

Electronic Signatures cases – French law

Introduction

French law relating to electronic signatures makes a significant distinction between business to business (B2B) contracts and other transactions (e.g., business to consumer (B2C)). For a B2B contract, the contents of the contractual documents and the parties' signatures can be evidenced electronically by any method.

For most other contracts and acts with legal consequences, the Civil Code lays down how written documents and signatures may be proved in court. The cases summarised in this White Paper should be understood against this background.

In summary, the Civil Code provides:

- **Acts with legal consequences:** With the exception of contracts below EUR 1500, an act with legal consequences (whether a contract or of some other kind) must generally be proved by signed evidence in writing (Art 1359). Writing can be in any medium, including electronic (Art 1365).
- **Evidence in writing:** Electronic writing has the same evidential status as writing on paper, so long as:
 - the person from whom it originates can be properly identified; and
 - the document is created and stored under conditions that ensure its integrity.

An electronic document that does not meet the identification and integrity conditions may still have some evidential value, if other proof is available to supplement it. [Arts 1365 and 1366]

- **Signature:** An electronic signature required to prove an act with legal consequences must use a reliable process of identification of its author, which guarantees its link to the act to which it is attached. As with Art 1366, an electronic signature that does not meet this requirement may still have some evidential value, if other proof is available to supplement it. [Art 1367]

If an Electronic Identification, Authentication and Trust Services (eIDAS)-compliant qualified electronic signature (QES) is used, then it is not normally necessary to establish the reliability of the process, since a rebuttable presumption of reliability arises (Art 1367, Decree 2017-1416).

Practical consequences Although the above Civil Code's written evidence and signature provisions apply to both B2C and B2B contracts, they are relaxed for B2B contracts. That facilitates use of an electronic signing platform such as DocuSign. In the B2C context a signing platform may be able to assist in satisfying the identification, integrity and reliability conditions of Arts 1366 and 1367.

Although Art 1367 confers a presumption of reliability on a qualified electronic signature (QES), in practice business contractual relationships and ecommerce transactions largely rely on ordinary electronic signatures. It is rare for French law to require an eIDAS-compliant advanced (AES) or qualified (QES) electronic signature to be used.

Unlike a scanned handwritten signature that can readily be copied, a robust electronic signing platform automatically creates an audit trail that can provide evidence of the signature and transaction.

Support for electronic signatures in France : Overview of applicable case law

Although in principle a binding contract can be reached by oral agreement, the Civil Code provisions above illustrate that in practice – at least for agreements above EUR 1500 in value – a signed written contract is necessary. Without that, it is difficult, if not impossible, to prove the existence of the agreement in court. This framework explains why the majority of the case law concerns B2C contract compliance with the provisions of Articles 1366 (Evidence in Writing) and 1367 (Signature) of the Civil Code, or their predecessors. Further, in B2B contracts, submission of evidence can be by any means (letters, email, SMS messages, testimonies, subsequent conduct of the parties). This dynamic may explain the relative scarcity of electronic signature caselaw specifically related to B2B contracts.

Requirements for proof in court must be distinguished from specific formalities to which some kinds of transaction, such as ‘solemn contracts’ are subject in order to be valid (see Formalities section, below). Requirements of proof apply, regardless of whether a signature or writing or some other formality is required for validity.

With that background in mind, certain key themes emerge.

Key Themes

Outside B2B relationships, such as in B2C relationships, Courts may be more demanding in terms of reliability of electronic evidence and signature, especially with respect to claims exceeding EUR 1,500 – the threshold above which written evidence will be required in civil matters.

That said, eCommerce transactions (which are generally under the EUR 1,500 threshold) generally rely on clickthrough/clickwrap mechanisms (the “double click rule”). This contracting process has been institutionalised in French civil code under articles 1127 and seq and is generally based on a simple electronic signature (within the meaning of Article 26 eIDAS).

Even in the B2B context, it may be necessary to produce evidence, perhaps long after the event, of the processes that were followed for any given signed document and what the contents of the document were. This evidence might be needed in court, or perhaps in other situations such as due diligence or inspection by auditors. Uncertainty may invite litigation.

In order to prove that a contract has been agreed to by the parties, the parties will usually draft and sign a written instrument. As a result, in cases where no other formalities are required, an electronic signature provided through a software platform should assist in proving that the parties have expressed their agreement as to the obligations set out in the contract and as to the manner in which they are to be performed.

Electronic transaction and signature cases

M. X C/ Mme Y
RG N° 09-68555 Cour de Cassation, 1st civil chamber
30 September 2010

When a party denies being the author of a writing in electronic form, the judge must check whether the conditions relating to the validity of the writing or the electronic signature have been met.

In this non-B2B dispute between a landlord and tenant, the trial court had admitted into evidence an e-mail, the alleged author of which denied having written. The court had taken the view that the evidential equivalence to paper provided for in Article 1316 (now 1366) (Evidence in Writing) applied if the other party produced no document likely to contradict that.

The French Supreme Court ruled that the trial court had to systematically verify that such evidence complied with the conditions set out in Article 1316 (Evidence in Writing) (notably that the person from which the electronic document originates can be properly identified and that such document is established and maintained under conditions that ensure its integrity).

SARL DELICAT ET SCENE C/ Monsieur Constant T.
RG N° 13/03492/ Cour d'appel, Orléans
12 January 2015

The existence of a contract can be proven by an exchange of emails.

In this decision, the Court ruled that exchanges of e-mails can form the basis for proving a contract, in combination with other evidence, in the absence of a signed quote. The Court considered that in the light of the various e-mails exchanged between the parties, both in the context of the preparation of the performance and, subsequently, in claiming payment, the reality of the performance of the litigious agreement could not be disputed.

