DIGITAL TRANSITION

By Luisa Clode

Decision makers worldwide have seen electronic trade as a virtuosity that should be encouraged, determining the existence of legal relations through computers and networks. The UN Convention on the Use of Electronic Communications in International Contracts, signed in New York in early 2005, reflects a view that aims to remove obstacles to the use of electronic communications in cross-border legal relationships.

Electronic conveyancing is considered a decisive instrument for the establishment of the European Single Market, allowing parties wherever they are to contract within the European space of freedom.

Despite the undeniable advantages, the risks associated with electronic contracts are clear: the neglect of less aware consumers and the gaps in the jurisdictional control in cross-border obligations raise questions regarding the applicable law and competent judicial authorities. In addition, it is seen as a means for illicit behaviours, insofar as the consumer does not know the counterpart and is not even sure of their existence.

Conflicting interests have led to regulation at a European and a National level that, on one hand, removes obstacles to electronic conveyancing but, on the other, tries to mitigate its risks by imposing security mechanisms.

In Europe the issue is ruled by the eIDAS REGULATION (EU) No 910/2014 (on electronic identification and trust services for electronic transactions in the internal market).

Concerning **immovable properties**, we can say along with the conclusions of a study carried by ELRA Network, that electronic conveyancing is at a very early stage except in **Estonia, Finland, Latvia and Slovakia**.

Some other countries, especially while facing the pandemic, have adopted measures such as the remote signature of acts and contracts on immovables, but still with limited scope and practical effects.

ELRA is an association whose mission is the development and understanding of the role of land registration in real property and capital markets and is perfectly aware of the importance of the information in their data basis, as well as ensuring the legal security of real estate transactions. As such, it is crucial that Land Registry Systems are prepared to receive, analyse and use electronic documents for registration purposes in internal and external proceedings providing (it never hurts to reaffirm it) **legal certainty**.

Contracts on immovable properties, due to their particular characteristics and the amounts usually involved, have somehow remained apart from electronic conveyancing, but under the COVID-19 circumstances the trend is going to change.

Land Registries systems must play their role within the scope of electronic contracting; either enhancing their ability to receive electronic documents or by providing information in an electronic format that precisely allows electronic conveyancing.

What is a signature?

In most legal systems, there is not a definition of signature. Literally, a signature is the act of affixing or placing the name of an individual, *written in their particular way*, to any document. Signing a document implies connecting its author to the content therein.
Each signature, with its *peculiar graphic*, expresses, somehow, one's personality or character, age, and in a certain sense, a way of living. Someone said: "*a man's kiss is his signature*" …

When talking about electronic signature, besides the absence of graphical display, there is a totally new and different manner of placing one's name without "*writing in their own particular way*" as a means of uniquely expressing one's will or consent. There is, in fact, a whole set of technological tools and devices that allow, without the use of an ink pen, to associate the authorship of written content in a dematerialized format.

There might be no more place for peculiar graphic or character lines arising from the signature; and no more place for any third party assuring the free expression of consent, because the technological tool is assigned to the signatory to be used "*under their sole control*".

We can speak of three types of electronic signature:

- **simple electronic signature** – data in electronic form attached to other data also in electronic form, which is used by the signatory to sign
- **advanced electronic signature** – which is an electronic signature uniquely linked to the signatory; being capable of identifying the signatory; using technological tools that allow the signatory to use it under their sole control; and linked to the data signed therewith in such a way that any subsequent change in the data is detectable; and
- **qualified electronic signature** – which is an advanced electronic signature based on a qualified certificate for electronic signatures, not necessarily but often linked to certain personal or professional attributes of the signatory being all of them, backed by a trust service provider.

It is obvious, allow me to say, *a truth de palisse*, that an electronic signature can only be placed on an **electronic document,** meaning any content stored in electronic form, specifically text, when thinking about written documents.

Written documents can be divided into categories: original versus copy (or derivative); and private versus authentic (or with specific formalities)

The original written document is the one where the signatures are placed, whether handwritten or through machinery processing. The original electronic document is created on computer with IT tools, unless the document originated from a different support (for instance, on paper) and was then introduced into the computing environment, namely by digitalization, for signing purposes or others, for example for electronic transmission or certification.

A copy of a written document is a mechanical reproduction of the original – a derivative from the original. When issued by an authorized depositary (for example, a notary) such as is a certificate, it will have the evidentiary strength of the original.
In electronic format, copies extracted from the original document may keep the same or a different electronic form or even materialize on a paper support, if necessary.
Except for transmission purposes, the original of the electronic document itself is, in principle, directly accessible in electronic format through a code, generally eliminating the need to extract copies.

