

ELECTRONIC SIGNATURE AND OPERATIONAL CONTINUITY

The e-signature is a tremendously useful tool to aid in the operational continuity of companies that, in the face of the restrictions to freedom of movement resulting from the expansion of Covid-19, need to digitalize their processes, including the way in which they render their consent to contracting long distance.

Identifying 2 key elements: Processes and service renderer

The implementation of the e-signature to standardize and simplify execution of all sorts of contracts implies the exercise of identifying 2 essential elements: On the one hand, identifying which are the acts, within a company's contractual flow, that admit the use of an e-signature (and what sort of signature, at that); and, on the other, identifying an e-signature service renderer that meets the needs of each line of business.

And the regulation?

Law No. 19,799 (the "Law on e-Signature") and its regulation govern, mainly, e-documents and their legal effects; the kinds of e-signature; and the certification and accreditation process. It contemplates the existence of 2 kinds of signature: the simple e-signature ("FES") and the advanced e-signature ("FEA").

When to use an e-signature?

Whenever contracts you mean to execute are consensual and of a private nature, an e-signature shall be legally valid and will be worth exactly the same as a handwritten signature executed on hardcopy.

When not to use an e-signature?

You may not use an e-signature to execute an act or contract: (i) for which the law requires a solemnity that cannot be achieved by means of an e-document; (ii) that requires the personal attendance of one the parties thereto; or (iii) that is associated to Family Law.

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Additionally, certain acts that can in fact be signed electronically necessarily require the use of an advanced e-signature: if an e-document is an instrument of public record, it necessarily will have to be executed with an advanced e-signature.

What is the difference between a simple e-signature and an advanced e-signature?

The simple e-signature has a broader definition, and it is “any sort of electronic sound, symbol, or process that enables recipient of an e-document identifying, at least formally, its author”.

A FES may be, for instance, the name of a person at the end of an e-mail, a thumbprint, or any biometrics means (e.g., fingerprint), or a complex electronic process that does not necessarily have a perceptible manifestation as regards the senses, as is the case when accepting a privacy policy by checking a box at a website (provided the process enables the formal identification of at least one author). An e-signature that is technically identical to an advanced e-signature, but which is not issued by an accredited service provider, is also a simple e-signature.

The FES is the method most commonly used in e-commerce. The validity of a contract signed with a FES shall be similar to that of a contract in hardcopy bearing a manually executed signature, and its chance of being enforced before the courts of justice shall be equivalent to any other sort of instrument of private record.

The advanced e-signature is a signature "certified by an accredited service provider and created by using means that the holder keeps under its exclusive control, so that it is linked exclusively to the holder and data to which it refers, allowing the subsequent detection of any modification, verifying the holder's identity and preventing the lack of knowledge of the integrity of the document and its authorship".

There are currently 8 accredited service providers, [listed](#) on the website of the Accreditation Body.

What are the elements to consider when choosing an e-signature service provider?

The e-signature in the digital environment has 2 relevant purposes: (i) to express the will to be bound; and (ii) to constitute an essential element of identification of the signatory subject. Thus, it is important not to misunderstand the 2 elements when assessing an e-signature

provider:

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That the electronic procedure to be performed is valid as an e-signature pursuant to Law on E-Signature; and

- That, in the existence of a lawfully issued e-signature, the procedure to obtain the signature is strong enough to ensure a defense against the possibility of objection to the authenticity of the signature.

How is a contract signed by e-signature proved before a court of law?

On the basis of the principle of media equivalence set forth in the Law on e-Signature, e-signatures, both FEA and FES, are worth the same as if they had been handwritten on hardcopy.

On the evidentiary value in court of e-documents signed through e-signature:

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E-documents bearing the status of instrument of public record shall be signed by means of an advanced e-signature and shall be fully accepted as evidence according to the general rules.

- E-documents bearing the status of instrument of private record signed with an advanced e-signature shall have the same evidentiary value as instruments of public record pursuant to the foregoing rule, except for the date, unless the latter is recorded through an electronic dating system provided by an accredited service renderer.

- E-documents having the status of private instruments and signed by means of a simple e-signature shall have the corresponding evidentiary value pursuant to the general rules; that is, they may be submitted in court, shall have the same evidentiary value and may be subject to the same objections as private instruments signed in handwriting and on hard-copy.

Notwithstanding these considerations, the effectiveness of this evidentiary value is subject to degrees and will be more significant if signatory's authentication protocol is stronger or more secure.

How to purchase an e-signature?

An advanced e-signature must be purchased from 1 of the 8 accredited service renderers, available at the website [Accredited Entity](#). FEA procurement, as a rule, requires the personal attendance of the applicant, i.e. the person who will take the FEA for himself/herself or for the company of which he/she is the legal representative.

A simple e-signature does not necessarily involve the procurement of a specific product, since it suffices to verify the elements mentioned above during the technological process of procurement (i.e. the sound, symbol or electronic process allows, at least formally, identify its author). However, for reasons of security, reliability or evidence, it is also possible to purchase a simple e-signature, which does exist as a product in the market. In this case, it can be purchased from different service renderers, who do not necessarily have to be an accredited service renderer.