



# GLOBAL EXPANSION GUIDEBOOK

IPT

*South Korea*



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## INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Intellectual Property and Technology*.

### GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

### INTELLECTUAL PROPERTY AND TECHNOLOGY

Inside this guide, we outline crucial aspects of IPT laws in over 40 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we've also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper's IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide's use of the term "trademarks" also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty).

We hope that you find this guide valuable and we welcome your feedback.

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.

## SOUTH KOREA



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### INTELLECTUAL PROPERTY FRAMEWORK

#### *Overview*

As a general matter, intellectual property rights are governed by various Korean intellectual property statutes, including the Patent Act (PA), the Copyright Act (CA), the Utility Model Act, the Trademark Act (TMA), the Design Protection Act, the Unfair Competition Prevention and Trade Secret Protection Act (UCPA) and the Semiconductor Chip Act (SCA).

### COMMERCIAL CONTRACT FRAMEWORK

#### *Overview*

The Civil Code, the Commercial Code (KCC) and the Standard Terms Control Act (STCA) are the primary statutes that govern private and commercial contracts. The Monopoly Regulation and Fair Trade Act (FTA) is relevant to antitrust laws, and there are industry-specific regulations that may be applicable to contracts in particular industries.

Commercial contracts with national and local government agencies are subject to additional laws and governmental regulations, which can include, among other matters, specific bidding requirements as well as a grant of intellectual property rights to the government by default.

### COPYRIGHTS

#### *Nature of right*

Copyright protection arises upon creation of an original copyright work without any formality.

Copyright registration is not a prerequisite for copyright protection or enforcement, although it provides certain statutory presumptions that give advantages in enforcement. Protection under the CA applies to any creative work that expresses ideas or sentiments of mankind.

The copyright holder who has the right to reproduce and distribute a work (initially, the author) may license or assign the right of publication to a person who intends to publish the work (whether in writing or drawing).

## *Legal framework*

Copyrights are governed by the CA. Korea has also acceded to the Universal Copyright Conventions, the Berne Convention, the Rome Convention, the Geneva Phonograms Convention, the GATT, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

## *Duration of right*

An individual author can enjoy copyright protection for 70 years after their death (an individual author of a cinematographic work can enjoy copyright protection for 70 years from the date of its publication), and the copyright protection term for a work made for hire is 70 years after the date of its publication.

## *Ownership / licenses*

The CA recognizes an author's moral rights as well as economic rights. The moral rights are in principle inalienable. Joint ownership of copyrights is recognized. To exercise copyright in a jointly owned work, consent from all joint owners is required. Non-exclusive licenses are available. An exclusive right against 3rd parties is recognized only for the right of publication (including publication rights for computer programs).

## *Remedies for infringement*

Remedies available for infringement are:

- Criminal action
- Preliminary injunction
- Permanent injunction
- Damages

Under the CA, infringement of a copyright is punishable by imprisonment of up to 5 years and/or a fine of up to KRW50 million (USD37,000), as determined based on the particulars of each case.

In addition, the CA also provides for imprisonment of up to 3 years or a fine of up to KRW30 million (USD22,000) if:

- A claimant uses the information on an infringer that has been received from an online service provider for purposes other than the intended purpose of pursuing a legal action against the infringer.
- A person manufactures or distributes equipment that descrambles or decodes encrypted broadcast signals.
- A person forges copyright labels to be attached to a work (eg, a DVD) or transacts labels beyond the permitted scope.

- A person emits signals to a 3rd party without legitimate authority before the work is broadcast.

In addition, a person who watches, listens to or transmits illegally descrambled broadcast signals or records or publicly transmits a cinematographic work on video tape without receiving proper permission from the copyright holder will also face up to 1 year imprisonment or a fine of up to KRW10 million (USD7,000).

The CA generally provides copyright holders with the ability to claim for damages and the right to demand restoration of reputation, depending on what may be appropriate given the nature of infringement.

