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ELECTRONIC SIGNATURES IN CHILE – WHEN YOU CAN USE THEM AND WHEN YOU CAN'T?

The pandemic revealed a great need to remotely execute acts and contracts, avoiding the need to meet to sign the documents or appear before a notary. This increased the doubts about the regulation on electronic signatures, especially in order to understand under what circumstances they can be used and when not.

In this article, we will briefly explain: (i) how electronic signatures are regulated in Chile; (ii) which acts may and may not be executed through electronic signatures; (iii) the bill of law that aims to expand the number of acts that may be executed with electronic signatures; and (iv) proposals for changes to the bill in order to extend the usefulness of electronic signatures.

REGULATION OF ELECTRONIC SIGNATURES IN CHILE

Electronic signatures are regulated by Law Nº 19,799 about Electronic Documents, Electronic Signatures and Certification Services of such Signature ("LFE", by their initials in Spanish), and its Regulations . [1]

1.1. Principle of equivalence between electronic and paper documents. As a general rule, acts and contracts executed by means of electronic signatures are valid in the same way and produce the same effects as those executed in writing and on paper. For all legal purposes, these acts and contracts are deemed to be in writing and their signature is regarded as a handwritten signature, whatever its nature.

1.2 Types of electronic signature. The LFE recognizes two types of signatures, the simple electronic signature ("SES") and the advanced electronic signature ("AES").

(i) Simple electronic signature. A simple electronic signature is "any type of sound, symbol or electronic process that enables the recipient of an electronic [2] document to identify, at least formally, its author". [3]

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Therefore, the following can be an SES: the incorporation of a person's name at the end of an e-mail or even the mere act of sending that e-mail from her/his personal mailbox; the scanned image of a handwritten signature incorporated at the end of an electronic document; a biometric sign (e.g. fingerprint); the marking of a checkbox on an electronic form; or other electronic processes that allow the identification, at least formally, of the author of an electronic document. A mechanism that is not compatible with the concept of an electronic document could not be considered a simple electronic signature.

In accordance with the principle of equivalence of the medium, a contract signed by SES will have the same legal value as a contract signed with a handwritten signature.

(ii) Advanced electronic signature. An advanced electronic signature is a signature "certified by an accredited provider and which has been created using means that the holder keeps under her/his exclusive control, so that it is linked only to the holder and the data to which it refers, allowing the subsequent detection of any modification, verifying the identity of the holder and preventing her/him from being unaware of the integrity of the document and its authorship". [4]

The Under-Secretariat for the Economy and Smaller Businesses, through the **Accreditation Body,** is responsible for accrediting the providers of advanced electronic signature certification services and keeping their records up to date. [5]

1.3. Restrictions on the use of electronic signatures. The general rule is that simple and advanced electronic signatures can be used without distinction to execute all kinds of acts and contracts, with the exception of the following:

(a) SES cannot be used where the law expressly requires the use of AES, for example:

(i) Public instruments in electronic form must bear the AES of the issuing official: an authorized electronic copy of a public document must bear the AES of the authorizing notary; a certificate of the civil registry must bear the AES of the issuing official, etc.

(ii) Judicial powers-of-attorney granted in an electronic document must be signed with the AES of the principal.

(iii) The forms for the constitution, modification, dissolution or annotations of companies from the Registry of Companies and Corporations must be signed with the AES of the constituents, partners or shareholders; or with the AES of the notary who authorizes the act if they do not have their own AES.

b) An electronic signature (FES or FEA) cannot be used when the LFE or other laws forbid the use of an electronic signature:

i) When the law requires a solemnity that cannot be complied with by electronic document

ii) When the law requires the personal attendance of any of the parties

iii) In acts and contracts related to family law

PRACTICAL APPLICATION OF THESE RULES

2.1 Acts that must be executed by public deed cannot be executed with an electronic signature

The executing of acts for which the law requires the formality of a public deed (e.g. the sale of real estate [6] or easements or the granting of mortgages [7]) cannot be executed by electronic signature, neither AES nor SES, since this formality is not susceptible to be fulfilled by means of an electronic document, as it can be seen from articles 403 and following of the Chilean Organic Courts Code ("COT").

According to those rules, the granting of a public deed requires (i) the personal appearance of the parties before the notary (article 405) and (ii) the fulfilment of a series of formalities that are incompatible with the notion of electronic signature and electronic document [8] .

Articles 4 and 5 number 2 of the LFE often create confusion on this matter: article 4 provides that "electronic documents that have the quality of public instruments must be signed by means of an advanced electronic signature". Because of its concise wording, this provision could lead to the misconception that a public instrument -such as a public deed- could be created directly by the contracting parties if they execute it using their advanced electronic signatures. But that conclusion is not correct.

