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## Learning the E-Signature Essentials

The pandemic notwithstanding, companies have to continue to comply with existing laws and protect their interests with enforceable contracts, valid consent declarations, formal records, effective applications for government approvals, and other documents.

By **Lothar Determann** | March 26, 2020



**Lothar Determann, with Baker McKenzie.**

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These days, companies are pushing full throttle to accelerate their digitization roadmaps. With “shelter in place” ordinances and social distancing mandates, most workers are at home. The days of closing ceremonies are all but forgotten. Emergencies, challenges and opportunities are popping up left and right. No one has time for snail mail, ink and paper. “Essential businesses” remain open. But, they, too, cannot easily meet counterparties to sign contracts. Even essential businesses feel an urgent need to revisit e-signature essentials.

The pandemic notwithstanding, companies have to continue to comply with existing laws and protect their interests with enforceable contracts, valid consent declarations, formal records, effective applications for government approvals, and other documents. All in-house and outside counsel need a basic understanding of legal form requirements and practical guidance for their clients.

**Ask the Right Question:** People commonly ask: Are electronic signatures legal? This is usually not the right question to ask. No one is prohibited from using electronic signatures anywhere in the world. The better questions to ask are: are electronic signatures effective and binding? Do electronic signatures and documents meet statutory form requirements? Do they protect interests as well as handwritten signatures on paper documents? Precise answers to these right questions are, unfortunately, much harder to come by.

**Legal Form Requirements:** To determine whether you can create a contract or record electronically to meet a certain legal objective, you have to analyze the laws applicable to such objective. For example, if you want to assign a U.S. copyright, you have to consult the U.S. Copyright Act. If you want to hire an employee in Germany, you have to consult the German Civil Code. For some types of documents and transactions, you must satisfy form requirements that cannot easily be achieved electronically, such as certification before a public notary or witnesses, official recordals, or handwritten documents or signatures, for example, in some jurisdictions for wills, codicils, testamentary trusts, adoption, divorce, leases, and real estate transfers. According to the California Confidentiality of Medical Information Act (CMIA), an authorization for the release of medical information is valid if it is handwritten by the person who signs it or is in typeface larger than 14 point font, see, Lothar Determann, *California Privacy Law* (3d Ed. 2018, Ch. 2-H). But, many other transactions are subject to lighter or no form requirements, including most commercial agreements between corporate entities.

In addition to myriad individual form requirements, most countries have enacted specific statutes concerning electronic commerce, signatures and transactions. Unfortunately, few such laws give a definitive answer whether a particular document can be effectuated electronically. The first modern electronic signature laws around the world, including the U.S. Federal E-SIGN Act, are now 20 years old and in dire need of upgrade. For more detail and an overview regarding the complex international legal landscape, see Lothar Determann, *eSignature Laws Need Upgrades* (<http://ssrn.com/abstract=3436327>), forthcoming in 72 *Hastings Law Journal* 2020.

**Practical Considerations:** Even before the COVID 19 pandemic, individuals, companies and governments recognized many advantages that electronic signatures and documents offer over ink and paper, including speed, cost savings, convenience, easier search and analysis, cheaper archiving and retrieval, automation of retention/deletion, additional options to protect authenticity and integrity, better evidence and identification, scalability, standardization opportunities, and arguably a plus for sustainability: Don't print this article, save a tree. Forgery concerns apply equally to electronic and ink-on-paper signatures, but electronic signature technologies offer additional security measures.

Despite all these advantages of electronic documents and signatures, companies opt for "ink and paper" where they determine that an electronic document or signature will not be accepted by a customer or government authority, does not meet a particular form requirement, does not suffice to create an enforceable contract, or will otherwise result in a disadvantage. Until recently, many have also still resorted to ink and paper when they were not sure – forgoing benefits of digitization. But, the COVID-19 pandemic is putting extreme pressures on default inertia.

Clients and their counsels are revisiting the question whether ink and paper is necessary with acute urgency. Here is my checklist for electronic signature essentials to assist in this process:

**Check 1: Is the signature or document even required?** Many documents that companies and consumers sign every day are neither legally required nor necessary to pursue legal objectives. For example, in many situations companies can—and probably should—just notify consumers about data processing practices or sales terms without seeking signed consent declarations; the company just needs to retain proof that the consumer proceeded with a transaction or activity after receiving the notice, for example, by retaining evidence that a notice was conspicuously posted on premise or online. Even if a document or signature is

not legally required, companies nevertheless often have good operational, customer or human relationship reasons to document a consent or acceptance. But, they do not have to worry about electronic versus other form where the document is not legally required in the first place.