The CA introduces a system of statutory damages, which takes into account the difficulty in assessing the amount of actual damages suffered as a result of copyright infringement. Under this system, a copyright holder may now claim up to KRW10 million (USD7,000) in statutory damages (or KRW50 million – or USD37,000 – for intentional copyright infringement for profit) for each copyrighted work.

Another alternative is to seek administrative remedies through the Ministry of Culture, Sports and Tourism, which grants to certain government officials the authority to confiscate and destroy any illegal or unauthorized reproduction of copyrighted works. The officials may also order the infringer to delete any illegal or unauthorized reproduction online.

## MASK WORKS / TOPOGRAPHIES

### *Nature of right*

The SCA defines a protectable layout-design as a plane or 3-dimensional design of circuit elements and wires connecting those elements such that the design could be used in manufacturing an integrated circuit topography. Registration is necessary for protection under the SCA. If the registered layout-design lacks creativity, it may be cancelled.

### *Legal framework*

Circuit layout-design protection is governed by the SCA.

### *Duration of right*

The term is 10 years from the date of registration. However, the term shall not exceed 10 years from the date when the registered layout was first used for commercial purposes or 15 years from the date when the registered design was created.

### *Ownership / licenses*

Joint ownership of layout-design rights is recognized. Both exclusive and non-exclusive licenses are available.

### *Remedies for infringement*

A person who infringes the layout-design right or exclusive license is subject to imprisonment for a term of up to 3 years and/or a fine of up to KRW30 million (USD22,000). This offense may be prosecuted only upon filing of a criminal complaint by the holder of a layout-design right.



A preliminary or permanent injunction may be sought against infringers of the layout-design right. Compensation for damages may also be sought in a civil action.

## PATENTS

### *Nature of right*

Patents are examined and granted by the Korean Intellectual Property Office (KIPO). A patent may be granted for a new and industrially applicable invention. The industrial applicability requirement is often discussed when an invention is directed to the treatment of humans or involve the human body as an indispensable element, such as surgical methods and methods of treatment of humans.

Inventions that are likely to injure public order, morality or public health are unpatentable in Korea.

Further, under the PA, technical information made public through the Internet may be also regarded as prior art.

### *Legal framework*

The legislation governing registered patents is the PA.

### *Duration of right*

Under the PA, the term of a patent is 20 years from the filing date of the application.

For a patent application filed on or after March 15, 2012, the term may be extended to compensate for unreasonable delays during the prosecution of the application, where the delay is caused by KIPO.

If the registration of a patent is delayed for more than 4 years from the filing date of the application or more than 3 years from the request for examination, whichever is later, the patent term can be extended for a period equal to the delay occurred. Any delays attributable to the applicant will not be included in the patent term adjustment period. The above patent term adjustment is not automatically granted by KIPO and may be awarded only upon a petition by the applicant within 3 months from the registration date of a patent.

### *Ownership / licenses*

Joint ownership of patents is recognized. Both exclusive and non-exclusive licenses are available.

### *Remedies for infringement*

The remedies available for infringement are:

- Criminal sanction (quite rare)
- Preliminary injunction
- Permanent injunction

- Damages

Under the amended PA which became effective on July 9, 2019, courts are authorized to award damages as a punitive measure of up to 3 times the amount of actual damages for intentional or willful acts of patent infringement.

## TRADEMARKS

### *Nature of right*

A trademark is broadly defined as any type of mark that functions to distinguish one's goods from others, regardless of its construction or its representation, including a symbol, character, sound, scent, 3-dimensional shape, hologram, motion, single color or any combination thereof.

A service mark is a mark that is used by a person who carries on a service business to distinguish such business from those of others. Except as otherwise expressly provided for under the TMA, the provisions under the TMA relating to trademarks shall apply to service marks as well.

Rights in a trademark based on prior use are only minimally protected, with the exception of "well-known" trademarks. The owner of a well-known, unregistered trademark may prevent others from using or registering a similar mark or may bring an invalidation action against such a registration.

