

Electronic execution of contracts, e-signatures and COVID-19: Italy

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This article discusses the electronic execution of contracts and the validity of e-signatures under Italian law in the context of the 2019 novel coronavirus disease (COVID-19) pandemic.

Main requirements for a legally binding contract

The essential requirements for a legally enforceable contract are:

- Mutual agreement between the parties.
- Legitimate purpose.
- An identifiable object.
- The correct form (if required by law).

(Article 1325, Civil Code.)

If a specific form is not required by law, it is open to the parties to choose written or oral.

However, to be legally valid and enforceable, certain types of agreement must be made in writing (*ad substantiam*). Other agreements may be proved to exist in court only in written form (*ad probationem*). In other words, they cannot be proved to exist solely by witnesses' testimony (*Article 2725, Civil Code*), unless the party can demonstrate they lost the document without fault (*Article 2724, paragraph 1, Civil Code*).

Many other types of agreement can be entered into orally or in the presence of witnesses. In certain circumstances, the actions of a party may be sufficient to render the contract valid and enforceable.

Is any particular form required by law?

To be valid, certain types of contract must be in writing, for example:

- Contracts for the transfer or sale of immovable property.
- Contracts relating to rights *in rem* over immovable property (such as usufruct, rights of way and so on).
- Immovable property leases exceeding nine years.
- Deeds of incorporation.

- Other contracts identified by law, such as for example banking agreements (*Article 117, Banking Act*), fixed-term employment contracts (*Article 19, Law Decree 81/2015*) and arbitration agreements (*Legislative Decree 40/2006*).

(*Article 1350, Civil Code*.)

The requirement for a written contract can be satisfied by a private written agreement, a certified private written agreement or a public deed. The correct form may depend on the contract's nature and type (for example, certain agreements can only be executed by public deed).

If a contract must be in writing, any related pre-contract must comply with the same requirement (*Article 1351, Civil Code*). The same rule applies to powers of attorney, which must be in the same form as the contract that the attorney is appointed to enter into on behalf of the delegating party.

Some other agreements can only be executed by delivering the object of the transaction (for example, by depositing certain goods with a custodian).

Scope of electronic execution and parties' consent

Documents in electronic form are defined as the computerised representation of acts, facts or legally relevant data (*Article 1(p), Legislative Decree 82/2005* (Digital Administration Code (CAD))).

Parties can enter into valid contracts through electronic means (email, web-forms and so on), on condition that they comply with the provisions of the Civil Code and other sector-specific legislation.

Parties' consent is not necessary. However, when the offering party requests that acceptance be given in a specific form, acceptance given in a different form has no effect and the contract is not valid (*Article 1326, Civil Code*).

Legal requirements for a written document and court admissibility

Whether or not a document in electronic form qualifies as written, in cases where the written form is required, depends on the type of electronic signature used to sign the document.

An electronic document satisfies the written form requirement if it is signed by means of an advanced, qualified or digital signature ("strong" electronic signature) (see [What is an e-signature?](#)). This type of signature also certifies the parties' authorship of the document. (*Article 2702, Civil Code*.)

If a document is signed with a "simple" electronic signature (an electronic signature which does not belong to any of the "strong" types mentioned above), the question of whether that document can be regarded as in writing must be determined by a court, taking into account whether the signature is sufficient to guarantee authenticity and lack of alterations.

Most of the contracts which must be in writing under Article 1350 of the Civil Code (see [Is any particular form required by law?](#)) can be drafted electronically, as long they are signed by means of a qualified or digital electronic signature (*Article 21, paragraph 2-bis, CAD*). Other contracts that must be in writing can also be signed through advanced electronic signatures (for example, banking contracts).

Electronic documents are admissible as evidence in court, subject to the rules and limitations under Article 20 CAD and to the applicable procedural rules.

The Tribunal of Milan held that electronic documents could be introduced as evidence on condition that they be marked with a hash function to ensure the documents' reliability and lack of alterations (*Order of 4 April 2019*).

There are no rules preventing documents from being executed electronically.

Notarial deeds can be signed by the parties, in the presence of the notary, by means of an electronic or digital signature. The notary will affix their digital signature to the deed (*Article 52-bis, Law 89/1913*).

Any electronic document will be deemed as authenticated under Article 2703 of the Civil Code (*sottoscrizione autenticata*) when the electronic signature used by the parties has been authenticated by a notary or by another authorised public official (*Article 25, CAD*).

What is an e-signature?

Electronic signatures are governed by Regulation 910/2014 (e-Idas Regulation), as supplemented by the more detailed provisions of the CAD.

