

BalticBusiness Quarterly

AUTUMN 2020



2.99 €



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Legal effect of electronic signatures in the Baltics

ELLEX IN THE BALTICS



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the COVID-19 outbreak has changed the way in which many businesses have to function. In the light of governmental restrictions, many companies have implemented working from home practices as a solution to their business continuity. As many people are working remotely, obtaining original “wet ink” signatures for commercial agreements has become difficult. In this digital era electronic signature is the best solution. However, it is important to know that not every electronic signature will have the equivalent legal effect as a handwritten signature.

EU rules

Article 25 (2) of eIDAS Regulation¹ establishes that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature. Thus, it is clear that “qualified electronic signature”

has an equivalent legal effect of an original “wet ink” signature under the EU law. “Qualified electronic signature” means an advanced electronic signature that is created by a qualified electronic signature creation device and is based on a qualified certificate for electronic signatures². Generally speaking, services for qualified electronic signatures (for example, issuing qualified certificates for electronic signatures) in the EU can be provided only by qualified trust service providers, the list of which is publicly available³.

From the practical perspective we see that businesses sometimes sign documents with electronic signatures which do not meet the requirements of the qualified electronic signature. Such signatures fall under the definition of “advanced electronic signature”⁴ or simple

“electronic signature”⁵ provided for in eIDAS Regulation. These electronic signature solutions are also offered by world-wide popular signing platforms such as DocuSign. Depending on jurisdiction and other circumstances, DocuSign is a one-stop shop for all types of electronic signatures, including advanced and qualified electronic signatures⁶.

The EU law stipulates that it is for national law to define the legal effect of “non-qualified” electronic signatures. Therefore, the legal effect of a “non-qualified” electronic signature (i.e. advanced electronic signature or simple electronic signature) depends on the national law applicable to a certain agreement.

Lithuania

The Lithuanian national law⁷ establishes that an electronic signature which does not meet

the requirements for the qualified electronic signature provided for in eIDAS Regulation will have the equivalent legal effect of a handwritten signature, where the users of that electronic signature: (i) agree, in writing, in advance and (ii) where it is possible to store that agreement on a durable medium. In the absence of such prior written agreement by the parties on the use of “non-qualified” electronic signature, the agreement will be deemed not concluded in written form. The legal effect of such agreement depends on the type and amount of the contract, and on other circumstances. Legal consequences under the Lithuanian law may vary from complete validity of the agreement (for example, agreements which may be concluded in non-written form) to the loss of the right to use testimony of witnesses as evidence in court, or even voidability of the agreement in some specific cases.

Latvia

Under Latvian national law⁸ a document is regarded as signed by the individual personally if a qualified electronic signature is used, or electronic signature which does not meet qualified signature requirements, but on the use of which the parties have agreed in writing (on paper with ink signature or electronically using qualified electronic signatures). If any of the two types of electronic signatures are used, then such electronic document is regarded as equivalent to written document. This is relevant for such documents which in accordance with law have a mandatory written form requirement. There are, however, plenty of daily commercial or consumer contracts where written form is not mandated and it is sufficient to meet a lesser standard, for example, providing information to consumers electronically so

that they can download/save the information, but without adding any type of ink or electronic signature from the seller or requesting such in return from the consumer. In other words, there are still plenty transactions that can be entered into through “click/accept” buttons, whereas in cases where document must be “in writing”, but parties cannot exchange ink signatures, then one of the two electronic signature types noted above can be used for Latvian law governed documents.

Estonia

Under Estonian national law, the feasibility of use of electronic signatures depends on the type of contract or document. Where the document is subject to a mandatory written format, one should give effect to such document by means of a qualified electronic signature (defined as a digital signature⁹ under Estonian law). Alternatively (and provided that the transaction is given an electronic form) Estonian law allows the use of any other electronic signature given in a manner which allows the signature to be associated with (i) the content of the transaction, (ii) the person entering into the transaction and (iii) the time of entry into the transaction.¹⁰ Theoretically, certain advanced electronic signatures may meet those conditions and therefore be used to give effect to documents subject to written form, however

this has not been tested in court. Furthermore, it is theoretically possible that in rare circumstances also a simple electronic signature (such as signature in the form of a picture, text, stamp etc.) may qualify as equivalent to a handwritten signature, where the (i) use of such a mechanical signature is common and (ii) the other party does not require a hand-written signature immediately.¹¹ Again, there is no established practice on this. However, and regardless of the above, all electronic signatures may in any case be used to give effect to documents which are not subject to any mandatory form, or which are subject to a form which can be reproduced in writing.

Conclusion

Each business should be clear about electronic solutions they use to sign the documents. If agreements or other documents are signed with qualified electronic signatures, such signatures have the legal effect equivalent to original “wet ink” signatures under the EU law. However, if electronic signatures do not meet the requirements of the qualified electronic signature, businesses should evaluate all related legal risks. The applicable national law, the type and amount of the agreement as well as other circumstances become particularly important for determining the legal effect of such agreements.

1 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

2 Article 3 point (12) of eIDAS Regulation.

3 <https://webgate.ec.europa.eu/tl-browser/#/>

4 Article 3 point (11) of eIDAS Regulation.

5 Article 3 point (10) of eIDAS Regulation.

6 <https://www.docuSign.com/learn/eidas-regulation-primer/>

7 Article 5 (1) of Law of the Republic of Lithuania on Electronic Identification and Trust Services for Electronic Transactions

8 Electronic Documents Law, art 3.2, <https://likumi.lv/ta/en/en/id/68521-electronic-documents-law>

9 In practice, this includes signatures that are given by means of national ID-card, mobile-ID, digi-ID and Smart-ID.

10 Section 80 of the General Part of the Civil Code Act (tsiviitseadustiku üldosa seadus).

11 Section 78 (2) of the General Part of the Civil Code Act.