

Working remotely or only remotely working? Top tips for contracting electronically

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On Monday 23 March 2020, the New Zealand Government announced that New Zealand is at Level 3 on the COVID-19 alert system, and will move to Level 4 at 11.59 pm on Wednesday 25 March 2020.

Among other matters, the upshot of this is that many businesses have implemented remote working arrangements and will need to conduct business electronically for the foreseeable future (and at least the next four weeks).

While many will be familiar with conducting business remotely, for some, this will be entirely new, and can seem like a daunting and unclear process – especially when it comes to entering contracts remotely and by relying on electronically signed documents.

In this article, we set out answers to frequently asked questions about contracting electronically.

How can contracts be entered into under New Zealand law?

The default position is that a contract does not need to be in writing (or signed) in order to be valid and enforceable, unless the law expressly requires otherwise.

Generally speaking, provided that the party seeking to enforce the contract can establish that the parties intended to be bound by terms that are ‘certain’ in nature, a contract will be taken to have been formed.

That said, recording the terms of an agreement in writing, and obtaining a counterparty’s signature is often the best evidence that the counterparty intended to be bound by the contract.

In a remote working context, the typical methods of signing a contract ‘electronically’ are likely to include:

- **E-signing:** that is, one or more party using an electronic signature to execute a document. While this can be achieved many ways (more on this later) a common method is by using third-party e-signing software, such as DocuSign.
- **Sending electronic copies:** that is, where the parties each sign a ‘hard-copy’ version of the document, convert it to electronic form (for example, by scanning the document) and then send the ‘soft-copy’ to the other parties by email.

What kinds of contracts can be entered into electronically?

Generally speaking, most contracts can be entered into ‘electronically’.

Where a contract is required to be in writing and signed, an electronic version of the document executed using an electronic signature will satisfy this requirement (except in limited circumstances, detailed below).

In practical terms, what that means is that the parties can rely on an electronically signed and/or exchanged copy of a contract.

The crucial point is to ensure that contracts executed and exchanged electronically can be relied on as evidence of the terms agreed by the parties to it (our suggested practical measures to that end are also detailed below).

What kinds of contracts and documents can't be signed electronically?

There are certain documents that are subject to special formalities – in particular, a very limited subset of documents that require a very high level of integrity are unable to be signed electronically.

These include:

- wills, or other testamentary instruments;
- notices required to be given to the public;
- bills of lading;
- powers of attorney or enduring powers of attorney; and
- affidavits, statutory declarations, or other documents given on oath or affirmation.

What is an 'electronic signature'?

An electronic signature can take many forms.

Under Part 4 of the Contract and Commercial Law Act 2017 ('**CCLA**'), any legal requirement for a signature can be met by means of an 'electronic signature', provided that the electronic signature:

- adequately identifies the signatory and adequately indicates the signatory's approval of the information to which the signature relates (an emailed signature may suffice for this purpose); and
- is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

Practically speaking, this might include, for example, inserting a photograph of the signatory's handwritten signature to the execution block of the electronic copy of the contract, or the signatory typing their name.

To be clear, the 'signature' used by a signatory need not resemble the signatory's usual handwritten signature. The important point is that the form of signature meets the necessary reliability standard relative to the circumstances of the contracts.

What are some practical measures we can take to make sure that our electronic contracts are legally enforceable?

One good way of ensuring that electronic signatures meet the requirements set out above is to employ technology that has been designed to meet the requirements of the CCLA.

For instance, where available, you may wish to employ:

- document signing technology (such as DocuSign) that meets the standard for the presumption of liability under the

CCLA such that the electronic signature amounts to what is known as a 'digital signature', that is, an electronic signature which has been applied using security and trust measures which authenticate the validity of the electronic signature.

- document management technology which applies an unalterable timestamp to documentation and which employs other measures to preserve the integrity of documentation.

If such technology is not available, parties to a contract can still rely on the exchange of contracts by email (whether by 'e-signing' the document by other means, or scanning through hand-signed copies).

You should also ensure that each of the counterparts are identical, for instance, by:

- time or date stamping the document prior to signature;
- clearly marking the document to be signed as an 'execution copy' or similar; and
- initialling each page of the executed document.

Do desperate times call for desperate measures?

That said, as noted above, very few contracts actually require a physical signature in order for them to be legally binding. What you do need to establish, however, is that the parties intended to be legally bound. In the absence of the ability to apply a physical signature on a copy of such a contract, there are a few other innovative ways you might consider to ensure you can deliver evidence that this is the case:

- if you can print the document but can't scan it, think about taking a photo of the signature page (or even ask a self-isolation buddy to video you signing it);
- if you don't have printing facilities, see if you can use a digital pen, or failing that, a version of your signature created by you on a programme such as MS Paint that you can paste into the document;
- alternatively, send to the counterparty a copy of the final contract (unsigned), as a PDF, with an express statement indicating that you intend to be legally bound by the contract attached, and undertaking to sign a copy when it is practical to do so.

Are there any particular clauses that should be included when a contract will be executed and exchanged electronically?

While there's no legal requirement to include particular clauses in a contract that will be executed electronically, for the purposes of certainty, it can be helpful to include a 'counterparts' clause (which is typically included as a 'boiler-plate' clause in many commercial contracts) – along the lines of:

This agreement may be executed in two or more counterpart copies each of which will be deemed an original and all of which together will constitute one and the same instrument. A party may enter into this agreement by signing a counterpart copy and sending it to the other party (including by fax or email).

When should a contract not be entered into electronically?

There may still be circumstances where it will be appropriate to insist on the exchange and/or retention of original signed contracts (always having regard to the COVID-19 alert level in place at the time).

This will be particularly important in the case of contracts that are of particularly high value or which are expected to be contentious, since the evidential certainty inherent in an original signed contract is likely to outweigh the expediency of exchanging copies of the contract electronically in those circumstances.

If a contract is executed using an electronic signature, does a hard-copy of that contract also need to be hand-signed?

No – there’s no need to sign a hard copy version of a contract for it to be effective. Provided the electronic signature has the effect of indicating the signatory’s intention to be bound by the contract, it makes no difference whether its signed electronically or otherwise.

If your business requires assistance in the context of remote working, please contact Hayley Miller, Campbell Featherstone, or Gretchen Fraser.

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