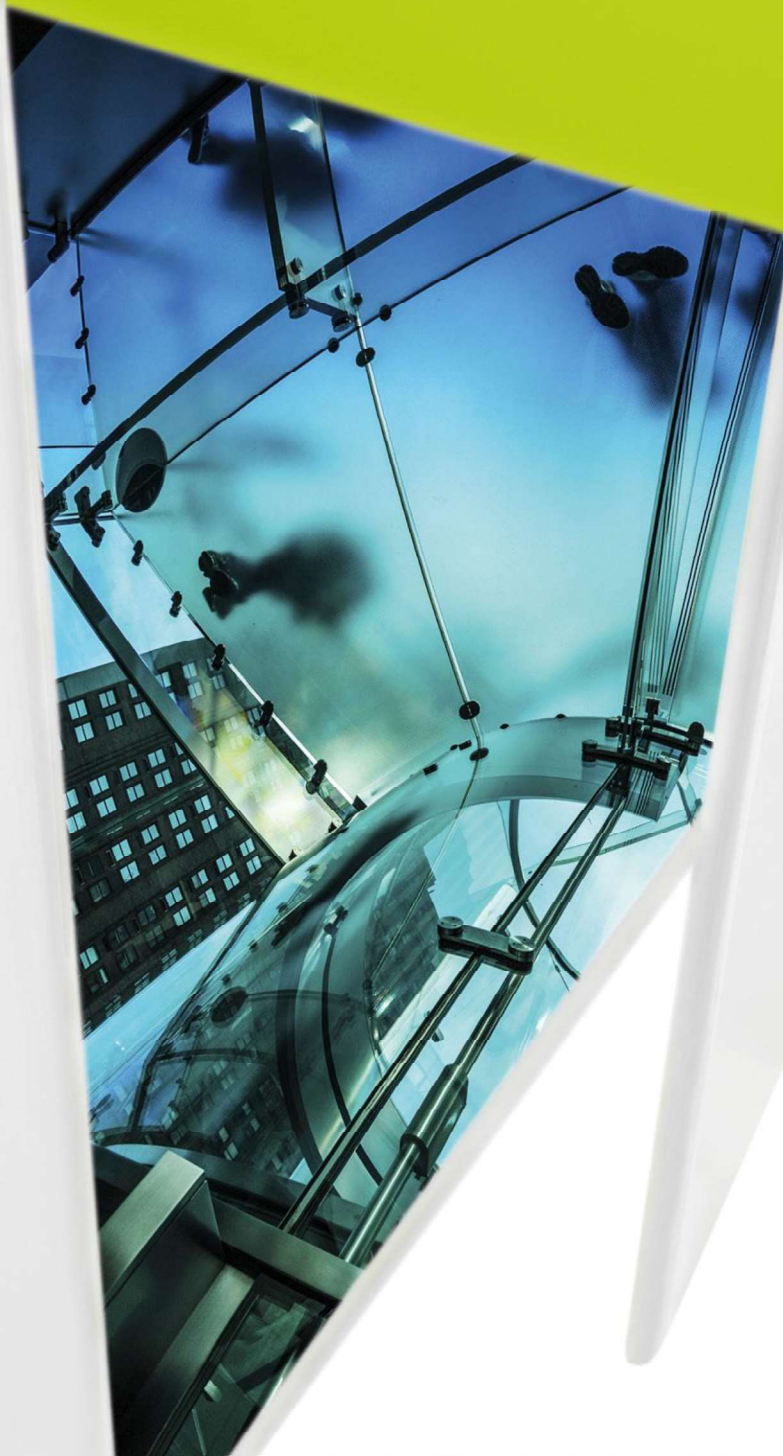


Electronic signatures

Doing business remotely



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Further information

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Electronic Signatures

The purpose of this memorandum is to provide guidance on the legal status of electronic signatures under Dutch law, more particularly in relation to corporate resolutions and powers of attorney.