As it may be difficult to establish the well-known status of a trademark, registration of trademarks is highly advisable to secure protection.

Trade dress of a service provider is now protected under the UCPA. Examples of such trade dress are as follows: the manner in which goods are offered for sale or services are provided and the overall appearance of the place where the service is provided, such as signboards, and external and interior design.

The amended UCPA which took effect on July 18, 2018 introduced a new provision prohibiting unfair competition in connection with "idea theft" – the unfair use of the ideas of another with economic value that has been obtained as part of a business negotiation or transaction.

### *Legal framework*

Protection of trademarks is governed by the TMA and the UCPA.

### *Duration of right*

The term of protection is 10 years from registration, renewable indefinitely as long as the prescribed fees are paid.

### *Ownership / licenses*

Joint ownership of trademarks is recognized. Both exclusive and non-exclusive licenses are available.

### *Remedies for infringement*



The remedies available for infringement are:

- Criminal sanction
- Preliminary injunction
- Permanent injunction
- Damages

Under the amended TMA which became effective on October 20, 2020, courts are authorized to award damages as a punitive measure of up to 3 times the amount of actual damages for intentional or willful acts of trademark infringement.

## TRADE SECRETS

### *Nature of right*

The UCPA defines "trade secret" to mean information of a technical or managerial nature that can be used in business activities (including production or marketing methods), is generally unknown to the public, possesses independent economic value, and the secrecy of which is managed. Under the amendment to the UCPA which took effect on July 9, 2019, the reasonable effort requirement was deleted and as long as secrecy is simply maintained, the secrecy requirement will be considered met without reference to the "effort" of maintenance at all.

The UCPA defines infringement of a trade secret to include the following:

- Acquiring a trade secret through larceny, embezzlement, coercion or other improper methods (ie, an illegal acquisition), or subsequently using or revealing an acquired trade secret (including the revelation of the trade secret to certain people while generally maintaining the confidentiality of the trade secret).
- Acquiring a trade secret knowing (or being grossly negligent in not knowing) that it was the subject of illegal acquisition, or subsequently using or revealing a trade secret so acquired.
- Using or revealing a trade secret having learned (or being grossly negligent in not learning) subsequent to the acquisition of the trade secret that it was the subject of an illegal acquisition.
- Using or revealing a trade secret in breach of a contractual or other obligation to maintain that trade secret for purposes of acquiring an improper benefit or harming the owner of the trade secret.
- Acquiring a trade secret knowing (or being grossly negligent in not knowing) that the trade secret had been revealed in the manner set out above, or that the trade secret had otherwise been the subject of such revelation, or subsequently using or revealing a trade secret so acquired.
- Using or revealing a trade secret having learned (or being grossly negligent in not learning) subsequent to the acquisition of the trade secret that the trade secret had been revealed in the manner set out above, or that the trade secret had otherwise been the subject of such revelation.

Under the amended UCPA which became effective on July 9, 2019, courts are authorized to award damages as a punitive measure of up to 3 times the amount of actual damages for intentional or willful acts of trade secret misappropriation.

## *Legal framework*

Trade secrets are protected by the UCPA, the Act on Protection and Prevention of Disclosure of Industrial Technology (Industrial Technology Act), and the Act on Special Measures for Strengthening the Competitiveness of and Protecting National High-Tech Strategic Industries (National High-tech Strategic Industries Act) in Korea.

## *Duration of right*

The term of protection is potentially perpetual as long as the prescribed definition is met.

## *Ownership / licenses*

Joint ownership is possible. Trade secret (know-how) licenses are enforceable.

