

The Electronic Transactions (Guernsey) Law, 2000

GUIDE

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Introduction

This guide is designed to summarise the main features of the Electronic Transactions (Guernsey) Law, 2000 (the **Electronic Transactions Law**).

The Electronic Transactions Law facilitates electronic business, the use of electronic documents and process, and the storage of information in electronic form. The main features of the Electronic Transactions Law are:

- validity of electronic transactions, data and signatures
- liberalisation of requirements of legal form
- admissibility of electronic evidence
- clarification on the legal validity of electronic agents and 'smart contracts'
- protection of internet service providers and hosts from civil and criminal liability and
- confirmation that the use of encryption is not unlawful.

Validity of electronic transactions

The Electronic Transactions Law confirms that information and documents (more fully set out below) will not be denied legal effect, validity, enforceability or admissibility solely because they are in electronic form and that legal requirements of form can be met electronically.

Electronic transactions may not however be valid for other reasons– the Electronic Transactions Law simply clarifies that such information and documents cannot be invalid *solely* because they are in electronic form or done by electronic means.

Information

As a general rule, 'information' will not be denied legal effect, validity, enforceability or admissibility, solely because it is in electronic form.

Contracts

A contract (or any provision of a contract) will not be denied legal effect, validity or enforceability and it will not be denied admissibility in evidence solely because it is in electronic form. Accordingly, the ordinary principles of Guernsey contract law apply to electronic contracts.

Signatures

A signature, seal, attestation or notarisation in electronic form will not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form and a signature in electronic form satisfies a law requiring a signature written by hand.

A *signature in electronic form* is defined as being 'a signature wholly or partly in electronic form attached to or logically associated with information in electronic or non-electronic form, and references to a signature being in electronic form will be construed accordingly'.

Documents and records

A document, record, notice or instrument will not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form and any such document, record, notice or instrument in electronic form satisfies a requirement that it is in writing.

A document in electronic form satisfies a legal requirement to retain such in hard copy form, and vice versa.

Declarations and statements

A declaration or statement made under oath or by affirmation, a statutory declaration or other declaration or statement made otherwise in electronic form will not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form.

Information incorporated by reference

Incorporating electronic information and documents by reference will also not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form, for example terms and conditions incorporated by reference contained on a website.

Exceptions

The Electronic Transactions (Exemptions) Order, 2001 (the **Exemptions Order**) sets out certain transactions and other matters which are generally excluded from the application of the Electronic Transactions Law, ie they must continue to be carried out without the benefit of making use of electronic means or electronic form. These include transactions concerning real property, eg conveyancing and leasing, and wills or any other testamentary instrument.

Other circumstances where an electronic document or signature should not be used include where:

- the requirements of a specific statute or contract expressly require physical writing, eg a hard copy document and wet ink signature
- the document needs to be presented to an authority and it requires a wet ink original (currently not all documents submitted to the Guernsey Financial Services Commission (the **GFSC**) can be submitted electronically)
- the document is to be signed by an overseas entity and, as a matter of local law, it does not have the capacity to use electronic signature or the person signing does not have the authority to use an electronic signature and
- enforcement action may need to be taken in another jurisdiction and that may be made difficult as a matter of local law because the use of an electronic signature.

In addition, a person cannot be compelled to do or accept anything in electronic form or by electronic means, unless such an obligation is imposed by ordinance. The only such ordinance to date is the Electronic Transactions (Obligation to use Electronic Form) (Guernsey) Ordinance, 2014 under which the GFSC may require the submission of certain documentation required under Guernsey's regulatory laws in electronic format, including statutory declarations.

Where it is important to establish where a document has been signed or is held for tax reasons, extra precautions may need to be taken to establish where the signatories are when they sign and where the document is kept. Wet ink signatures may be preferable in such cases.

Electronic agents

The Electronic Transactions (Electronic Agents) (Guernsey) Ordinance, 2019 (the **2019 Ordinance**) came into force on 1 March 2019 to provide enhanced certainty in relation to the legal effect, validity and enforceability of a contract carried out by means of an 'electronic agent' in relation to the formation, execution, performance and termination of a contract.

