

Electronic signature of documents

In consideration of Covid-19, the physical subscription of contracts and other instruments becomes difficult when the representatives of companies are in quarantine areas, or when such companies have implemented remote work and/or limited the access of personnel to their offices.

This document includes a brief explanation on the regulation of electronic signature in Chile. We will address the different electronic signatures, the requirements that must be met, certain exceptions regarding electronic signature, and its probative value.

1. Law No. 19,799 on electronic signature

Law No. 19.799 on Electronic Documents, Electronic Signature and Signature Certification Services, dated April 12th, 2002 ("Electronic Signature Law") enshrines the validity of obligations undertaken through electronic means by establishing the principle of functional equivalence.

This principle means that an obligation undertaken by electronic means has the same validity and effect as an obligation undertaken on paper by a handwritten or holographic signature. Consequently, acts and contracts concluded by electronic means are deemed as concluded in writing for all legal purposes.

2. Electronic document

The Electronic Signature Law defines an electronic document as any representation of a fact, image or idea which is created, sent, communicated or received by electronic means and stored in a manner suitable for subsequent use.

The broad concept of electronic document refers to the representation of a fact or act. The main characteristic is that the referred representation has been created, sent, communicated or received by electronic means. For example, a document written in Microsoft Word is an electronic document, since it has been created by such means, the same as an e-mail. Such documents will not lose that character after printing. Likewise, a document written on paper (created by physical means) that is scanned and then sent in PDF format to a third party will also be an electronic document.

Article 5 of the Electronic Signature Law regulates the evidentiary value of electronic documents, taking into consideration whether they were signed with a simple or advanced electronic signature, as detailed below.

3. Electronic signature

There are two kinds of electronic signature: simple and advanced.

a. Simple electronic signature

Is defined as any sound, symbol or electronic process, which allows the recipient of an electronic document to identify, at least formally, its author.

Consequently, the simple electronic signature is an electronic process or system allowing the recipient of an electronic document to identify who was the author of the fact or act that is represented, just as the holographic signature identifies the author in a paper instrument.

Thus, an e-mail that can identify the sender, for example by its footer or by the structure of the account (e.g. name.surname@mail.com), where acceptance of a certain agreement is expressed in some way, constitutes a (simple) electronic signature and, therefore, a valid obligation undertaken for all kinds of private contracts, with the exception of those indicated in the following paragraph.

A simple electronic signature is suitable for the performance of acts and the conclusion of all kinds of private contracts, with the following exceptions:

- a) Those in which the law requires a formality that cannot be fulfilled by an electronic document (for example, if a law refers to books or physical records)
- b) Where the law requires the personal presence of a party (e.g. a solemn will); and
- c) Those relating to family law (e.g. a contract referred to child maintenance)

In Chile employment contracts are not included in the above-mentioned exceptions. Consequently, an employment contract signed electronically by the employer and/or employee is fully valid. This has been confirmed by the Chilean Labor Authority in its pronouncement No. 3161/064, dated July 29th, 2008, which states that it is legally acceptable the signature of employment contracts using the electronic signature means established in Law No. 19,799, as long as their implementation does not impede the inspections of the authority.

Finally, and taking into account that all kinds of contracts, agreements and employment settlements can be signed by simple electronic signature, we recommend that you leave a documentary record of electronic signatures, as an example, by creating an email account where all interactions by email constituting electronic signature should be backed up.

b. Advanced electronic signature

Is defined as an electronic signature certified by an authorized certification service provider. An advanced electronic signature is created using means under the holder's exclusive control, and therefore said signature is linked exclusively to such holder and the data to which it refers, allowing the subsequent detection

of any modification, verifying the holder's identity and preventing him/her from rejecting the document and its authorship.

Thus, it is a simple electronic signature that has been certified by a Certification Service Provider (CSP) authorized by the Economy Sub Secretary. The certification process implies that a document signed with an advanced electronic signature meets a stricter standard for verification of its author's identity, who can be properly identified.

Should you decide to certify an electronic signature, the current list of CSPs authorized by the Economy Sub Secretary is as follows:

- E-CERT CHILE.
- ACCEPT.COM.
- E-SIGN S.A.
- CERTINET S.A.
- E-PARTNERS (Paperless).
- TOC.
- BPO-Advisors (IDok).
- Thomas Signe

Electronic signatures using non-listed providers, such as Docusign, qualify as a simple electronic signature in Chile, since that company is not a CSP authorized by the Economy Sub Secretary.

4. Probative value

According to the Electronic Signature Law, instruments signed by means of an advanced electronic signature constitute full proof ("*plena prueba*") in accordance with the general rules, except for the document's date. A document signed with advance electronic signature will evidence its date, if the same is included by means of an electronic dating system provided by a CSP.

An electronic document signed with an advanced electronic signature shall provide full evidence that the declarations were made by the author (but not as to the truth of such declarations) and that the date is correct, provided that the above-mentioned dating system has been complied with.

As for the documents signed with a simple electronic signature, they will be governed by the general rules applicable to private instruments, i.e., it will depend on whether the parties recognize the document in question. In any case, there will be a definite date of the document from: (i) the death of a signatory; (ii) the notarization of the document; (iii) the presentation of the document in court; or (iv) the moment that a competent official has acknowledge the document or has recorded it.

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