

March 24, 2020

TriBar Opinion Committee¹

Comment concerning use of electronic signatures and third-party opinion letters

Parties to business transactions and their counsel seldom gather in the same location to exchange manually-signed agreements and other documents; virtual closings have been and are the norm. The COVID-19 crisis has resulted in increased focus on the widespread practice of giving opinions on the execution of agreements signed electronically. This Comment explains the legal basis for the conclusion underlying those opinions that the electronic signatures on those agreements have the same legal effect as manual signatures.

The Uniform Electronic Transactions Act (UETA) is the law in all but a few United States jurisdictions, and the Electronic Signature in Global and National Commerce Act, 15 USCA §§ 7001 *et seq.* (E-SIGN), is federal law. E-SIGN provides substantially the same rules as UETA.

The interplay of UETA and E-SIGN is as follows:

- E-SIGN is the law in states that have not adopted UETA or a statute providing alternative procedures for the use of electronic signatures consistent with E-SIGN.
- If a state has adopted UETA, E-SIGN does not preempt UETA in that state, except to the extent the state's version of UETA is inconsistent with E-SIGN.
- If a state has adopted alternative procedures for the use of electronic signatures consistent with E-SIGN, E-SIGN does not preempt those procedures.

The net effect of these rules is that *every* jurisdiction in the United States has substantially the same rules for the use of electronic signatures. (New York has enacted the Electronic Signatures and Records Act, State Technology Law §§ 301-309 (ESRA). ESRA is different from UETA but that should not change the result that an electronic signature will ordinarily be effective because if ESRA is not

¹ The views expressed in this Comment are solely those of the TriBar Opinion Committee and on any particular point are not necessarily those of particular members of the Committee or the law firms and other organizations with which they are associated.

consistent with E-SIGN, it is preempted by E-SIGN.)

Generally, UETA and E-SIGN provide that a signature may not be denied legal effect solely because it is in electronic form. UETA § 7; E-SIGN, 15 USCA § 7001(a). When the parties to a business contract subject to one of these statutes agree to use an electronic signature, the electronic signature ordinarily will have legal effect. The agreement of the parties can be implicit and can be based on all the circumstances broadly construed. UETA § 5(b). An opinion, therefore, that a business agreement has been duly executed can be based on the parties' conduct. Under UETA, the exchange of electronically-signed documents manifests the requisite agreement of the parties to use electronic signatures.² Electronic signatures include signatures in emails, PDFs, and faxes and signatures provided by processes offered by commercial firms, such as DocuSign and Adobe Sign, so long as they are affixed to or associated with the relevant agreement with an intent to sign by the persons providing them.

Except for agreements governed by Articles 2 (sales of goods) and 2A (leases of goods) of the Uniform Commercial Code (UCC), UETA and E-SIGN do not apply to agreements to the extent the agreements are governed by the UCC. The UCC governs only certain aspects of transactions within its scope, leaving the remaining issues to be governed by other law. The definition of "sign" in Article 1 and the definition of "authenticate" in Article 9 provide substantially the same rules as UETA and E-SIGN for the use of electronic signatures. Thus, for example, in cases where an agreement that bears an electronic signature does not qualify as a "negotiable instrument" for UCC purposes because it is not a "writing," execution by electronic signature pursuant to UETA or E-SIGN (or other consistent state law) is still sufficient to create an enforceable agreement as a matter of contract law.

Agreements sometimes require that they and any amendments be signed manually. When giving a duly executed opinion, therefore, on an agreement or amendment that has been signed electronically, the opinion giver must confirm that the agreement does not prohibit electronic signatures.

As a matter of customary practice,³ duly executed opinions can be based on an assumption, which may be unstated, that all signatures are genuine. That

² Although not applicable to the question whether an electronic signature on an agreement is valid, the Committee notes that the Governor of New York issued an Executive Order on March 19, 2020 in connection with the COVID-19 crisis providing for the use of audio-video technology for notarial acts.

³ See TriBar Opinion Comm., *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, § 2.3(a) at 615 (1998).

assumption applies to electronic as well as manual signatures.

The legal effect of the execution of a business agreement by a legal entity could also depend on the statute under which the entity was formed and the provisions in the entity's constituent documents relating to its internal actions. For example, the entity statutes of some states provide rules for the electronic execution of documents needed to create the entity and written consents authorizing the signing of agreements on its behalf. *See, e.g.*, Delaware Limited Liability Company Act § 18-113; Delaware General Corporation Law §§ 141(f) and 228(d)(1).