When the Electronic Transactions Law was enacted back in 2000, it was considered that the laws of agency and contract formation were 'sufficiently robust to encompass electronic agents'. However, in the interests of enhancing the appeal of Guernsey as a jurisdiction for businesses wishing to use electronic agents and smart contract technology (including enabling Guernsey to be the law of choice for commercial contracts in

respect of the same) the States of Guernsey have legislated specifically for electronic agents and the legal effect of actions carried out by such means.

The law of electronic agents

The Electronic Transactions Law describes an 'electronic agent' as:

'a computer program or electronic or other automated means used independently to initiate an action or to respond in whole or in part to information or actions in electronic form or communicated by electronic means, without review or action by a natural person'

and clarifies that the formation of a contract by the interaction of electronic agents will not be denied legal effect, validity, enforceability or admissibility where one or more electronic agent is acting on behalf of:

- all parties without any human involvement at all
- one party and a natural person acting on his own (or another party's) behalf
- one or more parties to the same transaction (where the same electronic agent is acting for all parties).

The Electronic Transactions Law creates a rebuttable presumption that the natural persons (on whose behalf the electronic agents are acting) intended to create a legally binding contract.

Smart contracts

A 'smart contract' is not a legal term but a technological one for a self-executing contract, the terms of which are written in computer code. As things stood before the 2019 Ordinance, there was some potential for doubt that a smart contract could create a legally binding contract (although in principle it should have already been possible under the Electronic Transactions Law). The position has now been clarified by the 2019 Ordinance so that a smart contract falls within the meaning of an 'electronic agent'.

Internet service providers (ISPs), hosting and encryption

ISPs

A 'service provider' is essentially a person who provides a service consisting of the provision of access to a telecommunications system or the transmission over a telecommunications system of information provided by another person. A service provider has the following defences available for certain functions:

- **Acting as a conduit:** a service provider shall not be subject to any criminal liability, or liable for any damages, in respect of or arising out of the information transmitted or to which access has been provided so long as the service provider can establish:
 - that they did not initiate the transmission
 - that they did not select the receiver of the transmission and
 - that they did not select or modify the information contained in the transmission.
- **Caching:** a service provider shall not be subject to any criminal liability, or liable for any damages, in respect of or arising out of the automatic, intermediate and temporary storage of the information, performed for the sole purpose of improving the efficiency of its onward transmission to other persons so long as the service provider can establish:
 - that they did not modify the information
 - that they complied with conditions on access to, or updating of, the information
 - that they did not interfere with the lawful use of technology to obtain data on the use of the information
 - that upon obtaining actual knowledge of the fact that:
 - the information at the initial source of the transmission has been removed from the telecommunications system or
 - access to the information has been disabled or
 - a court or other authority has ordered such removal or disablement,they acted expeditiously to remove or to disable access to the information they had stored.

Hosting

A host, being 'a person who provides a service that consists of the storage in electronic form of information provided by another person', will not be subject to any criminal liability in respect of, or arising out of, the information stored at the request of the other person where the host can establish:

- that they did not have actual knowledge of:
 - any unlawful information stored or
 - any unlawful activity arising out of the storage of the information, or
- that upon obtaining such knowledge or awareness, they acted expeditiously to remove or to disable access to that information.

A host will also not be liable for any damages in respect of or arising out of the information stored at the request of the other person if they can show (in addition to the above) that they were not aware of facts or circumstances from which the unlawfulness of the information or activity was apparent.

The defence is not available where the person who provided the information to be stored was acting under the authority or control of the host.

Encryption

The Electronic Transactions Law also declares that it is not unlawful for a person to use any means of encryption or decryption for any lawful purpose solely by reference to the bit size or other measure of strength of the means of encryption or decryption (save that Guernsey's import and export laws are not prejudiced by this law).

Other relevant laws

In addition to seeking specific advice on the Electronic Transactions Law, clients contracting online should seek advice on other applicable legal and regulatory issues, including:

- the Data Protection (Bailiwick of Guernsey) Law, 2017
- the Electronic Transactions (Obligation to use Electronic Form) (Guernsey) Ordinance, 2014
- the Electronic Transactions (Cheque Imaging) (Guernsey) Ordinance, 2017
- the Computer Misuse (Bailiwick of Guernsey) Law, 1991
- intellectual property legislation
- the Protection of Investors (Bailiwick of Guernsey) Law, 1987
- any applicable regulatory rules or consents and
- general principles of contract law.

Contacts

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

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