## *Remedies for infringement*

Trade secret misappropriation in violation of the UCPA is punishable by up to 10 years of imprisonment or a fine of up to KRW500 million; provided, however, if 10 times the pecuniary amount gained from such acts exceeds KRW500 million, the fine will be at least 2 times (not to exceed 10 times) the gain. The penalty is aggravated in case the trade secret is used overseas or disclosed to a 3rd party knowing that such trade secret will be used overseas (maximum 15 years of imprisonment, the fine is up to KRW1.5 billion – or USD1.1 million – subject to the same proviso as above). In addition, the employer (ie, company or an individual) of an employee who committed acts in violation of the law is vicariously liable unless the employer can prove that they were not negligent in preventing such act.

Under the amended Industrial Technology Act which became effective on February 21, 2020, criminal sanctions regarding misappropriation of industrial technology became stronger. A person who commits illegal use or disclosure of industrial technology shall be punished by imprisonment of up to 10 years or by a fine of up to KRW1 billion (USD 700,000). However, in case any of the such acts are committed to "use the industrial technology overseas" or "with the purpose of using the industrial technology overseas," the penalty is increased to imprisonment of up to 15 years or by a fine of up to KRW1.5 billion (USD1.1 million); provided, however, if the industrial technology is a "national core technology," which is a technology having high technological and economical values in the Korean and overseas markets or high growth potential to its related industries and being feared to exert a significantly adverse effect on the national security and the development of the national economy in the event that it is divulged abroad, the penalty becomes more severe as imprisonment of 3 years or more with a fine up to KRW1.5 billion (USD1.1 million). As under the UCPA, the employer (ie, company or an individual) of an employee who committed acts in violation of the law is vicariously liable unless the employer can prove that they were not negligent in failing to prevent such act.

Korea also implemented the National High-Tech Strategic Industries Act to protect so-called "National High-Tech Strategic Technologies" on August 4, 2022. On June 2, 2023, Korea designated and announced specific types of National High-Tech Strategic Technologies that are eligible for the protection under the National High-Tech Strategic Industries Act. Under the National High-Tech Strategic Industries Act, criminal sanctions regarding

misappropriation of National High-Tech Strategic Technology became even stronger. A person who commits illegal acquisition, use or disclosure of National High-Tech Strategic Technology shall be punished by imprisonment of up to 15 years or by a fine of up to KRW1.5 billion (about USD1.1 million). However, in case any of such acts are committed to "use the National High-Tech Strategic Technology overseas" or "with the purpose of using the National High-Tech Strategic Technology overseas," the criminal penalty is increased to imprisonment for not less than 5 years with a fine of up to KRW2 billion (about USD1.5 million). Unlike the UCPA and Industrial Technology Act, the National High-Tech Strategic Industries Act does not have a vicarious liability provision.

## OTHER KEY IP RIGHTS

### *Nature of right*

Not applicable for this jurisdiction.

### *Legal framework*

Not applicable for this jurisdiction.

### *Duration of right*

Not applicable for this jurisdiction.

### *Ownership / licenses*

Not applicable for this jurisdiction.

### *Remedies for infringement*

Not applicable for this jurisdiction.

## INTELLECTUAL PROPERTY IN EMPLOYMENT CONTEXT

### *Employees*

In Korea, the right to a patent belongs to the inventor or their successor in title. The right to a patent may be transferred by assignment, in whole or in part. An inventor has the right to be identified in a patent application. Conversely, the applicant for a patent application need not be the inventor, as the right to a patent may be transferred before the filing of the application, for example, by contract or inheritance.

The Invention Promotion Act (IPA) defines a "work for hire" invention as an invention that results from:

- Present or past duties of the employee
- Being within the scope of the employer's business

Unless otherwise stipulated, the ownership of a "work for hire" invention belongs to the inventor-employee. In the meantime, the employer is given a royalty-free and non-exclusive license (often called "shop right") to use the invention if the employee is a small or medium sized entity defined under the Small or Medium Sized Entity Framework Act (SME). In order for an employer that is not an SME to receive a non-exclusive license, the employer must have a contract or employment regulation where the employee agrees to assign the "work for hire" inventions to the employer in advance and which has to be executed or adopted after consultation with the employee.

