

Electronic signatures in Italy



In Italy, electronic signatures are commonly used. In fact, Italy was one of the first countries in the world to issue legislation regulating electronic documents and electronic signatures and their legal validity and effects. The law on these topics dates back to 1997. Since then, the relevant Italian legislation has evolved over time to adapt to the broadening uses of electronic signatures.

In 2005, all substantive legislation pertaining to electronic documents, electronic signatures, as well as electronic storage of documents, electronic identification schemes and other similar topics, were consolidated in the Legislative Decree 7 March 2005, no. 82 (“Code of Digital Administration”, hereinafter “CAD”).

In 2016, the EU Regulation No. 910/2014 (eIDAS Regulation) entered into force in Italy and CAD was amended to align with this regulatory scheme.

The eIDAS Regulation identifies three types of electronic signatures. These are:

1

The simple “electronic signature” (SES), which is “data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign”.¹

2

The “advanced electronic signature” (AES) has higher security and four (4) requirements:

- 1/ it is uniquely linked to the signatory;
- 2/ it is capable of identifying the signatory;
- 3/ it is created using e-signature creation data that the signatory can, with a high level of confidence, use under his sole control; and
- 4/ it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

3

The “qualified electronic signature” (QES) represents an even more secure standard and is “an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures”.

Qualified certificates are issued to signers by qualified trusted services providers (QTSPs), which are accredited (and supervised) by local authorities designated by each EU member state.

It is worth noting that, despite the terms of the eIDAS Regulation, certain peculiarities derived from CAD and other national laws and regulations still remain in the Italian legal system, specifically those related to the use of qualified electronic signatures (e.g., QES digital signatures),² which are treated slightly differently in Italy than elsewhere in the EU. The reason for this is that the CAD digital signature was the first electronic signature regulated by Italian law back in 1997, before the creation of a harmonized framework for electronic signatures within the European Union. However, currently the legal validity of a “CAD firma digitale” is exactly the same as any eIDAS QES digital signature and a QES may be used in its place. This nuance does not impact the usefulness and/or applicability of eIDAS electronic signatures (e.g., SES and AES), which remain commonly and broadly used in many commercial transactions. It merely should be noted that in some specific circumstances the so called “firma digitale” (“CAD digital signature”),³ or QES should be used. For example, CAD digital signatures are used for participating in tenders and competitive bids, signing specific contracts where required by law, as discussed below, or where the parties choose to use this enhanced or electronic signature as a preferred solution), modifications of corporate structures, as well as for billing systems and health documents.⁴

Electronic signature's legal value and written form requirement

Article 25 of the eIDAS Regulation applies to documents and acts regulated by Italian law and provides that, a non-qualified electronic signature (e.g., SES) "shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form". Further, a "qualified electronic signature shall have the equivalent legal effect of a handwritten signature" with heightened presumptive evidentiary value.

In addition to the foregoing, further provisions of CAD and Italian Civil Code ("ICC") need to be considered to get a complete framework of how electronic signatures work under Italian law. For example, as to the validity of electronic documents to set forth contractual obligations, in principle Italian civil law allows the parties to an agreement to freely choose the form in which such an agreement can be executed. However, for certain agreements, Italian civil and commercial laws require that the relevant contracts must be executed in "written form" to make the agreement valid. In particular, Art. 1350 ICC provides a list of contracts and acts for which written form is a legal requirement (see paragraph 1, No 1 to 12, mainly referring to real estate transactions). In addition, Art. 1350, paragraph. 1, No 13 provides that written form may be required by the law for other specific agreements.⁵

A specific regime is also set forth in the Italian Civil Code for the acceptance of so-called "burdensome" clauses. These clauses (which are actually quite common in many commercial agreements) are contractual provisions which establish particular rights in favor of the party who has drafted and proposed those terms and conditions (or burdens against the party who accepts them),⁶ for which Article 1341, para. 2, ICC requires a specific "written approval" by the party adhering to the terms and conditions.⁷

Even when written form is not required by the law, the parties involved often prefer to sign contractual documents in writing, in order to have strong and clear evidence of the existence of an agreement and of the obligations undertaken by each party, to prevent possible disputes, and reduce the risk of claims related to authenticity.

