



MIJARES ANGOITIA
CORTES Y FUENTES

USE OF ELECTRONIC SIGNATURES

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As a result of the COVID-19 health crisis and social distancing, companies have considered the execution of commercial agreements and other legal documents using electronic signatures.

I. Validity and Recognition in Mexico

Mexican law recognizes the use of *electronic signatures* in agreements. The Federal Civil Code provides that formal requirements in agreements are considered as fulfilled using electronic or optic devices, or any other technological means, if the information may be attributed to the obliged individuals and may subsequently be consulted.

Likewise, the Commercial Code ("CC") recognizes legal effects, validity and binding force of acts carried out through Data Messages (as defined below). In respect thereof, the CC provides that:

- "Electronic Signature" is data in electronic form recorded in a Data Message, or enclosed or logically associated thereto by any technology, to identify the individual who created it through such data and acted by his/her own accord or on behalf of a third party (the "Signatory") in relation to a Data Message, producing the same legal effects as an ink signature, being admissible as evidence in court.
- "Data Message" is the information generated, sent, received, or filed by electronic, optical or any other technology (a commercial agreement signed using an *electronic signature* is considered a Data Message).
- No legal effects, validity or binding force shall be denied to information for the sole reason of being contained in a Data Message. Therefore, a Data Message may be used as evidence in any proceeding filed before a legally recognized authority and shall have the same legal effects as a printed document, provided such Data Message complies with the provisions of the CC and the applicable regulatory guidelines.

II. Types of Electronic Signatures

The CC identifies three types of electronic signatures:

- a) Electronic Signature (Simple): This is electronic data contained in a Data Message or enclosed with or logically associated to a Data Message by means of any technology used to identify the Signatory in connection with such Data Message and to indicate that such Signatory approves the information contained therein.

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- b) Advanced or Reliable Electronic Signature ("AES"): For an AES to be valid and considered as "Advanced" or "Reliable", in principle, the four requirements provided in Article 97 of the CC must be satisfied:
- Unique data, such as codes or private cryptographic keys that are secretly created (the "Signature Creation Data"), in the context in which they are used, correspond exclusively to the Signatory;
 - The Signature Creation Data was, at the time of signing, under the exclusive control of the Signatory;
 - Possibility to detect any change to the Electronic Signature made after its moment of creation; and
 - Possibility to detect any alteration of the Data Message after its time of signing.

It should be mentioned that even of the provisions of Article 97 of the CC are satisfied, a third party may challenge the reliability of an AES or provide evidence that an AES is unreliable.

- c) Certified Electronic Signature ("CES"): This is a type of AES that has been certified by a recognized service provider ("RSP"). RSPs are individuals or public institutions that provide services related to electronic signatures, issue the corresponding certificates and are duly authorized as such by Mexico's Ministry of Economy. Authorized RSPs may be consulted in the following link (internationally-recognized firms, such as "*DocuSign*", are included in the list: <http://www.firmadigital.gob.mx/directorio.html>).

III. Official Mexican Standard -151 - SCFI - 2016 ("NOM 151" for its Spanish acronym)

On March 30, 2017, NOM 151 was published in the Official Gazette, approving new technical requirements to promote the adoption of mechanisms to allow the evolution towards a digital model. NOM 151 authorizes RSPs to:

- a) Issue digital certificates related to electronic signatures – refers to the issuance of CES;
- b) Digitize and certify under NOM 151 – migration of print documents to "*Data Messages*" pursuant to NOM 151, issuing a preservation certificate and, if required, storage services; and
- c) Issue stamps or timestamps – a certificate issued after applying the "*timestamp*" process, which is then sent to the owner of the document, allowing to prove its authenticity and integrity as of a specific date, hour, minute and second.

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IV. Notarization

Some notaries in Mexico already accept certain documents (such as commercial agreements, shareholders' resolutions and board of directors' resolutions) executed by means of a CES (such as the CES issued by the Tax Administration Service – "SAT" for its Spanish Acronym), as long as the electronic file is provided to consult the CES, and to be included to the appendix of the notarial instrument (*docx., pdf., html., xml.*, documents along with the "*hash*" of the signature and printed copy of the "*cer.*" – certificate of the *electronic signature*).

