

How The COVID-19 Pandemic Is Accelerating The Move Toward Electronic Signatures

By: Steve McCabe

Some of the few and faint benefits of the ongoing COVID-19 pandemic might be that it is encouraging the transition toward electronic documentation for lessors and lenders. That's one of the conclusions from a panel discussion presented by the Equipment Leasing and Finance Association (ELFA) during its recent "Wednesday Webinars at 1:00" session on Dec. 2.

The ELFA session, entitled "E-signing and E-leasing in the COVID-19 World: Taking It to the Next Level," was moderated by Steve Bisbee, president and founder of eOriginal, and featured panelists Dominic Libertore, deputy general counsel for DLL, and Bob Cohen, partner at Moritt Hock & Hamroff LLP.

The screenshot shows a Zoom meeting with three participants: Dominic Libertore, Robert Cohen, and Stephen Bisbee. Below the video is a presentation slide titled "Creating an Enforceable Digital Contract". The slide is divided into three main sections: a navigation menu on the left, a central section on "Electronic Signature", and a right section on "Electronic Record".

Creating an Enforceable Digital Contract

- Creating an Enforceable Digital Contract

Electronic Signature

"Electronic Signature" means:

- an electronic sound, symbol, or process
- logically associated with an electronic record
- adopted with the intent to sign the record

Attribution, Authority and intent are key:

- Use context of the record or circumstances
- Applies usual rules governing authority or intent

Electronic Record

"Record" means:

- Information on a tangible, electronic or other medium
- Is retrievable in perceivable form

"Electronic Record" is virtually any stored record that is not on paper

Record retention system is critical:

- Enforce legal obligations
- Meet State or Federal "writing" and "retention" requirements
- Obtain admission into evidence in the event of a dispute
- **ESIGN/UETA focus on accurate preservation and access to information in the record.**

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The Pandemic's New Priorities

According to moderator Bisbee, the pandemic has been “a digital adoption accelerator” that has significantly jump-started the adoption of digital technologies—including e-signatures and e-documentation for leases and loans. Bisbee noted that in the pre-pandemic marketplace, the movement toward adoption of e-documentation was driven primarily by the borrower and his or her experience.

Convenience and cost reduction were the primary incentives for the early adopters, many of whom saw e-documentation for leases and loans as the logical technological evolution of the same changes they were embracing in managing their personal finances. They were content, for the most part, to wait for the technology to present itself and then come on board with it when they saw a clear benefit.

There was little urgency, in short. After all, if they could buy and sell and manage their personal finances safely and efficiently on their phone or laptop, most were confident that they would soon have technology at their disposal that would allow them to achieve similar gains in their commercial finance transactions.

But if progress in this evolution was slow but steady, the pandemic changed that almost overnight. Lessors and lenders are eagerly embracing e-signatures and e-documentation as the logical next step to keep transactions moving forward while traditional financial institutions are buried under the weight of quarantines and lockdowns.

Bisbee points to a wider swath of potential electronic transactions and digital technology, one that encompasses everything from mortgages to auto loans. Even the conventional role of a notary public certifying a signature is being supplanted in many states by a RON, or remote online notary.

Throughout this pandemic-driven transformation, the desire for speed and compliance in a frictionless financial process have become goals in and of themselves. The COVID-19 marketplace had enough barriers; lessors and lenders saw that the last thing they needed was to have to continue to work around the traditional logistical barriers to transactions presented by the paper and ink world.



Bob Cohen

Bob Cohen's recognition of how the pandemic has changed the face of financial transactions is rooted in what he has seen firsthand. The steady, incremental movement toward e-signatures before COVID-19 struck became a race to adopt them as a very effective way to circumvent the traditional operational method of using ink signatures, which were severely curtailed as the country started to lock down.

In It for the Long Haul

"It's important to talk about the early adopters of e-documentation," Cohen says. He recounts how he and Libertore would meet annually in their roles on ELFA Legal Forum Committee.

"Every year, for three-plus years, Dominic would pitch e-signatures to us," Cohen says, laughing. "'You've got to adopt it,' he'd tell us. And every year, it was a big joke when he saw the show of hands of how few of us were doing so."

But Cohen notes that six or eight years ago, things had started changing: electronically signed documents were starting to take off. "Dominic was then the e-signature oracle," Cohen says.

Today, of course, "COVID put the accelerator on it," Cohen says.

Peter Zeihan, a geopolitical strategist and frequent observer of industry trends, agrees that the pandemic-driven wave of technology adoption swept up e-documentation—and, more importantly, that it's now here to stay in leasing and

lending. Zeihan also predicts a longer timeline for moving through the pandemic—and some fundamental changes in its wake:

“We will never return to where we were in 2019... Economically, this means that the COVID recession is no longer a one-off, but instead a deep-seeded event affecting every economic sector... The bottom line is that you should not count on what we consider normal demand in pricing patterns recovering--or an end to the recessionary activity--until at least 2022.”

