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## JURISDICTION OF DRTs & PROGRESS ACHIEVED UNDER IBC



### TIME TO REBOOT?

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# Execution of Documents in India: A Digital Outlook

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## INTRODUCTION:

The execution of a document means the affixation of the signatures of all the authorized persons who are required by the nature of the document to sign the said document. Such execution creates a binding effect under the law, and it is based on the principle of “consensus ad idem” – a Latin phrase meaning “meeting of the minds”, which is the guiding principle for agreements between parties, to ensure that there is clear and same understanding of the terms and conditions of the contract in each party’s mind.

In India, physical execution, that is, using wet signatures, is the most preferred mode of execution, and this preference comes down to ‘evidence’. The original physical documents that have been signed by the hand of the parties have primary evidentiary value as per the Indian Evidence Act, 1872 (“Evidence Act”), since in case the validity of the same is challenged in a court of law, the burden of proof or onus to prove that the document has not been duly executed lies on the person challenging it.

However, in the recent times, due to the COVID-19 scenario, there has been an increase in digital or electronic executions, as meeting face to face for executions is not safe.

## SIGNING IN COUNTERPARTS

Contracts can be signed in counterparts wherein copies of the said contract are printed, so each party has a copy of the contract to be signed, which is treated as original contract. Another scenario is where the signing pages of the contract are printed and signed by the parties who are in various parts of the country or world, followed by the parties mailing the physically signed copies of the signing pages, which is then compiled and scanned for record purposes, hence creating both primary and secondary evidence of the execution of the contract. A contract which lacks a clause for execution in counterparts can also be signed in counterparts. However, it is advisable to include one, as it would prevent the contract from being challenged by the parties as being not enforceable or valid.

## E-SIGNING OR DIGITAL SIGNING

Contrary to popular belief, the concept of e-signing or digital signing of contracts has been in existence since 2008, when an amendment was made to the Information Technology Act, 2000 (“IT Act, 2000”), to include Section 10A, which dealt with the validity of contracts formed through electronic means.

Section 10A of the IT Act, 2000 reads as follows:

“Where in a contract formation, the communication of proposals, the



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acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.”

There are multiple ways of signing a contract electronically or digitally, and some of the major ones are as follows:

**a) Digital signature:** A person can obtain digital signature certificate (“DSC”) issued by licensed certifying authorities under Section 24 and the rules under the IT Act, 2000. DSCs are a secure electronic record under the IT Act, 2000 and the Evidence Act, and are the digital equivalent of physical or

paper identity records. The authenticity and integrity of a DSC is generally not questioned in a court of law, and under Section 85B of the Evidence Act, it is presumed that the DSC has not been altered since the specific point of time of its secure affixation, and that the secure digital signature is affixed by subscriber with the intention of signing or approving the electronic record. DSCs have three different levels of security – ranging from Class 1 to 3, where Class 3 is the most secure.

**b) Electronic signature:** It is equivalent to a signature made by hand under the IT Act, 2000 and is usually of two types, which include e-signature associated with an Aadhar identity number with e-KYC (Know Your Customer) method, and a digital

signature with asymmetric crypto and hash function system stored on a USB drive. E-signature employs different technology from digital signature, and is not interchangeable with digital signature. E-signature must fulfil the following criteria to be considered as reliable: (i) the e-signature is linked only to the individual signing the document, and not to any other person; (ii) e-signature while executing the contract was under the control of the signatory to whom it belongs; and (iii) any alteration to be made to electronic signature after affixing signature is detectable. According to the IT Act, 2000 read with the Evidence Act, e-signature techniques using Aadhar and e-KYC method shall be considered as a valid e-signature.

### STAMP DUTY IMPLICATION ON DIGITALLY SIGNED CONTRACTS

It is crucial to note that as per Section 35 of the Indian Stamp Act, 1899 (“Stamp Act”), an instrument which is chargeable with stamp duty shall be admissible as evidence only when the appropriate stamp duty has been paid on the same. Contracts that have been executed digitally shall not be exempted from the payment of stamp duty. Section 3 of the Stamp Act provides the criteria which determines if stamp duty is to be paid or not – the document attracting stamp duty must be an “instrument” and the instrument must be executed. As per Section 2(14) of the Stamp Act, “instrument” includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended extinguished or recorded. Therefore, stamp duty shall be payable on all the digitally executed contracts which are enforceable before the court of law.

The Central Government allows for

the online payment of stamp duty on agreements, and in certain states, such as Delhi, all stamp duty payments are made via online mode. Stock Holding Corporation of India Limited (“SHCIL”) has been appointed as the Central Record Keeping Agency for all e-stamps used in India.

Following are the most popular methods of electronic stamp duty payment:

- **E-GRAS:** It is an electronic collection of government receipts by the State Government. Anyone can use the said service to deposit any government receipts if they choose to do so. In addition to the aforementioned, many Indian state governments have made it possible to pay stamp duty utilising the E-GRAS facility.

- **E-Stamp Paper:** Another common way of paying stamp duty in India is via e-stamp paper. The amount of the stamp duty is transmitted using this method of payment to the bank account of SHCIL or any other authorised vendor of e-stamp paper. Upon receiving the required amount of stamp duty, SHCIL or the licenced e-stamp vendor will produce the e-stamp paper of the requisite amount.

- **eSBTR:** The State Government of Maharashtra, in addition to the previously mentioned methods, has made available a method to pay stamp duty, known as the Electronic Secure Bank and Treasury Receipt (eSBTR). In the eSBTR system, a person is required to visit the bank, and make the requisite payment of stamp duty to an authorised officer after filling the application form. The said designated officer, after entering the details in their database online, will issue an eSBTR which shall be a proof of

payment of stamp duty akin to a stamp paper.

## CONCLUSION

Digital or electronic signature has become more prevalent in recent times, owing to the COVID-19 outbreak in 2020. Signing documents face-to-face is now a risk, and digital or electronic signing is a much safer and secure option for execution of agreements. A digital signature is authentic, preserves the integrity of the documents and cannot be repudiated. Digital signatures which use cryptographic algorithms cannot be copied or forged, and the slightest change to any digitally signed document makes the signature invalid. Furthermore, digital execution of documents is an environment friendly option, since it eliminates the requirement of physical paper documentation and reduces paper wastage.

However, the following documents require a notarial process and/or must be registered with a Registrar or Sub-Registrar, therefore, they can only be executed using handwritten signatures to be legally enforceable:

- Negotiable instruments such as a promissory note or a bill of exchange other than a cheque;
- Powers of attorney;
- Trust deeds;
- Wills and any other testamentary disposition; and
- Real estate contracts such as leases or sales agreements, or any other document which is required to be registered under law. 



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