In Portugal, for example, we can easily find three types of copies of information regarding a specific immovable in the Land Registry, all extracted from the electronic document in the electronic data base:

- the permanent certificate, a code to access the information on the database itself
- the paper certificate, a print extracted from the electronic data base, issued by the authorized service assuring that it is as the original
- a PDF copy with mere information for study or other purpose.

A private written document is the one signed by the party (or parties) without any further formality. Its strength as evidence is freely appreciated by the court. A private written document in electronic format cannot be complete without a technological procedure with a signature guaranteed by a service provider. Hence, I think it is fair to say that when speaking about electronic documents there is no place for the concept of a 100% private document.

An authentic written document is the one drawn up, with legal formalities, by a public authority, usually a notary, within the limits of their competence, granting with independence and under the sole principle of legality the identity of the parties and the free expression of their will. An authentic document usually provides full proof of the facts therein, unless it is proven false.

Within the electronic environment, the additional formalities of the authentic document may lead to other considerations. Let us see.

The electronic written document with advanced electronic signature provided by a trust service (article 26th and 46th of eIDAS Regulation):

- might be considered, by its own nature, an authentic document since necessarily "*equipped*" with the additional formalities of identification of the signatory who signs in a way that grants the detectability of any subsequent change; or
- might never be considered an authentic document due to the absence of a trusted professional, granting the free and informed consent of the parties' will, or, in short, the certainty between the apparent and the real author of the declaration.

Article 25th of the eIDAS Regulation states that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature, but it does not make explicit in which kind of document it is placed: the one in a private document or the one performed before an authentication authority.
It is up to each MS to determine these effects according to its juridical tradition and legislative options.

While it is quite easy to apply the dichotomy of original document versus copy to the electronic environment, it is more difficult to follow a similar dualistic reasoning opposing a private versus an authentic document, context in which the electronically written document is hardly framed.

The electronic written document is shaped in a totally new *hybrid reality*, that Land Registry Services have to deal with!

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Focusing on the Land Registry activity at national level, in particular in countries using electronic data basis, there are two approaches:

1. The sufficiency of the electronic document (or its title) to perform the transmission or burden of the immovable and, hence, to allow a registry entry, opposable before third parties and with legal effects; and
2. The use of electronic signatures by the land registry offices, in internal and external proceedings and organization.

Regarding the first approach, allow me to recall article 2 n. 3 of eIDAS Regulation, which states that "*this Regulation does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form*".

In such circumstances, each MS legal system determines the formal validity and legal effects of electronic contracts on immovable properties, namely, defining: the need (or lack thereof) of a legal professional who remotely assures the free consent and the expression of the will; the way the document is stored ensuring its preservation and inviolability; and the access to the document respecting its confidentiality.

Regarding accessibility, national decision-makers also establish rules about the way to reach and make use of the original electronic document, namely through an electronic key or

password. Moreover, in a different perspective, it is defined to what extent copies or certificates can be issued, whether extracted from the original electronic document or from the original paper document turned into an electronic format for certification purpose (the above said derivative electronic document).

In what concerns the second approach, different issues arise from using electronic signatures in the Land Registries, assuming most of them are already based on electronic data:

2.1. checking the identification of the applicant and their electronic signature placed in the electronic requirement, assuring the principle of legitimacy
2.2. delivering electronic proof of the application with an electronic signature and time stamp, granting the principle of priority
2.3. access to different data basis or key registries in order to get information needed to perform the entry – interoperability within public services
2.4. use of electronic signature by the registrar to sign the entry itself, with the guarantee of integrity and time stamping, identifying the signatory, the usage under their sole control and the immutability – principle of independence and of legality of the Registrar professional activity; and
2.5. making available certificates on land registry information, in an electronic format, either original or derivative, supported by the electronic signature of the professional in charge – principle of publicity.

Finally, Land Registry systems need to work, either receiving or sending electronic documents, with electronic delivery services that meet the legal requirements of article 44th of eIDAS Regulation: there must be confidence with the identification of the sender, secure identification of the delivery address, and precision with the indication of the sending and receiving date and time.

Developing electronic Land Registry data basis with virtual acceptance and delivery of information in a secure environment is the way forward with Land Registries!

It is a pressing demand of the current social situation and a cornerstone to cross-border conveyancing on immovable properties, and, therefore for the development of the European Single Market and the effective implementation of European Regulations and Directives.