provides that it is to be ‘construed and applied ... to facilitate electronic transactions consistent with other applicable law.’ UETA § 6, Comment 2 explains that UETA was drafted ‘to permit flexible application consistent with its purpose to validate electronic transactions.’
- E-SIGN does not require any affirmative agreement, implied or otherwise. It specifies that it ‘does not require any person [other than governmental agencies in certain contexts] to agree to use or accept’ E-Records or E-Signatures.
- As a matter of practice, an affirmative agreement (similar to UETA) is often obtained when there is reliance on E-SIGN



Examples of inferred agreement

- That agreement can be inferred from the context, including the parties' conduct.
- The use of an onscreen form or a fax or PDF generally should suffice, at least if both parties use it. But what if an offer is made on paper but accepted via email – has the offeror 'agreed' to conduct the transaction bound?
- It's better to have an express statement of agreement, such as the following immediately and prominently above the 'I agree and submit' button:
 - By [clicking/tapping] the '[I agree and submit]' button below, I [we] agree (i) to enter into this Credit Line Review (including the agreements contained in it) electronically, (ii) to receive electronic statements concerning my account, and (iii) to the terms and conditions of the Credit Line Review (including the agreements contained in it).
- This indicates that both the party who prepared the text and the party who responds in the specified manner agreed to effect the contract by electronic means.



Need for an ‘agreement’ to conduct transaction by electronic means

- *Wal-Mart Stores Texas LLC v. Shirley*, 2020 WL 548323 (Ct. App. Texas 2020) – Exchange of e-mails *sufficient* to form a contract.
- *Copano Energy, LLC v. Bujoch, Life Estate*, 2020 WL 499765 (Sup.Ct. Texas 2020) – Exchange of e-mails *not* sufficient to form a contract.



Scope: UCC exclusion under current law

- UETA and E-SIGN do not apply to the UCC, except they **do apply** to Articles 2 (sales of goods) and 2A (leasing of goods)
- Article 1 definition of ‘signing’ (§ 1-201(b)(37)) and Article 9 definition of ‘authenticate’ (§ 9-102) anticipate use of electronic signatures.
- But Article 1 definitions of ‘writing and ‘written’ (§ 1-201(b)(43)) still call for something reduced to ‘tangible form.’
- Next slide explains changes in these rules under the 2022 UCC Amendments
- Article 3 requires a writing (see definition of ‘promise’ in § 3-103) for a note to be a ‘negotiable instrument’, so no electronic signatures are possible for a note to be a negotiable instrument, except for ‘transferable records’ subject to UETA or E-SIGN, which have some characteristics of a negotiable instrument
 - An electronic note can still be enforceable as a contract



Scope: effect of UCC exclusion under 2022 Amendments

- Definition of ‘sign’ in UCC amended to read (UCC § 1-201(b)(37):
‘Sign’ means, with present intent to authenticate or adopt a record:
 - ‘(A) execute or adopt a tangible symbol; or (B) attach to or logically associate with the record an electronic symbol, sound, or process.
 - ‘(B) attach to or logically associate with the record an electronic symbol, sound, or process.’
- ‘Sign’ replaces ‘authenticate’ in most instances throughout UCC
 - Note **non**-application to Article 3 (see next slide)



Scope: effect of 2022 Amendments on Article 3

- Article 3 still requires a ‘writing’ (see definition of ‘promise’ in § 3-103) for a note to be a ‘negotiable instrument’, so no electronic signatures are possible for a note to be a negotiable instrument or equivalent, except for:
- ‘Transferable records’ subject to UETA or E-SIGN, which have some characteristics of a negotiable instrument
- Effect of choice-of-law and choice-of-forum additions to Article 3 in the 2022 UCC Amendments
- See discussion of ‘controllable payment intangibles’ and ‘controllable accounts’ below



Scope: 2022 UCC Amendments – CERs

- Creates ‘controllable **electronic** records’ (CERs)
 - Controllable accounts and controllable payment intangibles
- Perfection by ‘control’
- Secured party and buyer can take CER (and controllable payment intangible and controllable account evidenced by the CER) free of property claims of others
- Perfection by control defeats perfection by filing a financing statement
- When combined with waiver of defenses (UCC § 9-403), controllable payment intangible and controllable account are equivalent of an **electronic** ‘negotiable instrument’



Scope: 2022 UCC Amendments – CERs and choice of law

- For matters ‘covered’ by Article 12: ‘CER’s jurisdiction’
- Meaning of ‘CER’s jurisdiction’
- Application during period when not all jurisdictions have adopted the 2022 UCC Amendments
- PEB Commentary



Scope: 2022 UCC Amendments – chattel paper

- Authoritative ***electronic*** copy of a record evidencing chattel paper
- Clarified definition of ‘chattel paper’ in hybrid transactions
- Perfection by obtaining ‘control’ of the authoritative electronic copy



UCC: what is an ‘electronic record’?

- UCC § 1-201(b)(16A):
‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- UCC § 1-201(b)(31):
‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.