**Check 2: Is the signature likely to be challenged?** Software companies have relied for decades on shrink-wrap and click-through license terms. Licensees rarely challenge the validity of the license agreement if they would then be subject to greater liability for copyright or patent infringement without a valid license; they might, if they can rely on a statutory defense, such as the first sale doctrine, but otherwise not. Similarly, customers of month-to-month subscriptions or recurring services do not typically challenge the validity of an entire agreement where they remain liable for services received anyhow, based on prior course of dealing, unjust enrichment or other legal theories, and where canceling service going forward is relatively easy. Even in these cases, companies should spell out applicable terms in documents, to reduce risks of disputes or misunderstandings and to protect against undesirable legal consequences (such as a software transaction qualifying as a “sale” exhausting copyrights), but they need not be as much concerned about challenges of signatures on formal grounds.

**Check 3: Where would the signature be challenged?** Companies can reduce risks under laws of unfamiliar jurisdictions with an express choice of law and arbitration in a jurisdiction that recognizes electronic forum. Larger businesses with options regarding contracting entities can select entities in favorable jurisdictions that recognize electronic form, arbitration clauses and class action waivers. Limitations apply, for example, if you end up in bankruptcy court or in need of a preliminary injunction in a foreign jurisdiction.

**Check 4: What evidence do you retain to prove validity?** In a few cases, companies have been unsuccessful in enforcing electronic contracts because they either did not have, retain or present in court evidence to substantiate that it was the other party who signed the electronic contract, see, for example, *Fabian v. Renovate America* (<http://www.law.com/therecorder/almID/1575934018CAD075519>). Plaintiffs have run into similar problems, however, with respect to ink and paper contracts. See, for example, Jonathan Stempel, “Facebook and Zuckerberg Say Ownership Contract Forged (<http://www.reuters.com/article/us-facebook-lawsuit/facebook-zuckerberg-say-ownership-contract-forged-idUSTRE75144220110602>),” Reuters, June 2, 2011.

**Check 5: Which additional measures can help reduce risks?** Where practical, you could execute a one-time agreement on paper with handwritten signatures confirming that the parties may use electronic form going forward. If you had to press ahead with an electronic document, you could try to ratify the electronic version with hand-written signatures after the emergency is resolved and while all parties are still in agreement or you still have some leverage.

**Check 6: How manage the process?** Larger organizations should summarize in an easy-to-follow protocol under which conditions, for which jurisdictions and for which document types their representatives may use one or more electronic signature options. Such protocols should also list transactions, documents and situations where electronic form is not sufficient due to legal form requirements or business considerations. Very large organizations may find it helpful to further differentiate between departments, including sales, procurement, human resources, tax, finance and international corporate maintenance.

**Check 7: What e-signature technology is right for your client?** You can document offer and acceptance electronically in numerous ways, including per email; unilateral notices combined with mechanisms to trigger actions signifying implied assent; express click-through buttons on a web or mobile site; printing, signing, and scanning; pasting a photocopy of your handwritten signature into a Microsoft word.docx; or painting your signature on a PDF file or with a tablet. You can also use online solutions that offer additional functionality regarding authentication, retention, evidence and integrity features based on international market and legal research, see, for example, [www.docusign.com/how-it-works/legality/global](http://www.docusign.com/how-it-works/legality/global) (<https://www.docusign.com/how-it-works/legality/global>). In limited scenarios, you may also find a qualified

digital signature tool that is government-certified in a particular jurisdiction to be equivalent with handwritten signatures, although in practice, such tools have not found wide-spread adoption anywhere to date. Consider the previous checklist items as well as risks, resource limitations and operational preferences as you select the best tool for different situations.

**Questions?** Please contact the author at [ldetermann@bakermckenzie.com](mailto:ldetermann@bakermckenzie.com)—  
(<mailto:ldetermann@bakermckenzie.com>) and be well, stay safe and healthy.

**Lothar Determann** *practices international data privacy, technology, commercial and intellectual property law as a partner at Baker McKenzie in Palo Alto.*

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