To understand the true meaning of this rule, we must bear in mind the

definition of "public instrument" in Article 1699 of the Civil Code:

"Public or authentic instrument is the one authorized with the legal solemnities **by the competent official.**

Granted before a notary public and incorporated in a protocol or public registry, it is called a public document".

As can be seen, the public instrument is always authorized by "the competent official", which in the case of the public deed is the notary. However much private individuals may sign their private documents with an advanced electronic signature, they cannot give it the status of a public instrument, since that can only be done by the official who has the legal power to authorize it (e.g. the Civil Registry and Custodians of Real Estates are empowered to issue certain certificates within their sphere of competence; notaries may authorize copies of public deeds, etc.). The meaning of this rule, then, is that those officials are obliged to use AES to authorize this type of instrument.

Article 5 No. 2 of the LFE could also lead to some confusion, as it gives private documents signed with AES the same evidential value as public documents. This rule does not make both instruments equivalent in terms of their legal value, since the evidential value at trial is not the same as the absolute legal value of a document. To illustrate: the declarations on facts that are contained in a private instrument of sale of real estate subscribed with AES may have the same probative value that if they had been formulated in a public deed, but this does not mean that that private instrument will be accepted by the Real Estate Custodian to carry out the tradition of the real estate, since such instrument does not comply with the requirement that the law demands for the valid sale of a real estate, which is the execution of the act by public deed.

A very recent case illustrates this very well. In consideration of the constitutional state of catastrophe affecting our country, on April 7 of this year the 11th Civil Court of Santiago, in case C-6045-2018, resolved to sign a public deed of award of an auction sale using an advanced electronic signature and then to send it digitally to the respective notary's office. However, when required to register this document, the Real Estate Custodian of Santiago refused to do so, noting that the instrument in question would not be a true public deed.

In view of this refusal, the interested party requested the court to order the Custodian to practice the registration anyway. Based on articles 3° and 4° of the LFE, which we have already analyzed, on April 30, 2020 the 11th Civil Court of Santiago ordered the Custodian to register the instrument of award signed with AES . In response, on May 11, 2020, the Custodian informed the court about the grounds for its decision , explaining that the instrument in question could not be registered because it was not a true public deed:

"So that we compare the provisions relating to the public deed contained in Articles 403, 405, 426 No. 5 and 401 No. 7 of the Organic Code of Courts and Articles 1699 and 1770 of the Civil Code with the document accompanied for registration dated April 8 of the notary's office of Ms. Valeria Ronchera, it is possible to conclude that it is not a public deed as a public or authentic instrument that meets the requirements of the above-mentioned articles, but an electronic document whose original is in a repository for verification and the wording and expressions used in its drafting **appear to be a public deed without being so** ".

Resolving this controversy, on June 23, 2020, the plenary of the Court of Appeals of Santiago ordered to leave the instrument of award without effect , requiring the court to execute the award by true public deed ("the Judge of the Eleventh Civil Court of Santiago is instructed to arrange for the necessary actions to be taken so that an instrument in material form is granted for this purpose"). In addition, and evidencing a clear concern with what happened, the plenary of the Court ordered all civil courts in Santiago to report on how they are proceeding with the public auctions and officiated its decision to the Supreme Court and to all those involved in the dispute (the court, the notary who authorized the instrument and the Real Estate Custodian of Santiago).

2.2 The acts that must be granted by private instrument subscribed before a notary admit the use of electronic signature, but appearing before a notary

The acts or contracts that the law requires to be signed by private instrument granted before a notary will not produce their effects if they are only signed by means of an electronic signature, for the same reasons we have given for the case of public deeds.

However, unlike the case of public deeds, the use of electronic signatures is not totally prohibited for this type of acts and is possible

under the following circumstances: if the parties agree to sign the electronic document in the presence of the notary, who in turn certifies the granting of the document using her/his own advanced electronic signature.

This possibility is recognized in the fourth and eighth agreements of the Auto Acordado (Court Agreement) on the use of documents and electronic signatures by notaries, custodians and judicial archivists adopted by the Supreme Court in 2006:

"Fourth: Holders of electronic signatures, within the scope of their functions and competence, **may electronically issue, through the use of advanced electronic signatures, all documents that the law allows** , especially authorized copies of public and private instruments, notarized documents, certifications of digital signatures stamped in their presence, protests and findings of fact and certifications referring to records and proceedings.

