
Digital Signatures and Storage - how and when they can be used?

From courier deliveries to agreements to purchase real estate, the emergence of digital signatures in commercial transactions has become increasingly prevalent over the past decade. The Contract and Commercial Law Act 2017 (Act) consolidated a number of commercial statutes (including the Electronic Transactions Act 2002). The Electronic Transactions Act 2002 aimed to facilitate the use of electronic technology by reducing uncertainty relating to its legal effect. The Act, by incorporating that same intention, promotes a more innovative commercial landscape by providing guidelines for the use of digital signatures and the digital storage of documents.

Digital Signatures

Digital signatures are a sub-category of the more general “electronic signature”. An electronic signature is any form of identification indicating acceptance in an electronic form. It may be a scanned version of a signature, the ticking of an “I Accept” option or a signature formed by a finger on a tablet or smartphone. In a New Zealand context, digital signatures are electronic signatures that generally comply with the Act. A digital signature’s compliance with the Act is authenticated by embedded software that provides assurances as to identification, reliability and of course, acceptance.

The Act provides that, subject to a few exceptions (such as affidavits, statutory declarations, powers of attorney, or wills) digital signatures are permitted under New Zealand law. The Act sanctions the general rule that any legislation requiring dealings to take place on paper will also be permitted to take place electronically, provided both parties agree and the dealings are not expressly excluded from the Act.

Section 226(1) of the Act states that a digital signature must:

- adequately identify the signatory and adequately indicate the signatory’s approval of the information to which the signature relates; and

- be as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

To help provide certainty to users of digital signatures, the Act gives a rebuttable presumption of reliability if certain requirements are met. Section 228 provides that a digital signature will be presumed reliable if:

- the means of creating the digital signature are linked to the signatory and to no other person;
- the means of creating the digital signature were under the control of the signatory and no other person;
- any alteration made to that information (or the digital signature itself) after the time of signing is detectable; and
- the purpose of the signature is to provide assurance as to the integrity of the information to which it relates.

Essentially, a digital signature (as opposed to a mere electronic signature) will be presumed reliable as it generally meets these requirements.

Digital Storage

Continued technological innovations mean that many documents are never created in a paper form and many companies are looking to cut costs and increase convenience by storing information in digital, rather than physical form.

To cater for this, section 222 of the Act permits digital versions of documents as sufficient alternatives to originals where the digital version is “*readily accessible so as to be usable for subsequent reference.*” Provided that a digital system reliably ensures that the integrity of the digital version is maintained, it may replace the original.

Where a document might be used for evidential purposes in a court, digital evidence is not barred. However, it must meet the rules of evidence contained in the Evidence Act 2006 (**EA**) relating to hearsay and general reliability.

When retaining documents for use as evidence, clearly the objective must be to ensure that they are admissible. There is no restriction on the type of evidence a party may bring to prove its case in court, but there may be issues as to reliability. The definition of “document” in the EA is wide enough to encompass any form of digital document as it includes “*information electronically recorded or stored, and information derived from that information.*”

Under section 19 of the EA, a statement made in a business document is admissible in court, generally, if the person who made the statement is either unavailable to appear as a witness or the appearance would be significantly inconvenient due to cost or delay.

Conclusion

Digital signatures and digital storage provide an effective way for companies to save

time and money in the digital age. Their trend of increased prevalence will surely only continue. It is important therefore, that parties have a good understanding of what constitutes a digital signature and when it may be appropriate. Likewise, parties need to understand the steps required to ensure digitally stored documents will withstand the test of time. If you would like to know more, please contact [Rowan Barbalich](#).