Proving an E-Signature

- While UETA and E-SIGN *enable* the use of E-Signatures and E-Records in a broad range of circumstances, “other law” still applies to determine whether the record or signature is effective or, in the words of UETA, “has legal consequences.”
 - Similarly, E-SIGN specifies that it does not “limit alter or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons [thereunder] ... other than a requirement that contracts or other records be written, signed or in nonelectronic form.”
- How to show that a “signature” was the act of the person who purportedly signed it:
UETA Section 9. Attribution and Effect of Electronic Record and Electronic Signature.
 - (a) 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.
 - (b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties’ agreement, if any, and otherwise as provided by law.



Proving an e-signature

- *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal.App. 4th 836 (Cal.Ct.App. 2014) (conclusory declaration not sufficient)
- *Espejo v. So. Cal. Permanente Medical Group*, 246 Cal.App. 4th 1047 (Cal.Ct.App. 2016) (detailed description of process is sufficient)
- *Fabian v. Renovate America, Inc.*, 42 Cal.App.5th 1062, 2019 WL 6522978 (Cal.Ct.App. 2019) (summary declaration about use of DocuSign not sufficient)
- *Abernathy v. DoorDash, Inc.*, 2020 WL 619785 (N.D.Cal. February 20, 2020) (declaration by consumer that consumer clicked button to agree to agreement is sufficient)



Proving an e-signature

- *Chen-Oster v. Goldman, Sachs & Co.*, 2020 WL 1467182 (S.D.N.Y. March 26, 2020) Process sufficient where party seeking to enforce contract demonstrated that ‘the website is configured so that an employee must open the Award Agreement and Award Summary by using the hyperlinks in the Plan Documents tab. ... A “pop-up” error message appears if an employee clicks “Go to Next Step” on the Plan Documents tab without opening those documents.’)
- *Bacon v. Avis Budget Group, Inc.*, 959 F.3d 590 (3d. Cir. May 18, 2020) (Screenshots taken 18 months after the online transaction not sufficient to prove what customer saw at time of transaction; declaration by party as to assent process not sufficient when assent allegedly occurred on the web sit of another person)
- *Barrows v. Brinker Rest. Corp.*, 36 F.4th 45 (2d Cir. 2022) (‘unequivocal denial’ of electronic signature enough to put signature at issue)
- *Aerrotek, Inc. v. Boyd*, 624 S.W.3d 199 (Tex. 2021) (security procedure that made it ‘impossible’ to proceed without electronic signature sufficient)



Retention of e-records by recipient

- Under UETA, § 8, if other law requires a person to “provide, send or deliver information in writing,” that requirement is satisfied if the information is provided in an E-Record “capable of retention by the recipient at the time of receipt.”
 - This does not mean that the recipient needs to actually retain the record.
 - But the sender cannot inhibit the ability of the recipient to store or print it. If the sender does so, “the electronic record is **not enforceable** against the recipient.” (emphasis added)
 - This is consistent with the above referenced definition of a “record,” which requires that it be “retrievable in perceivable form.”
- E-SIGN § 101(e) is similar, but rather than addressing retainability by the recipient, it addresses retainability by those “entitled to retain” the contract or record. It provides that, if other law requires a record relating to a transaction to be in writing,
“the legal effect, validity or enforceability of an electronic record **may be denied** if [it] is not in a form that is capable of being retained and accurately reproduced for later reference **by all parties or persons who are entitled to retain** the contract or other record.” (emphasis added)
 - E-SIGN does not address who is entitled to retain such a contract or record, and since neither common law nor the Statute of Frauds generally do not entitle anyone to retain a copy of a contract, this requirement may be of limited practical effect outside the realm of consumer protection or similar laws and regulations.



Retention of record by sender

- Conversely, UETA § 12 provides that if a law requires that a record be retained, that requirement is satisfied by an electronic record that
 - “accurately reflects the information set forth in the record after it was first generated in final form as an electronic record” and also
 - “remains accessible for later reference.”
- E-SIGN § 101(d)(1) contains a similar provision but requires that the information in the E-Record “remain accessible to all persons who are entitled to access” under the other law “in a form that is capable of being accurately reproduced for later reference.”
 - As with the retainability provision in § 101(e), E-SIGN does not address who is entitled to such access, effectively leaving that to other law



Delivery of Information to consumers

- E-SIGN § 101(c)(1) contains a complex and demanding consent requirement that must be satisfied before E-Records can be used to provide information (e.g., deliver disclosure materials) to consumers when, under other law, that information is required to be provided or made available in writing. Such consents must be affirmative, must be given after the consumer has received a clear and conspicuous disclosure of various enumerated rights, options and requirements relating to electronic delivery, and must be self-validating in the sense that the consent itself must be given “in a manner that **reasonably demonstrates** that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.” (emphasis added)
 - For example, if a disclosure is going to be provided by posting on the sender’s website, the consumer may need to provide his or her consent by accessing a page on that website.
- Failure to satisfy this requirement will mean that the required information will not be deemed to have been provided. But § 101(c)(3) specifies that a failure to satisfy the “reasonable demonstration” test will not affect the “effectiveness, validity, or enforceability of any contract executed by a consumer.”
- Under E-SIGN § 104(d)(1), Federal regulatory agencies are permitted to adopt rules exempting particular categories or types of records from the §101(c) consumer consent requirements, but only if such exemption is “necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.”



