

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

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

The measures that governments around the world have implemented in response to the COVID-19 pandemic have in some instances made it more difficult to execute agreements in person or with handwritten signatures. In the Netherlands the main rule imposed by the government is that people must always maintain a distance from each other of 1.5 metres. That has had minimal impact on the execution of agreements in person or with handwritten signatures.

This article discusses the requirements for contract formation, electronic execution, and the validity of e-signatures under Dutch law and the impact that COVID-19 has had in these areas, if any. It does not discuss rules that may apply to e-commerce transactions or transactions with consumers.

Legal requirements for the creation of a valid, enforceable contract

The legal requirements to create a contract under Dutch law are:

- Offer.
- Acceptance.
- Intention to create legal consequences.

Consideration is not a prerequisite. Offer and acceptance are considered "legal acts" which, while not defined, require a will, conveyed in some statement, to create legal consequences (*Article 3:33, Dutch Civil Code (DCC)*). These statements can be expressed, implied, or inferred from a party's conduct.

Although there are exceptions, in general contracts can be in any form.

Requirement for certain contracts to be in writing

The general rule is that contracts can be concluded in any form (written or oral, expressed or implied). However, certain types of agreement must be in writing, including:

- Hire-purchase agreements (*Article 7A:1576i, DCC*).
- Agreements for the purchase of immovable property (*Article 7:2, DCC*).

- Construction agreements for residential buildings (*Article 7:766, DCC*).
- Collective labour agreements (*Article 3, Collective Labour Agreements Act*).
- Various clauses in employment contracts (for example, Article 7:652 of the DCC regarding trial periods and Article 7:653 of the DCC regarding non-compete clauses).

Dutch law also provides that contracts can be in electronic form.

Contracts in electronic form

If there is a legal requirement that a contract must be in writing, then this requirement is met if the contract is concluded electronically **and**:

- **It is available to the parties.** This could mean that if one party wants to use certain technology, they must ensure that the other party has access to the same technology in order to enable the other party to access the agreement.
- **The authenticity of the contract is guaranteed.** This requirement can be met by, for example, storing the agreement in an electronic file containing an e-signature using a technique whereby private and public "keys" are used to track if any changes were made during transmission.
- **The moment of conclusion of the contract can be established with sufficient certainty.** If, for example, an agreement is finalised by email, the moment the agreement is concluded is the moment that the other party received the acceptance of the offer.
- **The identity of the parties can be established with sufficient certainty.** Establishing a person's identity in the "e-world" is a lot harder than in the "physical world". Therefore, special measures will be required. For example, parties could comply with this requirement by adding an electronic signature to the agreement.

(*Article 6:227a(1), DCC*).

However, Article 6:227a(1) does not apply to contracts which, by law, must be concluded with a judge's intervention, a government body or a professional fulfilling a public task (*Article 6:227(2), DCC*). These agreements must be in the traditional, physical form.

Contracts in electronic form are enforceable if they comply with the applicable requirements. To be a legally enforceable contract, agreements in electronic form are no different from their physical document or oral equivalents in being subject to the legal requirements of offer, acceptance and intention to create legal consequences (see [Legal requirements for the creation of a valid, enforceable contract](#)). However, for an electronic agreement to be valid, the person who receives the electronic offer or acceptance must confirm that receipt to the counterparty (*Article 6:227c(2), DCC*). If this is not done, the party who does not receive the confirmation can rescind the agreement.

Dutch law distinguishes between so-called "authentic deeds" and "non-authentic deeds". An authentic deed is a deed drafted by a civil law notary. A non-authentic deed can be drafted by anyone. Non-authentic deeds do not need to be in writing (and can be in electronic form) if the following requirements are met:

- The person who will need to use the document as evidence must be able to store it in such a manner that it can be accessible for future use (or example, in pdf format).
- It must be possible to store the document during a period that is suitable for the purpose of that document (a pdf meets this requirement).
- The method of storage must allow for the unchanged reproduction of the document.

(Article 156a, Dutch Code of Civil Procedure (DCCP))

The requirement that the method of storage must allow for the unchanged reproduction of the document does not mean that the person who drafted the document must guarantee that it was unchanged during storage. According to the legislative history, the reason is that drafter has no control over the method of storage that will be used by the person relying on the document. In the legislative history, the example is given of a person relying on the evidence provided by the document having stored it on a CD-ROM or USB stick. Such a method of storage does not guarantee unchanged reproduction.

Except for situations covered by Article 6:227a(2) (see above), the counterparty's consent is always needed before a contract can be concluded electronically. This is based in the principle that a party should not be compelled to enter into a contract in electronic form without its consent. However, there is no requirement that the consent be documented. If a person does not agree to contracting electronically, they will not do so. If they do agree, they will.

Admissibility of electronic documents in court

In civil proceedings, unless the law provides otherwise, evidence can be furnished by any means (*Article 152(1), DCCP*). That means that evidence can also be provided by electronic documents. An example of the law specifying the required form of evidence is the evidence required to prove that the parties agreed to arbitration. Such evidence can only be furnished by a written agreement, although that written agreement may also be an electronic agreement (*Article 1021, DCCP*).

Documents which cannot be executed electronically

The law contains provisions requiring that certain documents must be in the form of an "authentic deed". These are documents drafted in the required form by civil servants with legal authority to draft them and relating to their observations or particular legal acts (*Article 156(2), DCCP*). These civil servants include notaries, court bailiffs and others responsible for the registration of births, deaths and marriages (*Article 156, DCCP*).

The formal requirements for such deeds are set out in various laws. For example, Book 1 of the DCC regulates the form of deeds to be drawn up for the registration of births, deaths and marriages, and there is a specific law governing deeds executed by notaries. Another example is Article 39 of the statute governing the notaries' profession (*Wet op het notarisambt*, of 3 April 1999), which requires notaries to identify the persons who appear before them and to state the form and number of the ID document in the deed. Article 40 of that statute requires the notary to state the names, dates and places of birth and addresses of the individuals for whom the deed is intended, and the place, date, and year of creation of the deed.

Common authentic deeds include:

- Mortgage deeds.

- Nuptial agreements.
- Deeds of incorporation of a limited or public company.
- Final will and testament.
- Deeds whereby ownership of real estate is transferred.

There is no statutory provision pursuant to which authentic deeds may be executed electronically. In accordance with European law with direct effect in the Netherlands, under Dutch law documents, other than authentic deeds, can be signed electronically.

E-signatures

Electronic signatures are regulated in the Netherlands under both European and Dutch law:

- Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market (which replaces Directive 1999/93/EC).
- Article 3:15a of the DCC.

Article 3:15a is the Dutch implementation of Regulation (EU) 910/2014. Article 3:15a refers to the qualified electronic signature and the electronic signature as defined in Regulation (EU) 910/2014. Article 3:15a is discussed in more detail below.

Conceptually an electronic signature might amount to no more than a scanned image of a signature applied to a message (or document attached to a message) which is then sent electronically. In order to facilitate commerce and reduce the scope for fraud, the Regulation distinguishes between electronic signatures, advanced electronic signatures and qualified electronic signatures. The latter two types of signature are superior in benefiting from assurance and identity certification measures implemented at the national level under Article 3:15a of the DCC.

The Regulation defines:

- "Electronic signature" as data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign (*Article 3(10)*).
- "Advanced electronic signature" as an electronic signature which meets the requirements set out in Article 26 (*Article 3(11)*).
- "Qualified electronic signature" as an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures (*Article 3(12)*).

Article 25(2) of the Regulation provides that a qualified electronic signature shall have the equivalent legal effect of a handwritten signature. This is because, unlike an electronic signature, it is possible to verify the authenticity of a qualified electronic signature. The Regulation assumes that a qualified electronic signature is not just a scan of a physical handwritten signature, but that it is a code which is unique to the signatory.

However, Article 3:15a of the DCC provides that, in addition to the qualified electronic signature defined in Article 3(12) of the Regulation, the electronic signature and advanced electronic signature, as defined in Articles 3(10) and

3(11) of the Regulation, also have the same legal effect as a handwritten signature provided that these two types of signature use a method of signing which is sufficiently reliable in the light of the purpose for which they were used and all other circumstances of the case.

The above shows that the statutory law is obscure regarding what exactly constitutes an electronic signature, as under Dutch law, all three types of electronic signature can have the same legal effect as a handwritten signature, subject to certain requirements. (For further discussion, see T.H.M. Van Wechem and J.H.M. Spanjaard, "*Hoe houdbaar is de handtekening in een pdf-document*", *Contracteren* 2019, pages 123 - 127 and page 125.)

In practise a contract is often signed, scanned to pdf and emailed to the other party for signing. Another method is that a handwritten signature is scanned to an image and that image is used to sign a contract in pdf form. An image of a signature is comparable to a signature stamp. The question arises whether a scanned handwritten signature qualifies as a signature in the sense of Article 3(10) of the Regulation. This will depend on the level of trust between the contracting parties and what they agreed regarding the signing of the contract. In the event of a dispute between the contracting parties, the judge will have to decide whether the method of signing is sufficiently reliable in the light of the purpose for which they were used and all other circumstances of the case (*Article 3:15a, DCC*). If that is so, then a scanned handwritten signature will be held to have the same legal effect as a handwritten signature.

If the authenticity of a signature is disputed, the party relying on the authenticity of the signature has to prove that it is authentic (*Article 159(2), DCC*). In situations where the law provides that there must be a signed document, such as, for example, the agreement of sale and purchase for a house whereby the buyer is a consumer (*Article 7:2, DCC*), it is probably best to use a handwritten signature because it is probable that in such a situation a judge will not find a scanned signature to have the same legal effect as a handwritten signature.

In conclusion, although in practise many commercial contracts are signed electronically by either including an image of a handwritten signature in a pdf document or scanning the signed document and emailing it to the other party, it is best to use a handwritten signature in situations that the law prescribes a signed document, such as, for example, Article 7:2 of the DCC which provides that agreements for the purchase of immovable property must be in writing.

In terms of verifying the authenticity of a qualified electronic signature, under Dutch law the authenticity of a qualified e-signature is determined in accordance with Regulation (EU) 910/2014. Under that regulation a qualified e-signature is an advanced e-signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for e-signatures (*Article 3(12), Regulation (EU) 910/2014*). Qualified certificates for electronic signatures shall meet the requirements laid down in Annex I to the Regulation (*Article 28(1), Regulation (EU) 910/2014*). Annex I to the Regulation contains ten requirements for qualified certificates, including that they must contain the following information among others:

- A set of data unambiguously representing the qualified trust service provider issuing the qualified certificates, including at least the member state in which that provider is established and:
 - for a legal person: the name and, where applicable, registration number as stated in the official records;
or
 - for a natural person: the person's name.
- At least the name of the signatory or a pseudonym; if a pseudonym is used, it shall be clearly indicated.
- Electronic signature validation data that corresponds to the electronic signature creation data.

The information in the above bullets make it possible to identify the signatory and to verify the authenticity of the qualified e-signature. In the Netherlands, commercial software platforms are available to enable the use and verification of qualified e-signatures, such as *AFAS software*.

Notarisation of contracts

Under Dutch law, the concept of the notary public does not exist. In general, there is no requirement that a contract be notarised. Under Dutch law, civil law notaries exist. They are independent public professionals who are appointed by the king. They are required to draft and witness documents in situations prescribed by the law. An example is the passing of ownership of real estate.

Impact of COVID-19 on contract execution in the Netherlands

We are not aware of any difficulties relating to the signing of contracts raised by COVID-19. Under Dutch law there is no requirement that a signature is witnessed by others. In the Netherlands there has not been a lock down in the sense that people are not allowed to travel. The main rules that the Dutch government imposed were that no groups of more than two people are allowed together outside and that a distance of 1.5 metres has to be maintained between people. That does not affect the signing of documents.

Similarly, we are not aware of any changes to the law relating to contracts as a result of COVID-19.

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