This memorandum is subdivided into three sub-parts. First, a general introduction will be provided as to the legal landscape in relation to electronic signatures under Dutch law. Second, this memorandum will specifically focus on the validity and legal status of corporate resolutions and powers of attorney signed electronically. Third, the identification and legalisation requirements under Dutch law will be addressed.

Introduction to electronic signatures

The Dutch legal landscape

The legal status and validity of electronic signatures under Dutch law is provided by a combination of European Union Law and Dutch national law. EU Regulation 910/2014 on the electronic identification and trust services for electronic transactions in the internal market (the "eIDAS") came into effect on 1 July 2016 and has direct effect, meaning that it applies automatically in the Netherlands.

The eIDAS distinguishes between three types of electronic signatures, namely:

- conventional electronic signatures;
- advanced electronic signatures; and
- qualified electronic signatures.

The conventional electronic signature is the most generic type of digital signature and includes all electronic signatures which are not advanced or qualified electronic signatures. Typical examples of a conventional electronic signature are: a scanned copy of handwritten signature, a signature placed with a stylus pen on a tablet, an email confirmation or the signature block at the end of an e-mail.

Advanced electronic signatures are a type of electronic signature that must meet specific requirements providing a higher level of signatory identity verification, security and temper-sealing. The eIDAS requires that an advanced electronic signature is:

- uniquely linked to the signatory;
- capable of identifying the signatory;
- created using electronic creation data that the signatory can use under his sole control; and
- linked to the signed data in such a way that any subsequent change in the data is detectable.

Finally, a qualified electronic signature must comply with all the requirements for an advanced electronic signature and must in addition be (i) created by a qualified electronic signature creation device that meets the requirements laid down in Annex II of the eIDAS and (ii) based on a qualified certificate for electronic signatures issued by a qualified trust service provider that is on the EU Trusted List (ETL) and meet the requirements provided in Annex I of the eIDAS.

Most electronic signature providers (such as for example DocuSign and Adobe Sign) offer to their users all of the signature types defined under the eIDAS, including advanced electronic signatures and qualified electronic signatures.

In the Netherlands, each of the three types of electronic signatures can have the equivalent legal effect of a handwritten signature. However, only the qualified electronic signature is guaranteed to have such legal effect pursuant to the eIDAS. The eIDAS does not regulate the legal status of conventional and advanced electronic signatures. Each Member State may regulate the validity and legal status of these signatures. As a consequence, there is no harmonised regime in the European Union with respect to conventional and advanced electronic signatures. In order to determine the validity and legal status of a conventional or advanced electronic signature, one must first determine the governing law of the (signed) document under consideration.

In the Netherlands, the validity and legal status of conventional and advanced electronic signatures is regulated in section 3:15a of the Dutch Civil Code ("**DCC**"). This section provides that a conventional and advanced electronic signature has the same legal status as a qualified electronic signature (and thus a handwritten signature), provided the method of signing is sufficiently reliable, considering the purpose for which the electronic signature is used and all other circumstances of the case. Dutch law does not define what that purpose should be and which circumstances are relevant in order to grant a conventional or advanced electronic signature the same legal status as a qualified electronic signature. Also, there is little to no case law on this point, which makes it difficult to provide an accurate *ex ante* analysis whether the conditions of section 3:15a DCC will be considered to have been met.

It has been pointed out by a number of academic commentators that a conventional electronic signature will generally suffice for relatively simple and routine transactions. More complex transactions which require a higher degree of security will generally necessitate (at least) an advanced electronic signature.

Please note that the general terms and conditions of electronic signature providers may (i) exclude any potential liability of the provider and (ii) exclude the applicability of "their" electronic signatures for specific types of documents.

Documents by electronic means

Section 6:227a DCC provides that an electronic agreement will be deemed to be the equivalent of a handwritten (physical) agreement if it meets a number of formal requirements, namely:

- the (electronic) agreement is and remains accessible to the parties;
- the authenticity of the agreement is sufficiently guaranteed;

- the moment on which the agreement was formed can be determined with sufficient certainty, and
- the identity of the parties can be assessed with sufficient certainty.

