

REVISED UNIFORM LAW

On

NOTARIAL ACTS

National Conference of Commissioners on
Uniform State Laws

Comments submitted by Amy L. Sommers, Observer*,
regarding
“Unified Version” circulated in respect of February 27 – March 1, 2009
Drafting Committee Meeting

The following comments are respectfully submitted for the consideration of the Drafting Committee:

Section 2: Definitions:

(3) “Electronic Signature”- Many countries have or are considering schemes for regulation of electronic signatures. The great equalizing aspect of electronic signatures is that there is no geographic limitation on the place of signature. However, questions of validity could arise in cross-border situations where a person in a foreign nation executes a transaction document electronically under a US law for purposes of a US-connection to the subject transaction, which execution does not comply with the rules for electronic signatures under that person’s country of residence or citizenship. Thus, in contemplating use of electronic signatures under the Act, it might be advisable to allow states to elect whether to limit use of electronic signatures to within US national boundaries or to make use occurring outside of the United States be subject to conformity with the relevant laws and regulations of the jurisdiction in which the electronic signature may be affixed.

It appears that currently the Drafting Committee contemplates allowing states to adopt regulations implementing mechanisms for use of electronic signature and thus, the current draft did not appear to have a suitable operative provision into which this comment could be added. Hence, it is submitted here as a place marker of sorts.

(4) “Identification” - The definition of ‘passport’ should be broadened to include any passport validly issued by other countries/jurisdictions, or similar identification document. As a matter of practice, it is assumed that foreign nationals undertaking transactions within United States borders (such as purchasing real property) who do not have a driver’s license or other state-issued form of identification, might have reason to present their non-US passport. Identification is addressed in various sections, including Section 4(b).

* Ms. Sommers is the Co-Chair of the US Lawyers Practicing Abroad Committee (the “Committee”) of the American Bar Association (the “ABA”) Section of International Law (the “Section”); these comments are the result of discussions among various of the Committee’s members, but do not reflect the official views of the Section or the ABA. While the comments are submitted in Ms. Sommers’ name as an Observer, she wishes to acknowledge the participation and contributions of the members of the Committee’s working group: Christian Jacobson, Linda Strite Murnane, Bruce Horowitz and Laurence Wiener (Committee Co-Chair).

(11) “Sign” - In certain jurisdictions, such as Japan and China, documents are commonly executed using a combination of signature and affixing of a person’s (whether a natural or legal person) chop (i.e., seal). Indeed, in some cases, the use of the chop can be binding even absent the person’s signature. Note that Japan has a registered seal system, and signatures alone are not that common. Therefore, in defining the term ‘sign’, it might be desirable to include ‘affixing with a seal’. It’s not entirely clear whether the existing definition is intended to include this action:

“Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a *tangible symbol* other than by using a facsimile stamp or other printing method; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process in accordance with [rules][regulations] adopted by the [commissioning officer or agency].

Section 9(a):

In today’s global economy, US citizens and/or permanent residents and their non-US citizen spouses are frequently living outside the United States for work, retirement, recreation and other reasons. Such persons can be adversely affected by the inability to easily access notarial services in various contexts, including with respect to state bar and similar professional organization affidavits (for example, with respect to an applicant’s work experience), voting registrations, execution of corporate documents, wills and estate related documents, filing of documents with the US Social Security Administration and other federal agencies, and other similar situations. This can lead to denial or delay of claims for social security benefits, disenfranchisement for an absentee ballot, and high costs (both monetary and time) to obtain necessary notarial services – in essence a tax or penalty on a person who, in good faith, is making every effort to comply with the applicable formality imposed by the relevant State.

It is proposed that Section 9(a) be amended to add a new subsection (4) as follows:

“(4) In addition to the preceding, a notarial act performed by an attorney who is licensed to practice law and is in good standing and active status in a state, district, or territory of the United States of America, and who is resident in the foreign jurisdiction where the notarial act is performed, has the same effect under the law of this State as if performed by a notarial officer of this State.”

Note that Section 9(a) sets out the persons who can be “notarial officers”, and this could include attorneys, depending on the state. However, the above wording would be (a) an exception to 9(a) in cases where the state does not allow attorneys to act as notaries, and (b) an extension in the case where the state does allow attorneys to be notaries.

Section 10(a):

In respect of an attorney acting in a foreign country under the addition proposed above, the requirements for qualifying the attorney should also be included. For example:

"Such Attestation shall be evidenced by a "Certificate of Attestation" which shall, in addition to briefly setting out the content of the matter attested in the accompanying instrument, document, or statement requiring notarization (which may be completed without a seal), set out the reason why a notarial officer is not available, acknowledge that the attesting attorney is subject to the Act, state the bar where the U.S. Attorney performing the Attestation is admitted and his/her bar admission number, state that the U.S. Attorney is in good standing and active status in the jurisdiction of admission, and set out the address and contact information for the U.S. Attorney."

The above comments are respectfully submitted by Amy L. Sommers, Observer, on this 3rd day of March, 2009.