Additionally, in the case of shareholders' and board of directors' resolutions, notaries require that the bylaws of the corresponding company include the possibility of executing this type of documents through a CES.

V. Evidentiary Value

Under Mexican law, *electronic signature* has the same legal effects as ink signatures and are admissible as evidence in trial. The Federal Civil Procedure Code recognizes as evidence any information generated by electronic or optical means or any other technology, while the CC recognizes Data Messages as evidence. Both statutes provide that to assess the evidentiary value of such information, the reliability of the method through which such information was generated, communicated, received, or filed shall be considered.

However, even if the law recognizes the legal effects and evidentiary value of *electronic signatures*, as electronic information may be altered it must be considered that, regardless the type of electronic signature used, electronic signatures contained in a Data Message may always be disputed or objected in the context of a court proceeding or arbitration (in the same manner in which an ink signature can always be disputed or objected). In case of an objection, evidence on technological matters would have to be provided, which may involve additional procedural challenges.

VI. Court Precedents

In a number of decisions, the Federal Courts have recognized the validity of commercial transactions executed by electronic means and have concluded that a document executed with an electronic signature is reliable if it complies with the reliability requirements established in the CC.

VI. Tax Law

Tax authorities have rejected certain evidence and supporting documents provided by taxpayers in audit procedures, by arguing that it is not possible to confirm the existence of certain legal events based on private documents, as such documents lack of a "*date certain*" and, as a result, have not recognized them as valid for tax purposes.

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This position was confirmed by Mexico's Supreme Court of Justice in case law precedent number 2a./J. 161/2019, indicating that "*date certain*" is an enforceable requirement in private documents that are submitted with the tax authorities, and that in private documents "*date certain*" is achieved: (i) when the document is recorded with the Public Registry of Property and Commerce, (ii) when the document is notarized; or (ii) on the date of death of any of the signatories thereof.

We consider that there are strong arguments to defend that, in addition to the means of evidence listed by Mexico's Supreme Court, as the execution of a document using a CES is also evidence to prove "*date certain*" on such document.

VIII. CES in International Transactions

In accordance with the rules established in the CC and NOM 151, if counterparties residing in other countries sign documents with a CES (e.g. by means of DocuSign), such signatures shall have legal validity under Mexican law.

IX. Conclusions

- (a) Under Mexican law is valid to express consent in commercial agreements and documents (including shareholders' and board of directors' resolutions) using an electronic signature.
- (b) A CES has the same value as an ink signature. It is advisable that all signatories, including counterparties to agreements, use the services of a RSP in order to provide maximum security in the context of any objection regarding the document's validity.
- (c) It is possible to notarize documents (including shareholders' and board of directors' resolutions) executed by means of a CES, if they comply with the requirements established by the CC and NOM 151 (and, in the case of shareholders' and board of directors' resolutions, if execution by electronic signature is permitted by the bylaws).
- (d) *As electronic signatures* may be disputed in court proceedings or arbitration (in the same manner in which an ink signature may be disputed), it is advisable to use a CES, as it provides the maximum evidentiary value in case of controversy, especially considering that the burden of the proof rests in the Signatory.
- (e) There are strong arguments to defend that the CES may be used to satisfy the "*date certain*" requirement for tax purposes.

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- (f) Under Mexican law, it is possible to use a CES for the execution of documents abroad, as long as the counterparties use electronic signatures with identity certificates equivalent to those required for Mexican CES (e.g. signing through DocuSign).

In case you have any questions regarding the implications of the Electronic Signature, please do not hesitate to contact our partners with expertise in corporate matters, who can be of assistance:

Horacio M. De Uriarte | Partner | hdeuriarte@macf.com.mx

Manuel Echave | Partner | mechave@macf.com.mx

Everardo J. Espino | Partner | ejespino@macf.com.mx

Adriana Morales | Counsel | mamorales@macf.com.mx

+52 (55) 5201 7400

Mijares, Angoitia, Cortés y Fuentes, S.C.