There are four types of electronic signature. The first is "weak", while the other three are "strong":

- The "simple" electronic signature.
- The advanced electronic signature. This signature must meet the following requirements:
 - it is uniquely linked to the signatory;
 - it is capable of identifying the signatory;
 - it is generated using electronic signature creation data that the signatory can, with a high level of confidence, use under their sole control; and
 - it is linked to the undersigned data in such a way that the receiver of the document would be able to detect any subsequent alterations to the document.

(*Article 26, e-Idas Regulation*).

- The qualified electronic signature. This is an advanced e-signature created by a specific device, and based on a qualified certificate for electronic signatures.
- The digital signature. This is a type of qualified electronic signature based on a system of cryptographic keys, one public and one private, which verify the origin and integrity of an electronic document or a set of electronic documents (*Articles 1 let. s and 24, CAD*).

For example, an email message is a "simple" electronic signature, a graphometric signature on a tablet or other electronic devices may constitute an advanced electronic signature, while a smart card may enable the card holder to sign an e-document with a qualified electronic signature.

All the "strong" electronic signatures can provide evidence of the time and date on which a certain document was signed. However, these signatures often require the involvement of certified service providers, which guarantee the identity of the signatory and the validity of any certificates associated with the signatures.

The Agency for Digital Italy (AGID) recently issued Technical Rules for the electronic signing of documents under Article 20 of the CAD. These rules regulate the way online service providers may enable users to sign documents and contracts through the public system for digital identity (SPID).

The SPID allows Italian citizens to access all online services of the public administration with a single digital identity (username and password) that can be used from computers, tablets and smartphones. If a user connects with an online service using their SPID, a simple electronic signature (a "point and click" signature) will have the same value as a "strong" electronic signature, because the SPID system guarantees the user's identity.

A list of accredited service providers is available on AGID's website (see [AGID: Qualified certification service providers](#)).

However, Italian case law has mainly focused on the legal effects of simple electronic signatures, often reaching contradictory conclusions.

Some courts have found that signatures executed by "pressing a consent button" (a point and click signature) did not satisfy the requirement for written form, and held that in those circumstances the documents should have been signed using a digital signature (see *Tribunal of Reggio Emilia, ruling no 1503/2011, on a contract between a bank and a client* and *Tribunal of Catanzaro, ruling of 30 April 2012, on the acceptance of unfair clauses in online forms*).

Conversely, the Supreme Court held that a contractual clause on choice of jurisdiction could be agreed by means of a simple electronic signature on condition that the contract was recorded on a "durable record" (*ruling no 21622/2017*), such as a pdf file, which remains at the disposal of the signatory and can be subsequently reproduced by them in the same form as it was received. The ruling is based on Article 25, paragraph 2 of EU Regulation 1215/2012, which states that any communication by electronic means which provides a durable record of the agreement will be equivalent to "writing".

Case law has often relied on the concept of "durable record" to give the status of written form to documents signed by means of a simple electronic signature (for example an email), in circumstances where the document could clearly and unequivocally be attributed to its author.

In another judgment, the Supreme Court found that the suitability of an electronic document, such as an email, to meet the requirement of written form will be assessed, taking into account the document's security or susceptibility to tampering (*ruling no 5523/2018*).

Contract notarisation

By law, certain types of document must be notarised, for example contracts for the transfer of immovable property, deeds of company incorporation or sales of a going concern.

These documents must be drafted by a notary or by a duly authorised public official (*Article 2699, Civil Code*) or signed by both parties in the presence of a notary to verify the parties' identities (*Article 2703, Civil Code*).

Legal developments in light of COVID-19

Emergency legislation enacted as a result of the 2019 novel coronavirus disease (COVID-19) pandemic has not introduced any restrictive measures concerning the use of electronic signatures.

However, some new rules simplified the execution of B2C banking and financial contracts entered into between 9 April 2020 and 31 July 2020 (*Article 4, Law Decree 23/2020 on banking contracts with retail customers and Article 33, Law Decree 34/2020 on financial and insurance contracts*).

During this period, these contracts could be signed through an exchange of emails (simple electronic signature) that made clear reference to the contract to be signed (for example, in the subject line), provided that the consumer attached an identification document to the email and that both the contract and the declaration of consent contained in the email were stored by means of appropriate technical measures. However, this simplification is no longer in force as Decree Law 83/2020, which prolonged the emergency period to 15 October 2020, excluded it from its scope of application. As a result, B2C banking and financial contracts must now be signed in accordance with the ordinary rules on electronic signatures.

While the emergency legislation on social distancing is in force, it is possible to grant a power of attorney to a lawyer for representation in civil proceedings by email, accompanied by a copy of a valid identity document. The lawyer is authorised to certify the client's authorship by inserting their digital signature on the digital copy of the power of attorney (*Article 83, paragraph 20-ter, Law Decree 18/2020*). This provision has not been affected by Decree Law 83/2020 mentioned above and continues to be in force.

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