

Electronic Communications (Jersey) Law 2000

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This guide is designed to summarise the main features of the Electronic Communications (Jersey) Law 2000 (the **E-Comms Law**), which facilitates electronic business, the use of electronic communications and the storage of information in electronic form.

The main features of the E-Comms Law are:

- contract formation and default rules for contract formation;
- admissibility of electronic evidence;
- validity of electronic transactions, data and signatures;
- remote witnessing of electronic signatures; and
- protection of internet service providers from civil and criminal liability.

Contract formation and default rules for contract formation

Formation of e-contracts

The E-Comms Law provides that the offer and the acceptance of the offer necessary for the formation of a valid contract may be communicated by means of an electronic communication (such as email or e-signature platform), unless the parties to the contract agree otherwise or the law provides otherwise.

When contracting online, consideration should always be given to the general principles of contract law that apply to offline contracts and the provisions of the Distance Selling (Jersey) Law 2007.

Electronic communications

The definition of electronic communications in the E-Comms Law has been drafted widely to incorporate email and other methods of online communication and also includes electronic records (i.e. information that may be generated, received or stored by electronic means).

The provisions of the E-Comms Law aimed at facilitating the use of electronic communications relate to the following:

- rules on the time and place of dispatch and receipt of an electronic communication, which apply unless the parties involved in the electronic communication agree otherwise;
- the attribution of an electronic communication to its originator when it is dispatched by or on behalf of the originator or when it is dispatched by an information system that has been programmed by or on behalf of the originator; and
- the entitlement of the addressee of an electronic communication to make assumptions about the identity of the originator and contents of an electronic communication and the addressee's entitlement to assume that each electronic communication received by him is a separate communication.

Admissibility of electronic evidence

The E-Comms Law provides that information shall not be prevented from being admissible as evidence in legal proceedings solely because it is stored in electronic form or because it is not in its original form (provided that in the latter case it is the best evidence that the person adducing it could reasonably be expected to obtain). When assessing the weight to be given to such information the court may consider the following:

- the manner in which it was generated and stored;
- the reliability of the way in which its integrity was maintained; and
- the way in which its originator was identified or the way in which the information was signed or otherwise accredited or authenticated.

Electronic Signatures

What is an electronic signature

An electronic signature is defined in the E-Comms Law as: 'a signature in electronic form attached to or logically associated with an electronic communication or electronic record'.

'Signature' or 'signed' is defined as including any symbol executed or adopted, or any security procedure employed or adopted, using electronic means or otherwise by or on behalf of a person with intent to authenticate an electronic communication or electronic record.

The English courts, at common law, also uphold the validity of electronic signatures applying a test of intention to authenticate rather than focusing on questions of form. The English Law Society's practice note 'Execution of a document using an electronic signature' (the **ELS Practice Note**) (which contains a summary of the English common law) states that: 'The test for determining whether or not something is a signature is whether the mark which appears in a document was inserted in order to give, and with the intention of giving, authenticity to it'. Therefore, provided that the signatory inserts an electronic signature into the appropriate place in a document with the intention of authenticating the document, a statutory requirement for that document to be signed will be satisfied. There are a number of English cases in which new forms of signature have been recognised including faxed signatures, a name typed into an email, a signature writing machine and clicking on an 'I accept' button. Examples of electronic signatures also include: a person typing their name into a contract or into an email containing the terms of a contract; a person pasting an image of their signature into the signature block of an electronic version of a contract and a person accessing a contract through an e-signature platform and typing their name into the party's signature block.

It is likely that the Jersey courts, although not bound by the English common law or the ELS Practice Note, would adopt a similar approach given the same 'intent to authenticate' test and this would be applicable to both the signing of simple contracts and contracts required by enactment to be signed.

Validity of electronic signatures

The E-Comms Law clarifies that a signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability simply because it is in electronic form. This provision in the E-Comms Law is now of general application, whereas formerly it only applied in circumstances where a signature was required by statute.

Requirement for signature

The E-Comms Law provides that a person required by an enactment to provide a signature is taken to have met that requirement in relation to an electronic communication in every case if a method is used to **identify** the person and to **indicate the person's approval** of the information communicated.

Authority to attach electronic signature for another

The E-Comms Law permits a signatory to authorise another person to attach the signatory's electronic signature on the signatory's behalf. This provision applies despite any rule or presumption relating to agency or delegation. Nevertheless, it is recommended that signatories attach their own electronic signatures.

Remote Witnessing of electronic signatures

Pursuant to the E-Comms Law, the requirement that a signature must be witnessed may, in addition to any other lawful means of witnessing that signature, be satisfied if the signatory and witness are able to see one another by means of an audio-visual link where either of the following applies:

- the witness (i) identifies the signatory and sees the signatory sign the document; (ii) is sent an electronic copy of the document by the signatory; and (iii) signs the document, attesting to the signature of the signatory; or
- (if utilising screen sharing software which allows both signatory and witness to see and sign the same electronic document): (i) the witness is in communication with the signatory at the time the document is signed; (ii) both the signatory and witness can see the document; (iii) the signatory electronically signs the document; and (iv) the witness signs the document, attesting to the signature of the signatory.

Nevertheless, if you can get wet-ink signatures and witnesses to be physically present this will always be preferable.

In general, only a Jersey law governed power of attorney or a Jersey law governed agreement containing a power of attorney signed by an individual needs to be witnessed. Where an ordinary power of attorney is signed by the donor using an electronic signature, the rules set out above concerning remote witnessing apply. It should, however, be noted that the Royal Court issued a direction on 16 April 2020 regulating the remote witnessing of ordinary and registrable powers of attorney signed by a donor using a scanned or photographed wet-ink signature (as opposed to an electronic signature), which is beyond the scope of this briefing.

It should also be noted that separate rules apply to the witnessing of lasting powers of attorney which are also beyond the scope of this briefing.

Protection of Internet Service Providers from civil and criminal liability

A service provider, which by the definition of that term in the E-Comms Law includes an Internet service provider, is basically the institution that provides access to the Internet in some form.

The following provisions of the E-Comms Law are intended to encourage Internet service providers to establish businesses in Jersey:

- a service provider is provided with an additional defence from criminal and civil liability in respect of information he handles if:
 - he can show that he did not know and had no reasonable cause to suspect that handling it would constitute an offence or give rise to civil liability;
 - as soon as practicable after he has such knowledge or suspicion he took reasonable steps to prevent the handling by the information system he owns or operates; and
 - in the case of potential criminal liability only, he notifies the police; and
- a service provider is not required to monitor electronic communications handled by him to ascertain whether such handling would give rise to an offence or to civil liability.

Other relevant Laws

In addition to the E-Comms, clients contracting on-line should seek advice on other applicable legal and regulatory issues, including the following:

- Data Protection (Jersey) Law 2018.
- Computer Misuse (Jersey) Law 1995.
- Distance Selling (Jersey) Law 2007.
- Supply of Goods and Services (Jersey) Law 2009.
- Intellectual Property Legislation.
- Any necessary regulatory consents.
- General principles of contract law.

Contacts

A full list of contacts specialising in corporate law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED