Kellerhals Carrard

In a nutshell

05/2016

Electronic signatures in practice: overview and outlook

Since the Federal Act on Electronic Signatures (CertES) entered into force on 1 January 2005, it has been possible to use so-called qualified electronic signatures, which guarantee the authenticity (i.e. verification of the sender) and integrity of the document sent. Furthermore, art. 14 para. 2bis of the Swiss Code of Obligations (CO) equates qualified electronic signatures to written signatures in terms of their legal effect. Thus, documents can be legally valid when signed electronically even if the written form (i.e. a written declaration containing the signatures of those undertaking an obligation) is required by law or by agreement between the parties. Electronically signed documents can also serve as acknowledgment of debt pursuant to art. 82 of the Debt Enforcement and Bankruptcy Act (DEBA).

To date, many service providers have been acknowledged as providers of certification services (cf. LINK). However, qualified electronic signatures can only be used by individuals and are unsuitable for mass business (because the PIN must be entered each time). For these reasons, they have not caught on in practice.

I. Total revision of the Federal Act on Electronic Signatures (CertES)

The Federal Council identified these shortcomings and presented a draft of a completely revised Federal Act on Electronic Signatures (CertES), which the Parliament voted on and passed. The referendum period expired on 7 July 2016. The date of entry into force of the revised Act will be determined by the Federal Council. The Act's most important new feature will be the creation of the «regulated electronic signature» for natural persons as well as the «regulated electronic seal» for legal persons and authorities. This will finally provide legal persons with the possibility to use certified electronic signatures. However, the revised ZertES does not stipulate that the regulated electronic seal and signature will have any direct legal effect, which is why they will not have the same legal effect as the written form pursuant to art. 13 CO. Still, the new instruments offer the possibility to ensure the origin and integrity of an electronic document. As is the case today for qualified electronic signatures, bearers of regulated electronic signatures and seals will be liable for misuse if they are not able to prove that they have handled the signature key carefully (revised art. 59a CO).

Companies that are considering using a regulated electronic seal or signature for their legal transactions should also take the following legal consequences into account:

- **Jurisdiction agreements:** Verification of the agreement in written form is sufficient for jurisdiction agreements according to the Civil Procedure Code (art. 17 para. 2 CPC), the Private International Law Act (art. 5 para. 1 PILA) and the Lugano Convention (art. 23 para 2 LC). Jurisdiction agreements with regulated electronic signatures or seals are thus legally valid.
- **Arbitration agreements:** Pursuant to art. II para. 2 of the New York Convention, arbitration agreements must be made in writing. However, art. 178 para. 1 PILA only requires verification of the agreement in text form. Courts in various countries (and Swiss courts among them) tend not to interpret the strict art. II para. 2 of the New York Convention literally, and so arbitration agreements bearing a qualified electronic signature should, as a rule, be valid and enforceable. A residual risk remains, however.
- **No legal title to set aside an objection in debt enforcement procedures:** Electronic documents bearing a regulated electronic seal or signature are not considered written acknowledgments of debt in the sense of art. 82 DEBA (the written form pursuant to art. 13-15 CO is crucial).
- **Evidence in proceedings:** Electronic documents (e-mails, PDFs etc.) can already be introduced as documentary evidence in civil proceedings independent of whether they contain a qualified electronic signature or not. The authenticity of (private individuals') documents is presumed by the court (art. 178 Swiss Civil Procedure Code, CPC) and can be refuted very rarely in practice. This is also true for (ordinary) e-mail correspondence, which is produced very often and is usually considered by the courts as being on equal footing with written documents, even though e-mails can easily be forged or adulterated. Part of the doctrine considers for this reason that the requirements for refuting the presumption of authenticity should be kept low in the case of simple e-mails. In any case, using a regulated electronic seal or regulated electronic signature would reduce the risk that the presumption of authenticity could be refuted even further. It is still possible for third parties to misuse the signature key, but suspected cases of misuse must be well founded. If misuse is proven, however, the question of the liability of the signature key holder pursuant to art. 59a CO arises (cf. above).
- **Contractual reservations as to form:** If the written form is required by law for the validity of a transaction, it is not sufficient to use a regulated electronic seal or signature. However, the parties are free to agree to subject the validity of declarations or changes to a contract to special form requirements (art. 16 CO), even when no such statutory requirements exist. The parties can freely define the requirements of this (voluntary) written form. Making reference to the new regulated electronic seal or the regulated electronic signature is therefore possible. However, it must be noted that even contracts subject to the parties' chosen formal requirements can be modified implicitly by the parties themselves. Invoking the formal requirements would constitute an abuse of rights in this case. Finally, within the scope of application of the Vienna Convention (CISG), the prevailing doctrine considers that the written form pursuant to art. 13 CISG is given if simple electronic communication is used.

The above remarks base on the assumption that Swiss law is applicable. As a rule, this will be the case if the contract itself is subject to Swiss law or has been signed by a party in Switzerland (art. 124 PILA). In practice, however, using regulated electronic seals and signatures will be possible in many cases when foreign law is applicable as well, since Swiss standards for certification services conform to international standards and because equating the legal effects of the electronic with the written form and use as an acknowledgment of

debt pursuant to art. 82 DEBA may not be expected anyway.

II. Electronic signatures not regulated by law

A large number of providers all over the globe offer electronic signatures and authentication services for companies that do not fulfill Swiss standards for qualified electronic signatures or which are not certified or recognized. Such electronic signatures are sometimes accepted as trustworthy by third-party software (e.g. Adobe Acrobat Reader, Microsoft Outlook), whereas qualified electronic signatures are classified as not trustworthy or invalid.

Some Swiss companies are considering introducing such electronic signatures, which are not regulated by law, or are faced with these types of electronic signatures when they are used by foreign business partners.

The legal effects of using electronic signatures that are not regulated by law are basically the same as described above for regulated electronic signatures and regulated electronic seals. When parties agree on contractual form requirements, the additional question arises of how the requirements for such unregulated electronic signatures should be defined. The possibilities include explicitly naming a provider's product or an abstract definition of technical requirements (with reference to the CertES). The legal liability regardless of fault in art. 59a CO is not applicable to holders of electronic signatures not regulated by law; the same holds for the revised CertES and CO. Furthermore, it is unlikely that a holder of an electronic signature could make itself liable pursuant to general liability provisions (in particular because no unlawful act would have been committed).

III. Conclusion

In particular, the newly created instrument of the regulated electronic seal offers companies interesting possibilities for application in e-commerce. However, the electronic signatures not regulated by law that are currently available on the market have few disadvantages in terms of their legal effects.

The question of whether using one of the currently available signatures or one that will be available in the future is advisable should be answered on a case-by-case basis, taking into consideration the legal effects required and desired. The new instruments are not suitable when a statutory form requirement exists or if the document is destined to serve as an acknowledgment of debt within the meaning of art. 82 DEBA.

Basel, August 2016

Dr. Nicolas Mosimann, LL.M.
nicolas.mosimann@kellerhals-carrard.ch