

E-signatures - The Next Logical Step in M&A Transactions



Gisèle Rosselle

Partner

gisele.rosselle@strelia.com



Eugénie Stinglhamber

Associate

eugenie.stinglhamber@strelia.com

Current culture and practice in Belgium surrounding the completion of transactions remains mostly in favour of the traditional wet-ink signed-by-hand signatures requiring all signatories to gather physically in one place. Although no one will complain about the joy of toasting to glasses of champagne, most would agree they could easily do without the travel – especially in cross-border transactions – the time spent at the signing, and the cramps in the hand and arms from signing.

E-signature offers a simple and complete solution to these “burdens”.

Advantages

Instead of gathering in one location to sign all documents, a signatory receives an email containing a link to a secure webpage hosted by an electronic signature platform. The signatory can then sign the documents with just a few clicks from anywhere in the world, using their smartphone, computer, or tablet. No account or specific software is necessary for this. Additionally, the platform indicates to the signatory where it should sign, and the latter can only sign in those blocked areas so that errors can be prevented.

Once signing is complete, all parties receive a copy of the documents, thereby enabling the rather cumbersome practicalities associated with the compilation of a “closing bible” to be avoided.

Probative Value

In spite of the above-mentioned advantages of e-signature and although it was introduced in EU law in 1999 and Belgian law in 2001, it remains rather uncommon in M&A transactions. Some of the main reasons have to do with the uncertainty and concerns surrounding the admissibility in court and probative value of digitally signed documents and the electronic execution of notarial deeds.

These issues have gradually been solved over the years, however, first by the adoption of the eIDAS Regulation in 2014 (Belgian Act of 21 July 2016), and more recently, thanks to the Belgian Evidence Law Reform (entry into force is 1 November 2020). Without going into too much detail on these regulations, let’s recall their main features:

- All qualified e-signatures – i.e., those meeting certain technical quality standards set out in the eIDAS Regulation – benefit from an equivalence or presumption clause, therefore exempting their user from the burden of proof in the event of a dispute. Thus, a qualified electronic signature has the equivalent legal effect of a handwritten signature, and the judge is bound by the probative value given to it by law.
 - Ordinary and advanced e-signatures benefit from a non-discrimination clause “only”, meaning that the legal effect and admissibility of such signatures as evidence in legal proceedings cannot be denied solely on the grounds that it is in electronic form. If this is brought before court, it will be up to the judge to verify whether the e-signature complies with the conditions laid down in Article 1322, paragraph 2 of the Belgian Civil Code – i.e. as from 1 November 2020: possibility to (i) identify the author and (ii) demonstrate its willingness to adhere to the contents – and up to its user to prove it.
- In practice, the risk that an advanced e-signature would fail such test is quite low.
- Public officers, such as notaries, may also sign electronically authentic deeds that are drawn up, received, or served in dematerialized form, provided that the signature is a qualified e-signature.

Old Habits Die Hard

The use of e-signatures in M&A transactions implies a real change in culture and practice that can only be achieved gradually.

While in all sectors combined, despite their high level of reliability, qualified e-signatures have not been as successful as expected, parties generally prefer simpler procedures such as ordinary or advanced signatures; in M&A, even advanced e-signatures are seldomly used.

In addition to the reasons mentioned above, this can also be explained by the necessity to get familiar with new logistics and by the usual slowness of the Belgian legal sector to adapt to new technologies and reluctance to change its ways. Hence, in the Netherlands, e-signature is gaining momentum.

Despite the time savings and ease of using e-signatures, some will invariably favour physical meetings and human interactions. Nevertheless, it is in the best interest of lawyers to quickly familiarize themselves with these technological processes anyway in order to be able to offer each client the services that best suits it.