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BY RAFAEL X. ZAHRALDDIN-ARAVENA, ANTOINE LEDUC AND OLYA ANTLE

COVID-19: A Catalyst of Modernization Across Jurisdictions



Rafael X. Zahralddin-Aravena
Elliott Greenleaf, PC
Wilmington, Del.



Antoine Leduc
Lapointe Rosenstein
Marchand Melançon,
LLP; Montréal



Olya Antle
Cooley LLP
Washington, D.C.

Editor's Note: To stay up to date on the COVID-19 pandemic, be sure to bookmark ABI's Coronavirus Resources for Bankruptcy Professionals website (abi.org/covid19). Mr. Zahralddin-Aravena also leads ABI's COVID-19 Global Economic Response Project (globalinsolvency.com/covid19).

The novel coronavirus disease has altered the way that legal professionals practice law across the globe, as courts in both the common law and civil law traditions¹ have had to modify the administration of law to do their part to enforce health restrictions. Courts closed, then reopened, primarily virtually, as their services are deemed “essential” functions in many jurisdictions.

In some courts, there has been a ban on paper deliveries of any kind due to health concerns.² The magnitude of the effects on legal systems around the world and their duration is yet undetermined but merits a close review, as common law jurisdictions (such as the U.S.) and civil law jurisdictions (such as Québec and France) are forced to accelerate the move toward electronic signatures, electronic filings and remote notarizations.³

Pre-COVID-19 Efforts to Modernize the Administration of Justice Global Proliferation of Electronic Transactions

The United Nations Conference on Trade and Development (UNCTAD) reports that 145 countries across the globe have adopted laws

to facilitate electronic transactions. It sees such laws as essential, stating that “to have e-transaction laws that recognize the legal equivalence between paper-based and electronic forms of exchange” is a “prerequisite for conducting commercial transactions online.”⁴ Eighty-one percent of the world's nations have such legislation in place, 6 percent have drafted legislation, 4 percent have no legislation, and the remaining 9 percent have not reported data to UNCTAD.⁵

Movement Toward Digitized Records, Electronic Filings and e-Signatures

In 1998, the Uniform Law Conference of Canada adopted the Uniform Electronic Commerce Act.⁶ It proposed the use of “functional equivalents” to paper in a “technology neutral” way to make the law “media neutral” (*i.e.*, equally applicable to paper-based and electronic communications).⁷ Legislation based on these principles was thereafter adopted throughout Canada, including in Québec,⁸ and is “generally permissive in relation to the use of [an] e-signature so long as the e-signature technology used is reliable and meets the basic characteristics of an enforceable e-signature.”⁹

The U.S.'s federal law has recognized electronic transactions, including smart contracts and electronic signatures, through the U.S. Electronic Signatures in Global and National Commerce (ESIGN) Act

¹ On the various legal traditions of the world in general, see H. Patrick Glenn, *Legal Traditions of the World*, 2d Ed. (Oxford University Press 2004).

² For example, by order of March 16, 2020, the Supreme Court of Delaware ordered that as a precautionary measure, lawyers shall not submit any copies of electronically submitted documents. Order (March 16, 2020), available at courts.delaware.gov/rules/pdf/March162020COVIDPaperFilingsSuspended.pdf (unless otherwise specified, all links in this article were last visited on May 28, 2020).

³ The Council of Europe has an informative webpage, “Management of the Judiciary — Compilation of Comments and Comments by Country,” which provides a good survey of measures across Europe; available at coe.int/en/web/cepej/compilation-comments.

⁴ U.N. Conference on Trade and Development, E-Transactions Legislation Worldwide, available at unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Transactions-Laws.aspx.

⁵ *Id.*

⁶ Uniform Law Conference of Canada, Uniform Electronic Commerce Act (Annotated 1999), available at uicc.ca/en/1999-winnipeg-mb/359-civil-section-documents/1138-1999-electronic-commerce-act-annotated.

⁷ *Id.*

⁸ “Act to Establish a Legal Framework for Information Technology,” C.Q.L.R. c C-1.1, available at legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-1.1 (updated Feb. 1, 2020).

⁹ Tracy Springer & Kiriakoula Hatzikiriakos, “What's Ink Got to Do with It? Enforceability of E-Signature in Commercial Lending Documentation,” *ABA Business Law Today* (April 9, 2020), available at businesslawtoday.org/2020/04/whats-ink-got-enforceability-e-signature-commercial-lending-documentation.