It has been argued in Dutch legal comments that the formal requirements contained in section 6:227a DCC in relation to electronic agreements should also be applied to other types of documents, such as resolutions and powers of attorney and that such electronically signed documents will be deemed to be the equivalent to physical documents.

Pursuant to section 157 sub 2 of the Dutch Code of Civil Procedure, a private instrument which is signed electronically can be equated to a physical private instrument and provides conclusive evidence of the truthfulness of the statements contained therein vis-à-vis the counterparty .

Transactions which require by law the intervention of a Court, a public authority or a professional who exercises a public function, such as a civil law notary (*notaris*), cannot be entered into electronically.

Decision making in the Netherlands

Board resolutions

The management/supervisory board can adopt its resolutions in three ways, being:

- a regular board meeting duly convened; in such meeting valid resolutions can be adopted if at least one managing/supervisory director is present. The board decides by an absolute majority of the votes cast. The managing/supervisory directors can attend through teleconference. The proceedings in the meeting will be recorded in minutes;
- a board meeting which is not convened or not duly convened; each managing/supervisory director has the right to attend the meeting and to express his views in the meeting. In a board meeting which is not

properly convened valid resolutions can only be adopted, if all managing/supervisory directors are present or represented. The proceedings in the meeting will also be recorded in minutes;

- a resolution by the managing/ supervisory directors outside a meeting; the board may take resolutions without holding a meeting, provided all managing/supervisory directors have expressed themselves in favour of the relevant proposals. The proceedings in the meeting will be recorded in writing or through electronic means of communication.

Dutch law does not prescribe any formal requirements as to the minutes and/or the written resolutions of the managing/supervisory board, but it is strongly recommended to execute them by way of a(n) (electronic) signature to avoid potential evidentiary issues. The articles of association or (if the company has these in place) board rules may deviate from any of the rules set out above. However, all clauses in the articles of association which prescribe a physical meeting of the management/supervisory board are temporarily inapplicable due to the Covid-19 pandemic.

Shareholder resolutions

The general meeting can adopt its resolutions in three ways, being:

- a regular shareholders' meeting duly convened; in such meeting valid resolutions can be adopted if at least one shareholder is present. The general meeting decides by an absolute majority of the votes cast. The shareholders can attend through teleconference. The proceedings in the meeting will be recorded in minutes;
- a shareholders meeting:
 - which is not convened or not duly convened; no valid resolutions may be adopted (i) on items not mentioned in the notice or (ii) if the notice period was shorter or if no notice was sent, unless each shareholder and each other person with meeting rights has

consented to such resolutions being passed;

- held in a place elsewhere than the municipality where the company has its seat or another place mentioned in the articles of association; no valid resolutions may be adopted, unless each shareholder and each other person with meeting rights has consented to the place of the meeting.

The proceedings in the meeting will also be recorded in minutes;

- a resolution by the general meeting without holding a meeting; the general meeting may take resolutions without holding a meeting, provided all shareholders and other persons with meeting rights have consented to this method of decision-making. The proceedings in the meeting will be recorded in writing or through electronic means of communication.

By way of exception due to the Covid-19 pandemic, the management board of a B.V. (private limited) or N.V. (public limited) company is authorised to decide that shareholders' meetings can be held exclusively through electronic means provided that (i) the shareholders can follow the meeting through (audio or visual) electronic means, (ii) the convocation notice provides that the shareholders' meeting will be held virtually, (iii) all parties entitled to attend the meeting can ask questions in relation to the topics contained in the convocation notice up to 72 hours before the meeting either through electronic means or in written form and (iv) the management board of a N.V. has ensured (*zorg dragen*) while the management board of a B.V. has used reasonable efforts to procure (*inspannen*) that additional questions may be raised during the virtual meeting either through electronic means or otherwise, unless this cannot be reasonably required in the given circumstances. In addition, the management board can change a physical shareholders' meeting into a virtual meeting, even if the convocation notice has already been sent, provided that such a change is made at least 48 hours before the meeting takes place and all parties entitled to attend the

meeting have been duly informed of this change.