In this regard, the employee must report the completion of the works made for hire to their employer (when 2 or more employee-inventors contributed to the invention, all of the employee-inventors must report together). The employer must notify in writing whether it plans to succeed the works made for hire or not within 4 months from the above invention completion report by the employee. The right to the invention is deemed to be transferred to the employer as soon as the timely written notice is provided to the inventor-employee. However, if the employer fails to make such notification in writing, the works made for hire are deemed as free inventions to the employer. The National Assembly of Korea passed a bill to revise the IPA on January 9, 2024, which will come into effect 6 months after the date of promulgation. Under the revised IPA, if the employer has a contract or employment regulation where the employee agrees to assign the "work for hire" invention to the employer in advance adopted after consultation with the employee, the ownership rights to the employee invention are automatically assigned to the employer at the time when the invention is completed. As an exception, the employer is required to notify the employee within 4 months from the receipt of the invention disclosure only when the employer decides not to acquire ownership to the "work for hire" invention.

The employee is entitled to "reasonable compensation" for any "work for hire" invention acquired by the employer. Further, the IPA provides several factors for determining "reasonableness" of the compensation:

- The employer is required to adopt an internal compensation rule and provide the employees with adequate details about the program in writing, including the type of compensation, criteria for determining the amount of compensation and the payment method.
- The employer is required to provide the inventor employee with adequate details in writing, regarding the compensation amount, including how the amount was derived based upon the above rules.
- The employer is required to consult with the employees regarding adoption or amendment of the above compensation rule; if an amendment is pursued that is less favorable to the employees, the employer is required to obtain consent from at least 50 percent of the relevant employees.
- In addition to the above requirements, the compensation must be determined in consideration of the profits that the employer gained or expects to gain from the in-service invention and the degree of contribution by the employer and the employee to the creation of the particular invention; and the IPA also stipulates that even if a patent application is not filed for a "work for hire" invention acquired by an employer, the employee is still entitled to reasonable compensation.

## *Consultants / contractors*

It is customary for consultants and contractors to sign written agreements. Absent a written assignment of developments, in principle, consultants and contractors will retain ownership of the intellectual property developed by them. However, depending on various factors such as price paid to consultants or contractors and degree of contribution in planning and developments, ownership in developments can be deemed assigned.

## KEY COMMERCIAL CONTRACT CONSIDERATIONS

### *Registration of commercial agreements*

In Korea, either non-exclusive or exclusive licenses may take effect contractually between the parties without registration. However, if the exclusive licensee wishes to create a right that can directly exercise its right to exclude a 3rd party from practicing the licensed patent, registration is necessary. Further, in either case of non-exclusive or exclusive licenses, a registered right of the licensee is honored in the event that the licensed patent is assigned to a 3rd party, but unregistered right of the licensee does not have such an effect.

Registration does not ensure that a licensor's bankruptcy administrator will not decline to perform obligations under a license agreement or revoke a license agreement under applicable law of bankruptcy. However, assuming that the administrator does not decline the license obligations or revoke the license agreement, registration will be beneficial if the licensed patents are transferred to a 3rd-party purchaser in connection with the licensor's bankruptcy. In other words, if the license is registered, the purchaser cannot acquire the patents free of the license.

A 3rd-party purchaser will acquire a patent free of any existing license unless the license is registered. In contrast, if the license is registered, the license is enforceable to a 3rd-party purchaser in the way that the 3rd-party purchaser acquires the patent subject to the pre-existing license.

The above applies to trademarks, utility models, designs and registered copyrights.

### *Recognized language of commercial agreements*

Any language agreed between parties can be adopted as governing language of a contract. However, the STCA requires that standardized contract terms be provided in language and expression that can be easily understood by customers. Providing the standardized contract term in Korean can be a positive factor in meeting the requirement, but the positive effect is not so significant in case of large business entity customers.