SA Carrefour Banque C/ M. XY
RG N° 12/00311/ CA Fort de France
12 December 2012

The scanned signature of X is insufficient to ensure the authenticity of his legal commitment as it does not allow a perfect identification of the signatory.

This case concerned the requirement of Article 1367 (Signature) that an electronic signature proving an act with legal consequences must use a reliable process of identification of its author. The Court held that this was not possible with a scanned signature alone. It was necessary to attach, as a minimum, an electronic authentication to the signature in order to be able to identify the author. In this case, the Court rejected the scanned handwritten signature.

MC²I C/ CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE
TA Toulouse
9 March 2011

A scanned document with a handwritten signature is not equivalent to an electronic signature.

This case concerned the requirement of Article 1367 (Signature) that an electronic signature proving an act with legal consequences must guarantee the link between the signature and the signed document. In the context of a public procurement contract, the company MC²I submitted its offer by means of scanned copies of hand-signed documents, compressed into a zip file. The zip file, but not the individual documents, were electronically signed. The court held that neither the scanned handwritten signature of individual files, nor the electronic signature of the zip file, sufficiently guaranteed the link between the signatory and the submitted documents.

SA Carrefour Banque C/ M. XY
RG N° 17/01050/ CA Chambéry
25 January 2018

An evidence file provided by a trusted service provider made it possible to certify the reliability of the electronic signature process.

The trusted service provider having provided its “evidence file” indicating the signatory’s e-mail address and the identity code of the electronic certificate, all with a precise timestamp of the transaction, made it possible to certify the reliability of the electronic signature process and, consequently, the validity of the contract, in accordance with Article 1367 (Signature).

Comparison: Informal electronic signature versus a signing platform

Although an informal electronic signature/consent is in principle capable of constituting a signature, it does carry risks.

Particularly outside the B2B context, as the case law on Article 1367 (Signature) illustrates, a court may reject an electronic signature if it is not satisfied that the signature reliably identifies the signatory or sufficiently guarantees the link to the document. Although since 2016 it has been easier to rely on a scanned copy of an original paper document as evidence in court, a court may still find that (for instance) a scanned signature does not satisfy Article 1367 (Signature).

At a more general level:

- It may be unclear whether a name inserted in the document was intended to be a signature at all.
- An informal electronic signature or a scanned manuscript signature can easily be copied.
- It may be difficult to establish the connection between the consent and the content of the document (who agreed to what)
- An easily amended electronic document signed with an informal electronic signature may be thought to be less robust than a paper-based traditional wet-ink signature.
- It may be unclear whether a required formality was complied with.

The use of a genuine electronic signature through a software platform (as opposed to a scanned copy of a handwritten signature) makes it possible to conclude more secure remote contracts, the validity of which will be more difficult to challenge. DocuSign provides a structured auditable environment and step by step process for signing documents.

The two key aspects of Article 1367 (Signature) are reliably linking the signature to the document and to the signatory. In the more flexible B2B context, these also are significant considerations.

Document integrity. An informal electronic signature leaves open the possibility of dispute about what the signed document consists of, and whether it might have been altered subsequently. Secure storage (e.g., tamper proofing) of the signed document and associated signatures reduces this risk.

Identity of signatory. What if the signatory subsequently denies that they signed the document? Can we prove that it was them? Many businesses wish to have the flexibility to choose a level of identity assurance that reflects the nature of the document and the value and importance of the transaction.

Overall, in the B2B context it is normally open to a business to choose the kind of electronic signature that it considers suitable for the transaction. Sophisticated cryptographic digital signatures offer the highest assurance levels of document integrity and identity of signatory. However, experience suggests that for most transactions businesses have taken a pragmatic view that that such heightened technological level of assurance of a digital signature is not required and that a standard electronic signature is adequate.

In cases where no other formality is required, the electronic signature of the contract will make it possible to prove that the parties have expressed their agreement as to the obligations set out in the contract and as to the manner in which they are to be performed. Indeed, in so far as it adds an authentication process to the handwritten signature, the court may indeed consider that the latter allows the identification of its author with certainty alongside the latter's consent to the content of the contract.

Formalities Requirements

Separately from evidential requirements, French law may impose other formalities. It distinguishes “consensual” contracts (where no formal requirements apply as a matter of validity) from “solemn” contracts i.e. those which validity is subject to mandatory forms determined by law. Four types of “solemn” contracts are referred to in the Civil Code (marriage contracts, mortgage contracts, donation contract and contracts bearing subrogation granted by the debtor) but other contracts may also be subject to specific formalities, such as physical presence. Some contracts and other documents are also subject to external filing requirements.

In principle, “solemn” contracts must be notarised, which necessarily implies the physical presence of the parties to the contract, particularly as a result of the significance of the commitments entered into in those types of contract.

However, the increasing need for remote working has sparked a greater need to adapt such formalities to modern-day needs of society, where interactions are increasingly virtual. This is particularly so with regard to the conclusion of contracts between people not physically in the same place. Therefore, these procedures may be more generalised in the near future and lead to the development of remote notarised electronic signature techniques.

Visit the [DocuSign eSignature Legality Guide](#) to learn more about electronic signature-related laws from around the world.

Disclaimer

The information in this White Paper is for general information purposes only and is not intended to serve as legal advice. It is limited to the laws of France. Laws governing electronic signature may change quickly, so DocuSign cannot guarantee that all the information in this White Paper is current or correct. Should you have specific legal questions about any of the information in this White Paper, you should consult a suitably qualified legal practitioner.

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