Eighth: In cases in which the Notary **authorizes a digital signature stamped in his presence,** he must attest to the identity of the signatory as laid down in the Organic Courts Code ".

The practical usefulness of this method is very low, since it still requires the presence of a notary, so that the most important advantage of electronic signatures, which is the possibility of concluding a contract remotely, is not exploited.

Some examples of acts and contracts that the law requires to be notarized are the assignment of copyrights [9] , the granting of a pledge without conveyance [10] or the incorporation of a non-profit association or foundation [11] .

2.3 The possibility and usefulness of issuing promissory notes in electronic form is controversial

The possibility of subscribing to a promissory note in electronic form faces two difficulties:

(i) Can a promissory note be signed by electronic signature? Part of the legal scholars hold that the legal nature of the promissory note is intrinsically related to its uniqueness and materiality: the promissory note is a physical document, not an abstract obligation that can subsist intellectually regardless of the medium on which it is recorded. For this position, the electronic promissory note would be no more than a private instrument in which a debt is recognized, but it

would not be a promissory note itself, to which the rules that are specific to it could be applied (Law 18,092).

Against this position, it has been argued that the existence of an electronic promissory note would be possible in accordance with the principle of equivalence between supports embodied in the LFE, and that being this law later and more specific, it should prevail over the classic and previous scholar notions on the matter.

(ii) For the promissory note to have "executive merit" (i.e. direct enforceability as a judgment debt), the participation of a notary is also required, either for the protest procedure or at the time of its granting. Even overcoming the previous scholar debate, there is still another inconvenience for the electronic promissory note: in order for a promissory note to have executive merit -which is one of its main advantages- it must (i) undergo the protest procedure regulated in article 60 and following of Law 18,092, which implies the intervention of a notary or a civil registry official; or (ii) have been subscribed to before a notary [12] , either by handwritten or electronic signature, as explained in section 2.2. As shown, both requirements involve the intervention of a notary, either to authorize the document or to make the protest, which makes the practical usefulness of an electronic promissory note considerably less than it is intended to be.

Due to these considerations, in 2012 the President presented a bill (bulletin 8466-07) to modify the rules regarding the promissory note -to which we refer below- expressly recognizing the possibility of its granting by advanced electronic signature and timestamping and granting it with executive merit under such circumstances.

2.4 Examples of acts and contracts that can be concluded by electronic signature

(i) Simple mandate agreement. There have been divided positions between legal scholars and court rulings on the need for the mandate to have the same formalities as the law requires for the act entrusted [13] . This debate becomes relevant in determining whether or not a mandate can be held in electronic form. If it were accepted that the formality of the mandate should be the same as that of the act entrusted, a mandate for acts that, for example, require a public deed, could not be concluded by means of an electronic signature.

(ii) Contracts for the authorization or licensing of works protected by copyright or industrial privilege.

(iii) Acceptance of terms and conditions of use on an electronic commerce website.

(iv) Assignments of industrial property rights.

(v) Authorizations for the processing of personal data.

(vi) Commercial agreements, such as distribution contracts, franchises, etc. (insofar as they do not contain acts that cannot be concluded by electronic signature, such as the sale of real estate, for example).

(vii) Confidentiality agreements.

(viii) Subscription of minutes of Board meetings (see NCG 434/2020 of the Financial Market Commission).

BILL TO AMMEND THE LAW ON ELECTRONIC SIGNATURES

As we have shown, there are still several impediments to adopting the mass use of electronic signatures. There are acts and contracts that must necessarily be concluded by public documents and others that, although they can be concluded by electronic signature, they still require that the signature is made in the presence of a notary, thus losing the usefulness of electronic means.

In order to eliminate some of these impediments and promote the mass use of electronic signatures, in 2012 the President presented a bill (bulletin 8466-07) which currently is in its third constitutional stage, and that intends to introduce a set of improvements to the LFE and other regulations, among which we will highlight three:

(i) **The concept of "time stamping"** is introduced, which is defined as the "assignment by electronic means of the date and time when an electronic document is signed with the intervention of a certified certification service provider, who attests to the accuracy and integrity of the document's time stamp". This concept is then required to replace the work of the notary in the granting of certain acts.

(ii) **The possibility that the use of AES and time stamping replace the legal requirement to authorize an act before a notary:** "In all cases where the legal system requires that the signatures of the grantors of a given legal act must be authorized before a notary, either as a formality of the act or as a requirement to make it effective against third parties or for any other legal effect, [14]

(iii) Law No. 18,092 is amended to expressly provide that the bill of exchange and the promissory note may be issued in an electronic document and signed with AES and time stamped, and that they will have executive merit under such circumstance. It is also stated explicitly that the protest of these documents may be made by means of an electronic document, in which case the officer carrying out the procedure must sign it with AES and stamp it with a time stamp.