### *Country-specific issues for online content*

The CA sets out a detailed list of the requirements for exempting an online-service provider from liability for carrying infringing materials. Subject to these requirements, a service provider must confine itself to acting as a mere conduit, to caching, to hosting, and to searching information in order to escape liability and to avoid responsibility for monitoring or investigating for infringing acts. To some degree, these safe-harbor provisions resolve the uncertainty previously surrounding the liability of online-service providers for direct infringement by their users. However, they also make it easier to impose liability on online-service providers if the requirements are not met.

## *Enforceability of online/clickwrap/shrinkwrap terms*

The Framework Act on Electronic Documents and Transactions stipulates that an electronic document shall not be denied its validity only because it takes an electronic form, unless otherwise provided in other laws.

Nor is there any law that restricts the effectiveness and enforceability of a contract in an online form.

For standardized contracts which we understand will be the case for most agreements executed via a web interface, the validity and effectiveness of such agreements will depend on meeting the requirements of the STCA. There is no black-letter law on what would be an acceptable form in an on-line setting to satisfy the foregoing requirements. However, it is widely accepted that a mere posting of the contract and its terms and conditions on a website would not be sufficient. Commonly used methods to meet this requirement include the posting of the online contract with an "I accept" button at the end (which can be clicked only if the counter-party had scrolled the screen to the bottom) or having a pop-up window show up with an explanation of the major terms and conditions and then having the other party click an "I understand" button.

## *Governing law*

While the choice of law agreed by parties is generally respected by the Korean court and thus designating a foreign law for a contract would be valid, the Korean court may apply mandatory Korean laws and deny the application of the selected foreign law which violates Korean public order and good morals.

In general, the forum selection agreed between the parties is enforceable under Korean law. In order to select a foreign court as exclusive jurisdiction (and contractually preclude the jurisdiction of Korean courts), however, Korean courts require that:

- The case is not under the exclusive jurisdiction of the Korean courts under Korean law.
- The foreign court in question selected by the parties has valid jurisdiction under the laws of the foreign court.
- The case has reasonable connection with the foreign jurisdiction.
- The agreement on the exclusive jurisdiction is not grossly unreasonable or unfair.

## **KEY COMMERCIAL CONTRACT TERMS**

### *Enforceability of warranty disclaimers*

Under the KCC, a seller is obligated under a statutory warranty to ensure that the product sold is not defective, unless the buyer was or should have been aware of the defect before it accepted the product. If defects are found in the product sold, the Korean law subjects the seller to the warranty liabilities vis-à-vis the purchaser.

### *Enforceability of exclusions/limitations of liability indemnification*

Under Korean law, damage claims are made for compensation of:



- Ordinary damages
- Extraordinary damages

Ordinary damages are those that would normally be expected to result from a breach of contract or a particular tort. Extraordinary damages refer to all other damages than ordinary damages that arise from the special circumstances which the wrongdoer "knew" or "could have reasonably foreseen." Parties may validly agree to exclude indirect damages from compensation, limit indemnification for indirect damages, or exclude warranty liability. However, enforceability of such agreement may be restricted by:

- Public policy and general principles of equity under the Civil Code.
- The court invalidating a clause that exempts a breaching party from liability for intentional wrongdoing or gross negligence on the part of that party.

However, in practice, many companies provide for a damage cap despite the risk that such damage cap provision may be held unenforceable.

## *Indemnification*

As a general rule under Korean civil law, if a contract obligates a putative indemnitor to defend any 3rd-party claim raised against an indemnitee, the indemnitor will have a contractual duty to assume the defense.

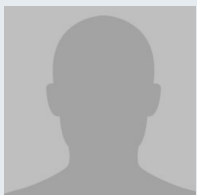
## *Electronic signatures*

The Electronic Signature Act provides that an electronic signature chosen as agreed to between the parties or pursuant to an applicable law has the same effect as a handwritten signature. An electronic signature cannot be denied legal effect or enforceability as a signature simply because the signature is in an electronic form.

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