Liberatore concurs.

“This [move toward e-documentation] is not a two-week, two-month, or two-year event. It’s here to stay,” he says. Libertore sees it as a truly transformational change in how leases and loans are documented and executed.

“It’s all around us, everywhere. It’s what all of our customers want—and need. It’s not going anywhere. COVID-19 will be the tipping point for the adoption of e-documentation,” he says.



Dominic Libertore

To understand where we are today with e-signatures and e-documentation, it’s important to understand how we got here.

According to Cohen, the “granddaddy statute” for e-documentation was the federal Electronic Signatures in Global and National Commerce Act (ESIGN), signed into law on June 30, 2000. While it did not garner much interest when first enacted, it was significant because it did provide for further state laws consistent with the principles of e-documentation.

“That’s where UETA [the Uniform Electronic Transactions Act] came into play,” Cohen explains. UETA is a model law, like the Uniform Commercial Code (UCC), and has been adopted by 48 states—with New York and Illinois as the outliers. UCC Article 9, specifically section 9-105, establishes six set rules for digital securities as electronic chattel paper for non-real estate assets and was the first law to apply “control” rather than possession for the priority of security interests. Combined, ESIGN, UETA, and UCC 9-105 provide a broad platform for conducting certain business electronically.

So, does this mean leases and loans that have been e-signed and e-documented are valid?

According to Cohen, “In a nutshell, yes: e-documents signed with a properly authenticated electronic signature are generally enforceable in the equipment finance industry, depending upon the type of document.” That said, Cohen encourages all parties to check with an attorney in their area to confirm that the document to be signed will be enforceable if e-signed. He goes on to explain that while e-documentation enforceability is sound for leases and loans, other types of transactions are not legally or practically ready for electronically signed documents. Mortgages, for instance, depend on state law for whether e-documentation of them is enforceable. He notes that in his home state of New York, for example, county clerks are permitted (not required) to accept e-signatures for mortgage documentation. “But the reality is that county clerks in New York State are not accepting electronically signed mortgages at this time,” Cohen notes.

Defining Some Key Terms

E-documentation is still new enough to carry some ambiguity surrounding its workings; it’s many things to many people. To provide some clarity, Cohen feels it’s often best to note what e-documentation is not. “We do *not* mean an ink signature faxed or scanned and then sent to a lender,” he says. “Instead, we are talking about, first, using a front-end vendor to authenticate that a document has

been signed by the intended person and, second, using an electronic ‘e-vaulting’ company to properly store that electronic document.”

E-signatures are far better than ink, for a number of reasons, Cohen says.

The age-old question surrounding any signature has been and always will be, “How do I know who signed this?” Prior to the advent of e-signatures, the only verification of the person who actually signed the document was by a witness and/or a notary—neither of whom were generally accessible and/or reliable, Cohen says.

However, when set up properly, an electronically signed document materially upgrades the verification process. For most e-documentation, it is recommended that a “multi-factor” authentication process be set up. For example, many front-end vendors start the e-signature process by sending a passcode and other required access information by SMS text to a signatory’s mobile phone. With this information in hand, the signatory logs on to a website and creates an account and new password. Then, before electronically signing the document, he or she has been authenticated by two methods (i.e., first by mobile phone and secondly by computer).

In addition, many funders go further and ask the signatories to properly answer specific questions to verify their identity. These questions often refer to information about him or her obtained from public or other records, such as prior addresses. This verification tool, often referred to as the “out-of-the-wallet” test, is specifically designed to *not* seek current information about the signatory. Passing the out-of-the-wallet test thus creates an additional layer of confidence and security that the person executing the e-document is, in fact, the person who should be executing the document.

Cohen notes that e-signatures have additional built-in verification tools in the form of a clear and traceable electronic “trail” verifying that the e-document was opened and signed electronically, in addition to providing a clear identification of the computer, phone, and/or other device that was used to access and sign the document. E-signatures are far more easily verified—and therefore more resistant to fraud or abuse—than their paper predecessors. Clearly, an e-signed document can provide many more touch points to confirm that the proper party signed the document. In contrast, an ink signature usually provides little to no additional verification.

E-documentation Beyond the Pandemic

Human behavior will solidify the role of e-documentation, the panelist feel . Noting that UCC 9-105, UETA, and ESIGN have been in effect for up to 20 years, the pandemic-induced acceleration in e-documentation has been long overdue.

“It’s taken this long because people have finally gotten comfortable with electronic transactions in general,” Cohen says. “You have to support human behavior, and it’s human behavior that is now driving the adoption of e-documentation.”

Cohen offers the example of a recent lease signing by a client using the e-signing process for the first time. Unfamiliar with the process, the lender had allocated three hours for the finalization and funding.

“They did it in 15 minutes,” Cohen says.

For a complete transcript of this webinar, visit the ELFA online library at: [eSigning and eLeasing in the Covid-19 World- Taking it to the Next Level \(elfaonline.org\)](http://elfaonline.org)

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