These modifications are a great contribution to overcome some of the obstacles that the electronic signature faces today and that have been felt so much in these times of pandemic that demand the possibility of executing acts and contracts remotely. However, the bill leaves a major issue pending: to introduce facilities so that acts and contracts that require the solemnity of a public deed can also be performed remotely.

In fact, the possibility of satisfying this solemnity by means of AES and time stamp was expressly forbidden in the project, through the following rule "The provisions of paragraph four [15] **shall not apply to public deeds** ."

We understand that acts that require the formality of a public document are of great importance and that it would be imprudent or reckless to allow them to take place without making an exhaustive verification of the identity of the contracting parties, as allows the appearance before a notary. However, we believe that the legislator could find ways to reconcile the formality of these acts with the pressing social need to facilitate their remote execution.

One possible way could be to modify the rules of the Organic Courts Code in order to allow public deeds to be granted remotely as well, requiring the executing parties to appear before the notary by means of some technological tool (for example, by video conference) to verbally ratify their willingness to execute the act, and to sign the electronic document at that precise moment, using their advanced electronic signature and time stamp. As an additional safeguard, technical and organizational security measures associated with the use of the tool by the parties and notaries could be required; and strict storage obligations could be created for notaries (e.g., keeping a recording of the video appearance).

CONCLUSIONS

Current legislation does not allow electronic signatures to be used for the conclusion of all types of acts and contracts, considering that electronic signatures, especially in their simple form, can easily allow identity fraud. In that context, it is understandable that the legislator may wish to protect certain acts by requiring the parties to appear in person.

However, the use of technological means and the need for appropriate verification of the identity of the contracting parties are not mutually exclusive. The pandemic that hits us today has made it clear how urgent it is to modernize our legislation in order to design creative ways that allow us to execute the most solemn acts by remote means, but with robust mechanisms for the authentication of the contracting parties.

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1 The Regulations of the LFE are contained in the Decree No. 181/2002 of the Ministry of Economy, and regulate electronic documents, their effects; the types of electronic signature; and the certification and accreditation process.

2 Electronic documents are defined by the LFE as "any representation of a fact, image or idea that is created, sent, communicated or received by electronic means and stored in a suitable way to allow its subsequent use."

3 Art. 2 letter f) LFE.

4 Art. 2 letter g LFE.

5 The current accredited providers of this type of firm are: (i) BPO-Advisors (IDok): https://bpo-advisors.net ; (ii) TOC: http://www.toc.cl/ ; (iii) E-PARTNERS (Paperless): http://www.pkichile.cl/ ; (iv) CERTINET S.A .: http://www.certinet.cl/ ; (v) E-SIGN S.A.: http://www.e-sign.cl ; (vi) ACEPTA.COM: http://www.acepta.com ; (vii) E-CERT CHILE: http://www.e-certchile.cl ; and (viii) Thomas Signe: http://www.thomas-signe.cl .

6 Art. 1801 of the Civil Code

7 Art. 2409 of the Civil Code

8 For example: (i) the notary must incorporate the deed in her/his protocol or public registry (art. 403) and render useless, with her/his signature and seal the unwritten back of its pages (art. 404, final paragraph); (ii) the deed must be initialed and sealed in all its pages by the notary (art. 406); (iii) the parties must have the opportunity to demand that the notary public reads the deed aloud (art. 407); (iv) the notary or any of the grantors must have the opportunity to require the rest of the parties to leave their fingerprint on the document (art. 409).

9 Art. 73 of Law 17,336 on intellectual property. According to the article, this act can also be granted by public deed.

10 Art. 14 of Law 20.190. According to this article, the instrument must also be registered in the registry of the same notary who authorizes it.

11 Art. 548 of the Civil Code.

12 Art. 434 n°4 of the Civil Procedure Code.

13 In favor of the thesis that the mandate must be solemn if the act commissioned is solemn, see the opinion of Fernando Alessandri and recital 24 of the Supreme Court ruling issued on May 31, 2017 in case role 50.064-2016 . For the contrary thesis, see the opinion of David Stitchkin and recital 7 of the Supreme Court ruling issued on December 27, 2017 in case role 42.458-2017 .

14 New art. 4th paragraph 4th of the LFE, if the project was approved.

15 It refers to the subsection that allows the use of advanced electronic signature and time stamp to supply the legal requirement to authorize an act before a notary.

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