

PAPERLESS OFFICE - WHAT CAN I SIGN ELECTRONICALLY?

For the purposes of concluding contracts electronically and the growth of e-commerce, the Electronic Communications and Transactions Act 25 of 2002 ('ECTA') that came into force on 30 August 2002, is of major significance. ECTA makes provision for the recognition and regulation of electronic commerce and its provisions deal specifically with how, when and where an agreement concluded electronically, comes into existence. In so doing, ECTA made electronic signatures legal in 2002.

This is not to say that electronic agreements did not exist before the promulgation of ECTA. Many people were doing business electronically before 2002 and used electronic documents and data messages (which included data generated, sent, received or stored by electronic means) instead of written records.

Many South African users of electronic communications (such as e-mails and SMSes) may believe that such electronic records and communications have the same legal weight as hardcopy records and communications. Whilst ECTA generally allows for agreements to be concluded electronically, signed with the use of an electronic signature, this is not necessarily the case in all instances, as-

- section 4 of ECTA excludes some important transactions from its operation; and
- in certain circumstances, electronic advanced signatures are required to conclude a legally valid agreement, as opposed to 'ordinary' electronic signatures.

Types of electronic signatures

ECTA provides for two categories of electronic signatures:

1. The first is an 'ordinary' electronic signature which is defined to include "data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature." These will include any digital or scanned signatures, for example, and are often referred to as non-secure signatures. An 'ordinary' electronic signature suffices where a signature is required by parties to an electronic transaction and they do not specify the type of electronic signature to be used. ECTA provides that the electronic signature will be deemed to be valid where:

- 1.1 a method is used to identify the sender and to indicate the sender's approval of the information communicated; and

- 1.2 having regard to all the relevant circumstances at the time, the method was

reliable and appropriate for the purposes for which the communication was intended.

For most purposes, these 'ordinary' electronic signatures suffice.

2. For certain types of agreements, the second type of electronic signature is required, this being the so-called advanced electronic signature ('AES'). This is defined in ECTA as "an electronic signature which results from a process which has been accredited by the Authority as provided for" in terms of the ECTA. The authority referred to is the Department of Communication.

When is an AES required?

An AES is required for agreements and documents that our law stipulates must be in writing and signed. These will be valid if they are concluded electronically or are in electronic format, provided they are:

- accessible "in a manner usable for subsequent reference"; and
- signed with an EAS.

An example is a suretyship or signing as Commissioner of Oaths. (The Commissioner can sign an electronic copy of an original paper document with his or her AES and create a certified electronic copy of the original.)

Exceptions

ECTA excludes the following from being concluded electronically, whether or not an AES was used by the parties to sign:

- ***Agreements for the sale of immovable property***
The Alienation of land Act requires that agreements for the sale of land must be in writing and signed. But ECTA makes it clear that its provisions (allowing the use of data messages and electronic signatures where a law requires writing and signature) do not apply to agreements concluded in terms of the Alienation of Land Act
- ***Long-term leases of land exceeding 20 years***
This is a bit of a misnomer in that long-term leases of land in our law is understood to refer to those leases described in the Formalities in Respect of Leases of Land Act, where a long-term lease is a lease of 10 years and longer. However, as ECTA currently reads, no 20 year lease of land (or longer) can validly be concluded via electronic means.

- **Signing of a will**

The Wills Act requires a will to be in writing, signed and witnessed. ECTA stipulates that its provisions do not apply to the execution, retention and presentation of a will. In other words, signing a will by electronic means, even if it is an advanced electronic signature, does not constitute compliance with the Wills Act.

- **Bills of exchange**

The Bills of Exchange Act deals with bills of exchange, cheques and promissory notes (referred to as negotiable instruments). This Act requires that these negotiable instruments be in writing and signed, and ECTA specifically provides that it does not apply to these instruments.

More about an AES

ECTA requires that AESes be issued by an accredited service provider. The Department of Communications appointed LawTrust as the accredited authentication services provider. Consumers can apply for an AES from LawTrust and use it as signature to agreements.

For assistance requiring the validity of electronically concluded transactions, contact our specialising attorney, Allan White at allanw@stbb.co.za.

CONTACT US

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|----------------------------------|--------------------------------------|------------------------------------|
| ■ CAPE TOWN Tel: 021 406 9100 | ■ SOMERSET MALL Tel: 021 850 6400 | ■ ILLOVO Tel: 011 219 6200 |
| ■ CLAREMONT Tel: 021 673 4700 | ■ TABLE VIEW Tel: 021 521 4000 | ■ CENTURION Tel: 012 001 1546 |
| ■ FISH HOEK Tel: 021 784 1580 | ■ TYGERVALLEY Tel: 021 943 3800 | ■ BEDFORDVIEW Tel: 011 453 0577 |