The deadline to submit questions is extended to 36 hours before the meeting (instead of 72 hours as mentioned above), if the management board decides to change a physical shareholders' meeting into a virtual one within the last 5 days before the meeting takes place.

Dutch law does not prescribe any formal requirements as to the minutes and/or the written resolutions of the general meeting, but it is strongly recommended to execute them by way of a(n) (electronic) signature. The articles of association may deviate from any of the rules set out above. However, all clauses in the articles of association which prescribe a physical meeting of the shareholders are temporarily inapplicable due to the Covid-19 pandemic. In each way of decision making by the general meeting the managing directors and supervisory directors must have been given the opportunity to advise.

Practices for execution of notarial deeds

General

Under Dutch law a civil law notary executing a Dutch notarial deed has a duty of care to all parties to the relevant transaction to ensure that:

- the persons appearing in front of the notary or granting a power of attorney are sufficiently identified to ensure they are the people they say they are; and
- all parties are validly represented in executing the relevant notarial deed or power of attorney to have such deed executed.

Execution in front of the notary

If a notarial deed is executed by the parties in front of the notary, the notary should check the passports of the persons appearing and verify whether these passports are not registered missing in the Dutch VIS (Verification Information System). If the person appearing is representing a non-Dutch company, the notary

should furthermore obtain a confirmation from a notary from the residence country/state of the company to confirm the authority of the person appearing to represent the company. Such confirmation may be provided by email.

Execution by power of attorney

If a notarial deed is executed on the basis of a power of attorney, the notary should verify the identity of the signatory of the power of attorney and the authenticity of the signature (e.g. was the signature placed by the alleged signatory). This can be evidenced by the Dutch notary:

- by requesting a legalisation on the signature from another notary, who confirms the identity of the person who signed the document and the authenticity of the signature. Such legalisation/notarisation should be furnished with an apostille if performed by a non-Dutch notary;
- by meeting the person via electronic means of communication (for example Skype or Zoom) and confirm the identity by checking the passport, verify whether the passport is not registered missing in the VIS (Verification Information System) and have the power of attorney executed "live" on camera. This possibility is temporary and forms part of the solutions to the practical problems experienced during the Covid-19 pandemic.

The original power of attorney should be sent to the civil law notary executing the deed. Again, if the person signing the power of attorney is representing a non-Dutch company, the notary should furthermore obtain a confirmation from a notary from the residence country/state of the company to confirm the authority of the signatory to represent the company.

Legalisation of electronic signatures

As mentioned above, the legalisation of a signature by the notary means that the notary confirms the authenticity of the signature. Such confirmation by the notary constitutes an official act, which means that the notary makes

a statement based on its own observations. This statement of the notary provides conclusive evidence on the identity of the signatory and the validity of the signature. However, proof of the contrary may be presented in Court.

Unfortunately, it is not yet established practice in the Netherlands to perform a legalisation of an electronic signature. If a legalisation of an electronic signature is requested, the notary should determine whether the technical requirements for electronic signatures are met (e.g. if the method of authentication is sufficiently reliable) and on that basis confirm the identity of the signatory and the validity of the signature. As the notary in the Netherlands may only confirm acts or observations that he can verify without reasonable doubt, he should make sure that he has well-founded reasons to conclude that the signature was validly put on the document by the alleged signatory. To verify the identity of the signatory and the validity of the signature, the notary should have sufficient technological knowledge to determine the reliability of the method used. As opposed to handwritten signatures, it may be challenged in Court that the method used for electronic signatures is insufficiently reliable considering the purpose for which the electronic signature was used and as such, electronic signatures do not always provide the same evidence as a handwritten signature. Therefore, notaries usually do not legalise electronic signatures.

In the absence of an established practice for Dutch notaries to legalise electronic signatures, the new (temporary) possibility to identify individuals during an online "meeting" with the notary is a welcome alternative to visiting the notary office in person.

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