Rafael Zahralddin-Aravena is director and chair of the Restructuring and Commercial Bankruptcy Practice at Elliott Greenleaf in Wilmington, Del. Antoine Leduc is a partner and practice group leader of Bankruptcy, Insolvency and Restructuring at Lapointe Rosenstein in Montréal. Olya Antle is an associate with Cooley LLP in Washington, D.C.

passed in 2000, as well as through the adoption of the Uniform Electronic Transactions Act (UETA) released in 1999.¹⁰ The UETA provides that when a law requires either a writing or a signature, an electronic record or an electronic signature can satisfy that requirement when the parties to the transaction have agreed to proceed electronically.¹¹ The UETA and ESIGN ensure that electronic records and signatures have the same legal effect as traditional paper documents and wet-ink signatures.¹²

In September 1998, the Judicial Conference of the U.S. adopted electronic record-keeping, opening up access to legal information to the public through the Public Access to Court Electronic Records (PACER).¹³ In the late 1990s, federal courts in the U.S. also adopted the electronic case-management system known as the Case Management/Electronic Case Files (CM/ECF), which allowed electronic filings of documents with electronic signatures (in lieu of wet signatures). While the movement toward digitization has not weaned the legal industry away from paper, it modernized the administration of justice in the U.S. and Québec, and created a platform from which their judicial systems can transition into the post-COVID-19 era.

Electronic Notarizations and Remote Online Notarizations

Pre-COVID-19 modernization efforts did not escape the realm of notarizations. In the U.S., even before the pandemic, a number of states permitted electronic notarizations or e-notarizations, which involve the notarization of electronic signatures on documents in electronic format in the presence of a notary.¹⁴ A number of states also permitted remote notarizations performed through the remote online notarization systems (RONs), whereby the notary and signer appear remotely and use audio/video technology to notarize documents.¹⁵ By the end of

2019, 22 U.S. states allowed RONs, with Virginia being the first state to lead this charge in 2010.¹⁶

However, prior to COVID-19, similar efforts were not implemented in civil law jurisdictions, likely due to the conceptual and substantive differences between a common law notary and a civil law notary. In common law jurisdictions, such as the U.S. and Great Britain, the notary public is a public officer with a more narrowly defined role centered on the identification of document signers, taking of signers' acknowledgments, and administering oaths and affirmations.¹⁷ Notaries in these systems are not responsible for the accuracy, contents or legality of the underlying documents they notarize.

On the other hand, the civil law notary is subject to ethical standards, with considerable responsibility and discretion in the performance of such legal functions as drafting and authenticating legal instruments (which conclusively establishes that the instruments themselves are genuine and that what they recite accurately represents what the parties said).¹⁸ An action authenticated by a civil law notary is given great probative value in the civil law system, a legal regime dominated by the need for authenticity of a written record, where notaries are trained in law school and perform tasks similar to those of a solicitor or attorney.¹⁹ The responsibility of a Latin American *Notario Publico* is an excellent example of the gravity of the civil law notary's duties, which extend to the incorporation of every company, buying and selling of real estate, establishment of deeds and wills, and the creation of mortgages.²⁰ *Notarios Publico* will "labor over the document and make sure it is in conformance with the law."²¹ The Mexican *Notario Publico* has the words "Doy Fe" next to the signature on a document, which translates into "I give faith," as the civil law notary's role is more akin to that of a jurist than a lawyer.²²

The difference in the degree of formality and evidentiary effect of the notarial act accounts for the relative ease with which certain common law traditions, such as in the U.S., have moved toward the implementation of RONs, even prior to the pandemic. However, it is clear that the pandemic has augmented the pace at which these changes must be made across all traditions, forcing both the civil law and common law jurisdictions to expedite

10 Electronic Transactions Act, Uniform Law Comm'n, available at uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034.

