

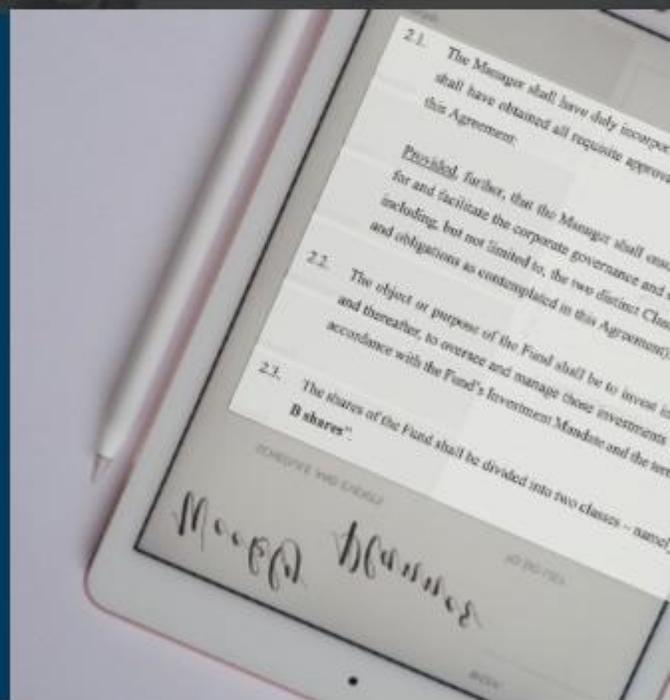
VIRAL LAW

A blog series on legal issues arising from the *Corona* pandemic

Electronic Transactions and Social Distancing

by

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ELECTRONIC TRANSACTIONS AND SOCIAL DISTANCING¹

SOCIAL DISTANCING AND CONTRACTING

The ongoing crisis caused by the “COVID – 19” virus has compelled us all to fundamentally change the way in which we conduct our affairs. “Work-from-home” policies and “social distancing” will probably remain the norm for some time since medical and scientific data strongly suggests that such precautions will be required for several months. However, even though the crisis has severely disrupted commerce and business operations, it does not necessarily have to bring them to a standstill. Alternate methods and procedures must be adopted to overcome the challenges that have arisen. Ironically, the crisis has forced us to re-examine provisions already catered for by law but ignored due to our own complacency with the traditional methods to which we are accustomed.

One of the most formal routines that lawyers engage in is contract formation and the execution of documents. Anachronistic procedures, usually requiring hard copies of documents, formal gatherings of parties and wet ink signatures continue, in spite of the law providing for the dispensation of such formalities in many instances. The present situation will hopefully result in greater use being made of the facilities provided for by the Electronic Transactions Act, No. 19 of 2006 [amended by Act, No. 25 of 2017, hereinafter the “ETA”] which recognizes the right of parties to execute transactions by way of electronic communication.

THE FOCUS OF THE ETA

The ETA gives legal recognition to electronic contracts and facilitates such transactions by laying down applicable principles with regard to contract formation, documentation and guidelines for electronic execution.

¹ This article is intended for informational purposes only and does not constitute legal advice in any manner or form.

CONTRACTS BY ELECTRONIC MEANS

The ETA supplements the general principles of contract law with regard to invitations to make offers, attribution of electronic records, acknowledgement of receipts, timing and place of dispatch of electronic records, and errors or variations in respect of electronic transactions.

It also provides that documents or records will not be denied legal recognition or be deemed ineffective, invalid or unenforceable on the grounds that they are not in manuscript form, even if any law mandates that they should be in writing. The ETA does, however, prescribe specific requirements that must be complied with in the retention of such documentation and records so that the integrity and reliability of such information is assured.

The ETA also recognizes the legality of electronic signatures by providing that, where a written law requires that a communication or other document must be signed or bear the signature of any person, that requirement will be deemed to have been met in relation to such a communication or document in electronic form if authenticated by a method that identifies the person and indicates such person's intention in respect of the information contained therein. In practice, electronic signatures can take any form, ranging from a "credential", i.e, the clicking of an "*accept*" button on a website, to a facsimile or scan of a physical signature, signing on a touch screen, or agreeing to any terms and conditions by way of an email, as long as the above criteria is met. However, one must be mindful that the ETA mandates that the method used must be appropriate for the purpose of the particular document and transaction in question. Hence, appropriate authentication would depend on the risk associated with mis-identification of the counter party and its intention. For instance, a simple order where the buyer takes possession of the goods will be difficult to repudiate even if the signature used is merely in the form of a typed name, whereas in a relationship which poses an ongoing risk, it may be prudent and necessary to adopt methods of multi-factor authentication, such as the use of one-time passwords (OTPs) or biometric measurement.

EXCLUSIONS

The ETA also specifically excludes certain types of transactions and documents from its ambit. They are: the creation or execution of wills and other testamentary dispositions; licenses for telecommunications systems (as defined in Section 17 (6) of the Telecommunications Act; Bills of Exchange (as defined in Section 3 (1) of the Bills of Exchange Ordinance); Powers of Attorney (as defined in Section 2 of the Power of Attorney Ordinance); Trusts (as defined in the Trusts Ordinance); contracts for the sale or conveyance of immovable property or interests in immovable property; or other documents or transactions that may be specified by the relevant Minister. Also excluded are any financial matters relating to (a) transactions on regulated exchanges; (b) foreign exchange transactions; (c) interbank payment systems, interbank agreements or clearance and settlement systems relating to securities or other financial assets or instruments; as well as (d) transfers of security rights in the sale, loan or holding of, or agreements to repurchase securities or other financial assets or instruments held with an intermediary. As such, wet ink signatures continue to be a requirement for such transactions and documentation.

EXPANDED USE OF THE PROVISIONS

Being creatures of habit, we are generally averse to change, preferring to stick with the traditional methods to which we have become accustomed. However, crises compel change and adaptation, and, in this instance, might result in a change in mindset which may prove beneficial to the conduct of more efficient commerce in the long run. However, due care must be taken to ensure that the principles in the ETA are strictly adhered to so that contracts made electronically meet the requisite tests of recognition. It must also be kept in mind that the provisions of the ETA do not dispense with other general safeguards and procedural requirements that must be observed in the execution of any document. For instance, statutes such as the Companies Act, No. 07 of 2007 have specific requirements on formalities with regard to methods by which companies may enter into contracts. These requirements remain relevant and must be complied with moving forward.