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With the COVID-19 crisis and the rise of teleworking, certain practices have evolved as the use of electronic signatures, which may soon become the rule rather than the exception.

In practice, it is not always clear which documents can be signed electronically, which type of electronic signature should be used and what is its legal value. This news addresses the legal and practical aspects of the e-signature.

THE ELECTRONIC SIGNATURE

WHICH VALIDITY?

LEGAL PROVISIONS APPLICABLE

Article 1322, subpara. 2, of the Civil Code, provides that “a signature may be required for the application of this article for a set of electronic data that can be attributed to a specific person and that establishes the maintenance of the integrity of the content of the act”.

Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation) provides that:

- “1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.
2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.
3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States.” (art. 25 of the eIDAS Regulation).



DIFFERENT TYPES OF ELECTRONIC SIGNATURES

There are three types of electronic signatures, classified according to their level of security.

| The basic electronic signature

This signature consists of “data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign” (art. 3.10 of the eIDAS Regulation). In practice, it can be a scan of a signature integrated into an electronic document, a ticked box on a website, a signature on a delivery man’s terminal, etc.

The signatory will have to establish, if the validity of his/her signature is disputed, that (i) it is attributable to him/her and (ii) the integrity of the content of the signed document is guaranteed (art. 1322, subpara. 2 Civil Code). This second condition, which is controversial, is doomed to disappear with the new Book 8 of the Civil Code, which will come into force on 1 November 2020.

| The advanced electronic signature

An advanced electronic signature meets the following requirements:

“(a) it is uniquely linked to the signatory;

(b) it is capable of identifying the signatory;

(c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and

(d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.” (article 3.12 and article 26 of the eIDAS Regulation).

How – by means of which technological solution – the four requirements are complied with, is irrelevant for the legislator. As a result, service providers such as DocuSign, GlobalSign, Yousign, etc. have developed various processes to verify the signatory’s identity and the integrity of the signature to offer advanced electronic signatures.



Even if advanced electronic signatures are not assimilated to handwritten signatures by article 25.2 of the eIDAS Regulation, they rely on more elaborate verification processes which in principle meet the requirements of article 1322, subpara. 2 of the Civil Code. Therefore, they will be used for documents with high financial and legal stakes, and each time the law so requires.

| The qualified electronic signature

A qualified electronic signature is an advanced electronic signature that (i) is created by a qualified electronic signature creation device (see requirements of Annex II of the eIDAS Regulation) and (ii) is based on a qualified electronic signature certificate that links the signature to the signatory's identity (see requirements of Annex I of the eIDAS Regulation) (article 3.11 of the eIDAS Regulation).

A qualified signature is assimilated to a handwritten signature (art. 25.2 of the eIDAS Regulation) and has the same legal value. A qualified signature recognised as such in an EU Member State shall be recognised with the same legal value in all EU Member States.

In Belgium, a signature created with an identity card will be considered as a qualified electronic signature (to find out how to sign a document using your electronic identity card, see [here](#)). An EU Trusted List also gathers all trust service providers able to provide qualified signatures in Belgium (see the list [here](#)).

Itsme and GlobalSign have been accredited as such qualified trust service providers.

REQUIREMENT OF MULTIPLE ORIGINALS

Article 1325 of the Civil Code, which does not apply to B2B contracts, states that: *“private deeds containing synallagmatic agreements are valid only to the extent that they have been made in as many originals as there are parties with a distinct interest”*. Given the obvious difficulty of satisfying this condition with digital contracts, article XII.15 of the Code of Economic Law provides that *“any legal or regulatory requirement of form relating to the contractual process shall be deemed to be satisfied in respect of a contract by electronic means where the functional qualities of that requirement are preserved”*.



Therefore, the formality of “multiple originals” is met when a document is digitally signed by all the parties, for which any modification of the content of the act requires the joint action of each of them.

Since it is not a matter of public order, the parties can also contractually exclude the application of article 1325 of the Civil Code.

IN PRACTICE

Acts under private signature

Private agreements can be validly concluded by means of an electronic signature.

All types of signature are valid, provided that the conditions of article 1322, subpara. 2 of the Civil Code are met for unqualified signatures. In practice, disputes as to the probative value of an unqualified electronic signature are rare. The type of signature will, therefore, certainly depend on the importance of the document to sign.

Notarial deeds

Article 1317 of the Civil Code states that notarial deeds can be received in dematerialised form, in which case a qualified electronic signature will be admitted.

In practice, the electronic signature of these deeds implies the establishment of a database of notarial deeds (NABAN), which has not yet been implemented.

Corporate documents

Documents drawn up for the management of legal entities (such as minutes) may be signed electronically by ordinary, advanced or qualified signatures.

The Companies and Associations Code expressly provides for the use of the ordinary or qualified electronic signatures for remote and proxy voting (art. 7:143 and 7:146).

The choice of the type of signature will depend on the importance and the nature of the decision taken by the corporate body.



CONCLUSION

According to the principle of non-discrimination in article 25.1 of the eIDAS Regulation, an electronic signature cannot be disregarded solely on the ground that it is an electronic signature. The author of a qualified signature will be assimilated to the author of a handwritten signature, whereas the author of an ordinary or advanced signature will have to convince the judge of the meeting of the conditions of article 1322, subparagraph 2 of the Civil Code.

In practice, all documents can be signed electronically but the type of e-signature must be adapted to the issues involved.

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