11 *Id.*

12 Several U.S. states, including Arizona and Tennessee, have also passed measures related to ESIGN and EUTA to encourage the proliferation of electronic transactions. Delaware has passed legislation and initiated a study to use technology to modernize securities and Uniform Commercial Code filings and record maintenance. For an excellent survey of areas where Delaware is positioned to push such innovation forward, see My Say, "Why the Delaware Blockchain Initiative Matters to All Dealmakers," *Forbes* (Sept. 20, 2017), available at forbes.com/sites/groupthink/2017/09/20/why-the-delaware-blockchain-initiative-matters-to-all-dealmakers/#ab9b8fa75508; Blockchain Consulting LLC, Open Letter to Delaware (Sept. 14, 2017), available at blockchainconsulting.net/open-letter-to-delaware.

13 See "25 Years Later, PACER, Electronic Filing Continue to Change Courts," *Judiciary News* (Dec. 9, 2013), available at uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts.

14 See Michael Lewis, "Remote Notarization: What You Need to Know," *Notary Bulletin* (June 27, 2018), available at nationalnotary.org/notary-bulletin/blog/2018/06/remotenotarization-what-you-need-to-know.

15 Notary performing the notarization services remotely must verify the identity of the signer through knowledge-based authentication (KBA) methods, credential analysis and remote presentation of the identification documents (via a webcam). To start a remote notarization, both the signer and notary must access a RON platform. Documents used must be in an electronic format, such as a PDF. Once the notary verifies the signer's identity and is confident that the signer is willing and mentally competent, the signer and notary both sign the document electronically, and the notary affixes an electronic seal to the same. When finished, the document can be retrieved from the RON platform. In addition to keeping a journal of the remote online notarization, notaries are also required to create an audiovisual recording of each remote notarization. See David Thun, "The State of Remote Online Notarization," *Nat'l Notary Magazine* (November 2019), available at nationalnotary.org/notary-bulletin/blog/2019/11/the-state-of-remote-online-notarization.

16 Bob Jawarowski, "Remote Online Notarization: More States, Including New Jersey, Join the Crowd," *Holland & Knight Alerts* (April 17, 2020), available at hklaw.com/en/insights/publications/2020/04/remotenonline-notarization-more-states-including-new-jersey.

17 See generally Pedro A. Malavet, "Counsel for the Situation: The Latin Notary, a Historical and Comparative Model," 19 *Hastings Int'l & Comp. L. Rev.* 389 (Spring 1996).

18 See John Henry Merryman, *The Civil Law Tradition* 113-115 (1969). Civil law notaries are at work in more than 88 countries around the world and are collectively grouped in the International Union of Notaries, "a non-governmental organization that aims to promote, co-ordinate and develop the function and activities of notaries throughout the world." See the Union's mission statement at uinl.org/mission.

19 J.-F. Sagaut, "The Notary," 4 *Henri Capitant L. Rev.* 130 (2012), available at henricapitant.org/revue/en/n4.

20 Jonathan A. Pikoff & Charles J. Crimmins, "Lost in Translation: Texas Notary Public v. Mexico Notario Publico," available at sos.state.tx.us/statdoc/notariopublicoarticle.shtml.

21 *Id.* (quoting personal interview with Francisco Visoso, *Notario Publico* No. 145 for Mexico City, Feb. 15, 2005).

22 *Id.*

the process of adopting the relevant regulations to modernize the traditional processes now challenged by the stay-at-home orders and social-distancing mandates.

Acceleration of Modernization Efforts in Light of the Pandemic Measures in the U.S.

In response to the global emergency caused by the outbreak of COVID-19, courts and legal professionals in the U.S. have implemented a number of measures to address the pandemic.²³ Such measures include the use of videoconferencing facilities to conduct remote court hearings, mediations, depositions and other functions that normally require extensive personal contact.²⁴

In bankruptcy (and other federal) courts across the U.S., “wet signatures” have been eliminated for most filings under the CM/ECF system; however, the majority of the U.S. bankruptcy courts have now gone a step further by temporarily suspending the requirement to obtain “wet signatures” on documents for which such signatures were required, including the debtors’ voluntary petitions for bankruptcy relief.²⁵

More than 20 other states have adopted emergency legislation allowing remote online notarization.²⁶ In those states where RON services are permitted (either on a temporary or permanent basis), there might be certain limitations concerning the audio/video platforms used, as well as certifications that notaries must obtain from the states’ regulatory authorities.²⁷