Formation of agreements online

- No governing statute (as with UETA and E-SIGN)
- General rules of contract law apply
 - Courts adapt them to online context
- *Specht* and following decisions
- *Restatement of the Law, Consumer Contracts* § 2:
 - (a) A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving:
 - (1) reasonable notice of the term and of the intent to include the term in the consumer contract, and
 - (2) reasonable opportunity to review the term.



Method of agreeing to form an online agreement

- ‘Totality of the circumstances’
- ‘Clickwrap’
- ‘Scrollwrap’
- ‘Browsewrap’
- Other methods:
 - *South West Terminal Ltd. v Achter Land*, 2023 SKKB 116 (CanLII) (Kings Bench Saskatchewan 2023) – Use of “thumbs up” emoji (👍) in an e-mail sufficient to manifest assent to contract, if that intent can be shown.
 - *Lightstone Re LLC v. Zinntex LLC*, No. 516443/21, 2022 WL 3757585 (N.Y. Sup. Ct. Aug. 25, 2022) – Thumbs up emoji (👍) in a text message *might* constitute a manifestation of assent to an agreement.



Adding and modifying terms online

- *Restatement of the Law, Consumer Contracts § 3*
 - Difference when original agreement retains right to modify
 - Role of good faith
 - Opt out rights
 - Effect on original agreement



Electronic Agents/Smart Contracts

- UETA and E-SIGN anticipate the use of smart contracts by enabling the formation of contracts without direct human involvement through the functioning of ‘electronic agents’ that independently ‘initiate or respond to electronic records or performances ... without review or action by an individual.’
 - ‘Electronic agent’ likely not an ‘agent’ under law of agency
- E-SIGN §101(h) provides that
‘a contract or other record ... may not be denied legal effect, validity or enforceability solely because its formation, creation or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.’
- UETA §14 is similar but more detailed. It specifies that a contract may be formed by the interaction of electronic agents “even if no individual was aware of or reviewed the electronic agents’ actions or the resulting terms and agreements.”
 - It also enables ‘click-through’ or similar contracts formed through the interaction of an electronic agent for one party and an individual who is or acts for the other, so long as the individual knows that its actions (which must be voluntary) ‘will cause the electronic agent to complete the transaction or performance.’
- As with E-Signatures, however, it is necessary to be able to attribute the actions of an electronic agent to an actual party. This includes not only identifying the party but also attributing the requisite intent to that party.
 - As explained in UETA § 14, Comment 1 the ‘requisite intention’ for the actions of a machine ‘flows from the programming and use of the machine.’



Scope: real property transactions

- UETA and E-SIGN do not override any requirements for paper documents for a real estate recording system – UETA § 3(c), *Legislative Note*
- Notarization – UETA § 11 (Notarization and Acknowledgement)
- Emergency orders, e.g., NY Emergency Order 202.7 (providing for use of video processes for notarization)
- Remote online notarization (‘RON’)



Scope: real property transactions

- UETA and E-SIGN apply to an ***agreement*** concerning real estate between the parties, but not recording rules
- Effect on third parties through recording may require paper documents



Scope: other exclusions

- Wills and the like
- Uniform Law Commission has approved a uniform law on electronic wills



Scope: Entity actions

- Entity laws typically govern electronic signing of resolutions and the like.
- E.g., Delaware GCL §§ 141 (written consent of directors), 228 (written consent of shareholders), and 232 (notice to shareholders and definition of electronic transmission).
- See also, Delaware LLC Act §302; Delaware RUPA §407; Delaware RULPA §§ 302 and 405, and Delaware Statutory Trusts Act § 3806(f)(2).
- UETA also validates matters (such as resolutions) that ‘relate’ to transactions. UETA, § 2, Comment 13.



Special Statutory Requirements in Delaware Governing Entity Actions — Corporations

- “Electronic transmission” means any form of communication not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and may be directly reproduced in paper form by such recipient in paper form through an automated process. DGCL §232(c)
- Written consent of Board members may be made by electronic transmission if such consents are filed with the minutes in paper form (if the minutes are maintained in paper form) or electronically (if the minutes are maintained in electronic form). DGCL §141(f)
- Written consent of a Shareholder shall be deemed written, signed and dated for purposes of DGCL §228 if delivered with information from which the corporation can determine:
 - that the electronic transmission was transmitted by the shareholder/proxy holder/other authorized person, and
 - the date of the transmission (which shall be deemed the date the transmission was signed).
- Under DGCL §228(d)(1), unless otherwise provided by resolution of the board, no written consent of a Shareholder by electronic transmission shall be deemed to have been delivered until
 - the consent is reproduced in paper form, and
 - such paper form is delivered to the corporation by delivery to its registered office, to its principal place of business, or to an authorized officer or agent of the corporation who has custody of the minute books.
- Notices to shareholders may be given by a form of electronic transmission consented to by the shareholder to whom the notice is given (e.g., to a fax number or email address at which the shareholder has consented to receive notice). DGCL § 232