According to Article 2702, if the signature is recognized as genuine by the relevant party, ICC documents signed in ink are considered as final evidence of the origin of the declarations set forth in an agreement from the person who signed the agreement. This approach means that the validity of a written document can only be contested through a formal action at court aimed at ascertaining that a signature is false (so-called “querela di falso”).

In this respect, Article 20 of CAD (“Validity and probatory value of electronic documents”) provides that an electronic document signed with a qualified or advanced electronic signature⁹ meets the “written form” requirement, while the suitability of other electronic signatures must be assessed by the Court, on the basis of the characteristics of that electronic signature in terms of security, integrity and immutability. However, as noted above, a simple electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form (Art. 25 eIDAS Regulation).

As to the validity of agreements, Article 21 paragraph 2-b of CAD (“Other provisions relating to electronic documents executed with advanced, qualified and digital signatures”) provides that agreements and acts specifically indicated under Article 1350, from No.1 to 12 ICC shall only be valid if executed with a qualified electronic signature (QES), while other acts and agreements for which the law requires the written form shall be valid if executed with a qualified or advanced electronic signature.⁹

The DocuSign eSignature platform provides different electronic signature solutions intended to satisfy different needs: simple, qualified and advanced signatures for clients who need to produce electronic documents with the same validity of a written document and more agile tools where the parties do not need to comply with “written form” requirements but at the same time want to benefit from a reliable signature tool.

Electronic signature court cases

As illustrated above, the validity of electronic signatures—and, in particular, of qualified signatures and advanced signatures—is clearly recognised by the CAD and relevant technical regulation. As a consequence, there is quite a limited number of precedents and court decisions concerning these topics and most of the decisions focus on the need to comply with written form requirements, rather than on the validity of electronic signature tools or digitally signed documents.

The following cases are examples of where Italian courts addressed the use of electronic signatures and/or digital techniques for the execution of agreements:

Supreme Court of Cassazione, decision of 6 February 2019—No. 3540

An email without an electronic signature is not effective as a private deed (“scrittura privata”) pursuant to Article 2702 ICC.

According to the Supreme Court of Cassazione, the electronic mail message (i.e. the e-mail) without electronic signature does not have the validity of a private deed provided by Article 2702 ICC as regards the attribution to its apparent author.

Such effectiveness is provided by the CAD only for the electronic document signed with an advanced, qualified or digital electronic signature.

Consequently, the suitability of an email without electronic signature to meet the requirement of written form must be assessed by the Court on the basis of its characteristics in terms of quality, security, integrity and reliability.

Local Court Catanzaro, decision of 30 April 2012

Point-and-click is not sufficient for the specific approval of the burdensome clauses according to Article 1341 ICC.

Given the principle of freedom of forms in the Italian legal system, the “virtual key” or “point-and-click” technique, normally used in on-line contracts, it is sufficient to approve the agreement and to consider the contract as duly executed, where it is a free-form contract.

However, the approval of the entire agreement does not imply the approval of the burdensome clauses provided by Article 1341 ICC.

Such burdensome clauses will be effective and binding only if specifically approved and this approval can be given by electronic means. The Court decision is not crystal clear in relation to which kind of electronic signature is required.

Justice of Peace Partanna, decision of 1 February 2002

Point-and-click is sufficient for the specific approval of the burdensome clauses according to Article 1341 ICC.

Acceptance of contractual T&C by means of an online form is valid with a mere point-and-click solution (i.e. a simple e-signature solution).

In addition, acceptance of burdensome clauses under Article 1341 ICC has been found to be validly performed by means of a mere point-and-click solution, with a simple e-signature solution.

According to the Court issuing this decision, a “double approval” of the general T&Cs and of the burdensome clauses (i.e. one point-and-click solution for approval of the general T&Cs and one point-and-click solution for approval of the burdensome clauses) appears to be sufficient.