Measures in Québec²⁸

The modernization of the Québec judiciary system is still at an early stage; however, the pandemic is accelerating it.²⁹ In 2018, the government of Québec had already announced a plan to modernize the justice system and invest CAD \$500 million between 2018-23, including a sum of CAD \$289 million dedicated to bringing the justice system in line with the latest technology.³⁰ In addition, since 2016 the newly enacted Code of Civil Procedure (Québec) adopted several provisions to foster the use of appropriate technology.³¹

In Québec, since March 16, 2020, courthouse services have been reduced and hearings limited to urgent matters. On March 26, 2020, a judge of the Superior Court of Trois-Rivières (Québec) presided over Québec’s first virtual trial.³² All Québec Superior Court judges have received special training on videoconference facilities and have formed a judicial IT Committee. The use of technology for all hearings that remain scheduled is favored, including virtual hearings, but lawyers are encouraged to try to amicably settle their cases. The Montréal Commercial Chamber (*i.e.*, the bankruptcy court) was only available for urgent or priority matters by telephone on a case-by-case basis during the pandemic until June 1, 2020, when it somewhat resumed its hearings and added virtual hearings as a possibility.

There is no e-filing system, and new urgent applications must still be filed at the court registry on paper with court fees paid at the registry,³³ but this is about to change in the forthcoming weeks.³⁴ However, the Digital Office of the Québec Court of Appeal, launched on April 7, 2020, allows lawyers and citizens across Québec to file electronic notices of appeal in *de plano* appeals in civil matters, and court fees for these filings are payable online.³⁵ Some matters may be heard by videoconference before the court of appeals.³⁶

As previously mentioned, e-signatures in Québec were generally accepted after the adoption of legislation based on the Uniform Electronic Commerce Act,³⁷ but not for notarial deeds.³⁸ On March 28, 2020, the government of Québec announced a temporary measure allowing notaries to close notarial deeds remotely.³⁹ Notarial deeds can be closed remotely if (1) the notary can see and hear each party; (2) all parties and intervenors can see and hear the notary; (3) where the context requires, witnesses can see and hear the parties and the notary; (4) the signatories and the notary can see the act; (5) the signatories other than the notary affix their signature by a technological means that enables their identification and the acknowledgment of their consent; and (6) the notary affixes his/her official digital signature.⁴⁰

A notary must ensure the integrity and confidentiality of the documents shared and the signature process. This notary must also maintain the integrity of the act throughout its lifecycle, including to ensure its preservation.⁴¹ As a side note, similar measures have also been adopted in France.⁴²

23 See “Global Responses to Limit the Economic Impact of Covid-19 Pandemic,” Global Insolvency, available at globalinsolvency.com/covid19/usa.

24 *Id.*

25 For a list of bankruptcy courts that have adopted such orders and to obtain copies of the orders, see uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic#bankruptcy.

26 For notary law updates by state, see nationalnotary.org/notary-bulletin/blog/2020/03/answers-urgent-questions-notaries-ron.

27 *Id.*

28 On Québec’s legal traditions, see Antoine Leduc, *Mondialisation et Harmonisation Du Droit Des Sûretés* (Les Éditions Thémis 2012), at 315-20. Québec is a mixed jurisdiction, with its private law system belonging to the civil law tradition and its public law system inspired by the British common law institutions. *Id.*

29 Emmanuelle Gril, “La Justice à Distance: Des Enjeux Pour L’avenir de la Profession Juridique,” National | ABC National (April 14, 2020), available at nationalmagazine.ca/fr-ca/articles/law/hot-topics-in-law/2020/la-justice-a-distance.

30 Minister of Justice and Attorney General of Québec, Budget 2018-2019/Justice, “A Plan to Modernize the Justice System” (March 27, 2018), available at justice.gouv.qc.ca/fileadmin/user_upload/content/documents/En_Anglais_centredoc/publications/ministere/dossiers/Justice_1819.pdf.

31 Code of Civil Procedure, C.Q.L.R. c C-25.01, Art. 26, available at legisquebec.gouv.qc.ca/en/ShowDoc/cs/C-25.01. See also Jean-François De Rico & Patrick Gingras, “Les Premiers Pas de la Procédure Technologique: Regard Technologique sur le Nouveau Code de Procédure Civile,” 21 *Lex Electronica* 1 (2016), available at lex-electronica.org/articles/volume-21/les-premiers-regards-de-la-procedure-technologique-regard-technologique-sur-le-nouveau-code-de-procedure-civile.

