



## Enforceability of Electronic Agreements in Real Estate Transactions

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Increasingly, and not surprisingly, more and more transactions are being created, negotiated, finalized and executed electronically. From a real estate perspective, virtually all documents other than those that are being recorded are exchanged electronically. The expression that something will be completed “before the ink dries” is largely anachronistic since most documents never make it from email onto a printer. Given this electronic reality, it is important to step back and examine whether, and under what circumstances, contracts executed via the internet or otherwise are enforceable under applicable federal and state laws.

### *Short Answer*

For those readers who are bottom line oriented and don't really want to know how the sausage is made, the answer to the question of whether real estate contracts negotiated and executed electronically are enforceable, is that, subject to general contract law governing enforceability, the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”) and various related state laws, the vast majority of which are modeled after the Uniform Electronic Transactions Act (“UETA”), provide that neither a signature nor a contract may be denied legal effect merely because they are in electronic form. Accordingly, contracts which would otherwise be enforceable if an original was executed and delivered, should generally be enforceable if executed electronically.

### *Discussion*

#### **E-SIGN**

For practical purposes, the enforceability of electronic agreements is governed by the substantive terms of E-SIGN. While E-SIGN explicitly provides that it does not preempt state law to the extent that such state law incorporates the uniform provisions of UETA without modification, generally, E-SIGN may be used as the guideline for crafting an enforceable contract because (a) the relevant provisions of E-SIGN and UETA are almost substantively identical; and (b) to the extent any state law modifies the uniform provisions of UETA or conflicts with E-SIGN, such provisions are preempted by E-SIGN. Accordingly, this article will summarize certain relevant provisions of E-SIGN as they may be applicable to real estate documents. In summary, E-SIGN provides:

- A signature, contract or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form.
- A contract relating to such transaction may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation.
- E-SIGN 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 under such statute, regulation or rule of law other than a requirement that contracts or other records be written, signed or in non-electronic form.

- E-SIGN does not require any person to agree to use or accept electronic records or electronic signatures.

Under E-SIGN, an “electronic signature” is defined as an **“electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”** Courts have consistently interpreted this definition to apply to any overt action that conveys a manifestation of assent on behalf of the contracting parties. Specifically, the commentary to E-SIGN and UETA explicitly provides that the definition of “electronic signature” includes the standard webpage click-through process because clicking “I agree” can be interpreted as the requisite manifestation of assent to a properly disclosed set of terms.

Accordingly, the implication of E-SIGN, together with its state counterparts, means that there are very few limitations applicable to the use and enforceability of electronic agreements.

## Applicability of General Contract Principles

Notwithstanding the general enforceability of electronic contracts, contracting parties must remain cognizant of the general rules of contract law, including the formal rules associated with valid contract formation, the manifestation of assent and the equitable concept of unconscionability. Moreover, it is important to recognize the differences between traditional contracting and electronic contracting and to ensure that the electronic contract adequately informs the resident (or his representative) of the terms of the agreement. Generally speaking, where courts have refused to enforce electronic contracts, those contracts involve consumer versus commercial transactions and the reason tended to be that the terms were not adequately communicated to the consumer such that the consumer would understand that the electronic transaction created a contractual relationship.

## Commercial Real Estate Agreements

In the commercial real estate world, we deal with a broad variety of contracts and agreements. They include purchase agreements, development agreements, management agreements, loan related documents such as promissory notes and mortgages, conveyance documents including recordable deeds and assignments, and leasing and occupancy agreements such as leases and licenses. Under E-Sign and UETA, the application of an electronic signature or the specific assent to the terms of a document should generally be enforceable against the contracting parties. This conclusion is easily reached where a document is actually signed by an individual and transferred electronically, as well as where an electronic signature is actually affixed to a document. It is more nuanced where the parties exchange emails agreeing to the content of that email without actually affixing a signature. Per the definition of an “electronic signature” summarized above, an exchange of emails should be binding as a “process” logically associated with a contract or other record and adopted by a person with the intent to sign the record. If challenged by a party to such agreement, it will be necessary to demonstrate that the parties intended the process to create a binding agreement. Accordingly, an exchange of emails should explicitly state each parties understanding that such exchange is intended to create contract.

In the real estate context it should be noted that, while enforceable, certain documents (e.g. mortgages and deeds) will require original signatures for recordation. Similarly, borrower and lenders continue to require originally executed promissory notes to maximize their comfort that there is only one negotiable instrument. I suspect that in the very near future both lenders and recording offices will grow comfortable with electronically delivered documents.

## Conclusion

Subject to the exceptions discussed above, it is clear that binding real estate transactions have been and will continue to be conducted via electronic transfer of signatures.

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