It has to be noted that (i) such a decision has been issued before most of Italian and EU e-signature legislation currently in force was enacted, and (ii) is not supported by prevailing Italian authors (nor mentioned by subsequent case law).

Local Court Ferrara, decision of 28 September 2020— No. 517

The graphometric signature is a type of advanced electronic signature and the same rules apply as for signing a paper document.

Pursuant to the Local Court of Ferrara, the graphometric signature is a type of advanced electronic signature, with legal value, which acquires the biometric parameters and encodes them, creating a unique and inseparable link between the signature and the document.

The same rules apply to a graphometric signature as for signing a paper document, i.e. the signature is not valid if the person who allegedly signed it, does not recognise the signature as his own.

If the person does not recognise the signature as his own, it will be up to the party wishing to make use of the signed document to present a request for verification of the signature.

Supreme Court of Cassazione, decision of 5 June 2020— No. 10786

The trial document (such as ruling) drawn up in electronic form by the judge may be filed electronically in the digital file if it has first been signed with a digital signature.

Pursuant to the Supreme Court of Cassazione, the trial document drawn up in electronic form by the judge may be filed electronically in the digital file if it has first been signed with a digital signature.

Indeed, the judgement drawn up in electronic format by the judge and signed by him through a digital signature is not null and void for lack of signature, since the author's identifiability, the integrity of the document and the immutability of the decision are certain.

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Notes

- 1 eIDAS Regulation, Article 3(10).
- 2 In particular, the Decree 22 February 2013 (“Technical rules relating the generation, use and check of advances, qualified and digital signature”) sets forth specific requirements concerning, among others, the generation of keys for qualified/digital signatures, safe devices for the generation of qualified/digital electronic signatures, certifications, certification service-providers (which are the current trust service providers), check of qualified/digital electronic signatures, time stamps, advanced electronic signature.
- 3 Digital signature is defined at Article 1 (1)(s) of the CAD as “a specific kind of qualified electronic signature based on a system of encryption keys, i.e. one public key, and one private key, interrelated each-other, allowing both the owner of the digital signature (through the private encryption key) and a third party (through the public encryption key) to certify and verify the origin and the integrity of one or more electronic documents”.
- 4 According to AgID (Italian Digital Agency which is the public authority competent for electronic signatures), in 2020 the active devices in Italy for digital signatures (including relevant qualified certificates) have exceeded 22 million of units – see <https://www.agid.gov.it/agenzia/stampa-e-comunicazione/notizie/2020/05/21/firma-digitale-piu-20-milioni-utENZE-attive>.
- 5 E.g. agreements for the provision of banking or investment services regulated under the Italian Financial Act and the Italian Banking Law; sub-supply agreement provided by L. 192/1998; contracts with the public administration.
- 6 In detail: i) limitations of liability; ii) the power to unilaterally withdraw from the contract or of suspend its performance; iii) time limits involving forfeitures on the other party; iv) limitations on the power to raise defenses; v) restrictions on contractual freedom in relation with third parties; vi) tacit extension or renewal of the contract or; vii) arbitration clauses; and viii) derogation of ordinary competence of the courts.
- 7 According to art.1341, para 2 ICC, such clauses would require a separate written acceptance of the party adhering to the agreement. Even if according to prevailing legal literature and case law, this acceptance has to be given through an advanced or qualified electronic signature, it is however worth noting that acceptance of burdensome clauses is commonly given with point-and-click solutions, which could be considered as a kind of simple electronic solution (to the extent it is somehow possible to recognize the signatory).
- 8 This article besides the qualified electronic signature mentions also the “digital signature”, as described above (i.e. it has the same legal effects as the qualified signature). For sake of completeness, the article makes also reference to documents formed after previous electronic identification of the author made according to a process having certain technical requirements.
- 9 It is the case, for example, of real estate contracts, or most of agreement for the provision of banking, payment and investment services, or sub-supply contracts, or self-certifications and self-declarations.

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DocuSign, Inc.
221 Main Street, Suite 1550
San Francisco, CA 94105

[docuSign.com](https://www.docuSign.com)

For more information
sales@docuSign.com
+1-877-720-2040

DocuSign®