32 Éric Thibault, “Le Système Judiciaire Arrivera Enfin au 21e Siècle: La Crise Forcera Nos Tribunaux à Moderniser Leurs Pratiques,” *Le Journal de Montréal* (April 11, 2020) at 20, available at journaldemontreal.com/2020/04/11/le-systeme-judiciaire-arrivera-enfin-au-21e-siecle.

33 “Expanded Operations of the Superior Court – Civil and Family Matters (District of Montreal),” Superior Court of Québec (April 17, 2020), available at tribunaux.qc.ca/c-superieure/avis/index_avis.html.

34 “A stronger Justice System Emerges as Québec Courthouses Gradually Resume Activities,” Minister of Justice and Attorney General of Québec (May 28, 2020), available at justice.gouv.qc.ca/en/press-releases/a-stronger-justice-system-emerges-as-quebec-courthouses-gradually-resume-activities.

35 See Québec Court of Appeal Digital Office website, available at <https://courdappelduquebec.ca/en/digital-office>.

36 See “Virtual Courtrooms,” Court of Appeal of Québec, available at courdappelduquebec.ca/en/virtual-courtrooms.

37 Vincent Gautrais, “Signature,” LCCJTI.CA, available at lccjti.ca/definitions/signature.

38 Mark Philips, “Électronique Juridique et Juridisme Électronique,” *Les Cahiers de Propriété Intellectuelle* 155 (2008), at 161, 165, available at lccjti.ca/doctrine/electronique-juridique-et-juridisme-electronique. See also Notaries Act, C.Q.L.R. c N-3, Art. 45-61, available at legisquebec.gouv.qc.ca/en/ShowDoc/cs/N-3.

39 “Temporary Measures Authorizing Notaries to Close Acts Remotely and Bailiffs to Serve Pleadings by Technological Means,” Minister of Justice and Attorney General of Québec (March 28, 2020), available at justice.gouv.qc.ca/en/press-releases/temporary-measures-authorizing-notaries-to-close-acts-remotely-and-bailiffs-to-serve-pleadings-by-te; but see “Management of the Judiciary: Compilation of Comments and Comments by Country,” Council of Europe, available at coe.int/en/web/cepej/compilation-comments (reflecting that notarial cases in civil jurisdictions across Europe have been treated in other ways in light of pandemic: prioritized by courts in Denmark, suspended in Portugal utilizing judicial holiday procedure, allowed in Serbia with discrete social distancing measures in place, and suspended in Italy).

40 “Regulation Respecting the Digital Official Signature of a Notary,” C.Q.L.R. c N-3, r.13.1, Art. 2, available at legisquebec.gouv.qc.ca/en/ShowDoc/cr/N-3,%20r.%2013.1.

41 See Cristina N. Armella, “The Exercise of the Notarial Activity in Times of Pandemic: New Technologies at the Service of the Notarial Function,” Int’l Union of Notaries (April 28, 2020), available at www.uinl.org/en_GB/-/the-exercise-of-the-notarial-activity-in-times-of-pandemic-new-technologies-at-the-service-of-the-notarial-function.

42 Notaires du Grand Paris, “Signature d’un Acte Chez le Notaire: Quelle Situation Pendant le Confinement?,” *Votre Notaire Vous Informe* (April 2020), available at fr.calameo.com/read/003616144b21750e7f304.

Conclusion

The virus has not respected borders, significantly affecting how lawyers provide legal services and courts administer justice in both common law and civil law jurisdictions. Katherine Mangu-Ward, editor-in-chief of *Reason* magazine, recently stated:

COVID-19 will sweep away many of the artificial barriers to moving more of our lives online. Not everything can become virtual, of course. But in many areas of our lives, uptake on genuinely useful online tools has been slowed by powerful legacy players, often working in collaboration with overcautious bureaucrats.⁴³

Current changes have occurred on a truncated timeline, accelerating trends that were already underway. As legal systems throughout the world are propelled into the digital age, they will emerge from the current crisis dramatically transformed post-pandemic. **abi**

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⁴³ "Coronavirus Will Change the World Permanently. Here's How," *Politico* (March 19, 2020), available at [politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579](https://www.politico.com/news/magazine/2020/03/19/coronavirus-effect-economy-life-society-analysis-covid-135579).