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Electronic signature: Current status and good practices

Webinar

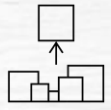
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YOUR SPEAKERS/CONTACTS



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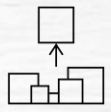


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From paper to electronic...

A graphic for the introduction slide featuring a hand reaching out towards a glowing digital globe with circuitry and data points in the background. The word "Introduction" is written in white, underlined text across the middle of the image.

Introduction

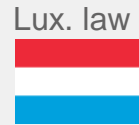
- **Disappearing paper tradition and accelerating digital transformation**
- **Gradual evolution of the legal framework**
- **Law of 25 July 2015 on electronic archiving**

Objective → establishing trust in the digital environment

- But: there is still hesitation and reluctance to use digital tools

I. Characteristics of the electronic signature

I. Characteristics of the electronic signature



1. Definition & general principles

- Definition → **Art. 1322-1 of the Civil code**

- i. **Identification** of the signatory and **indication of their agreement** to the content of the document; and
- ii. A set of data, inseparably linked to the document, which guarantees its **integrity**.

- **Art. 1322-2 of the Civil code:** An electronic document is deemed to be an original when **it offers reliable guarantees that its integrity will be maintained**.

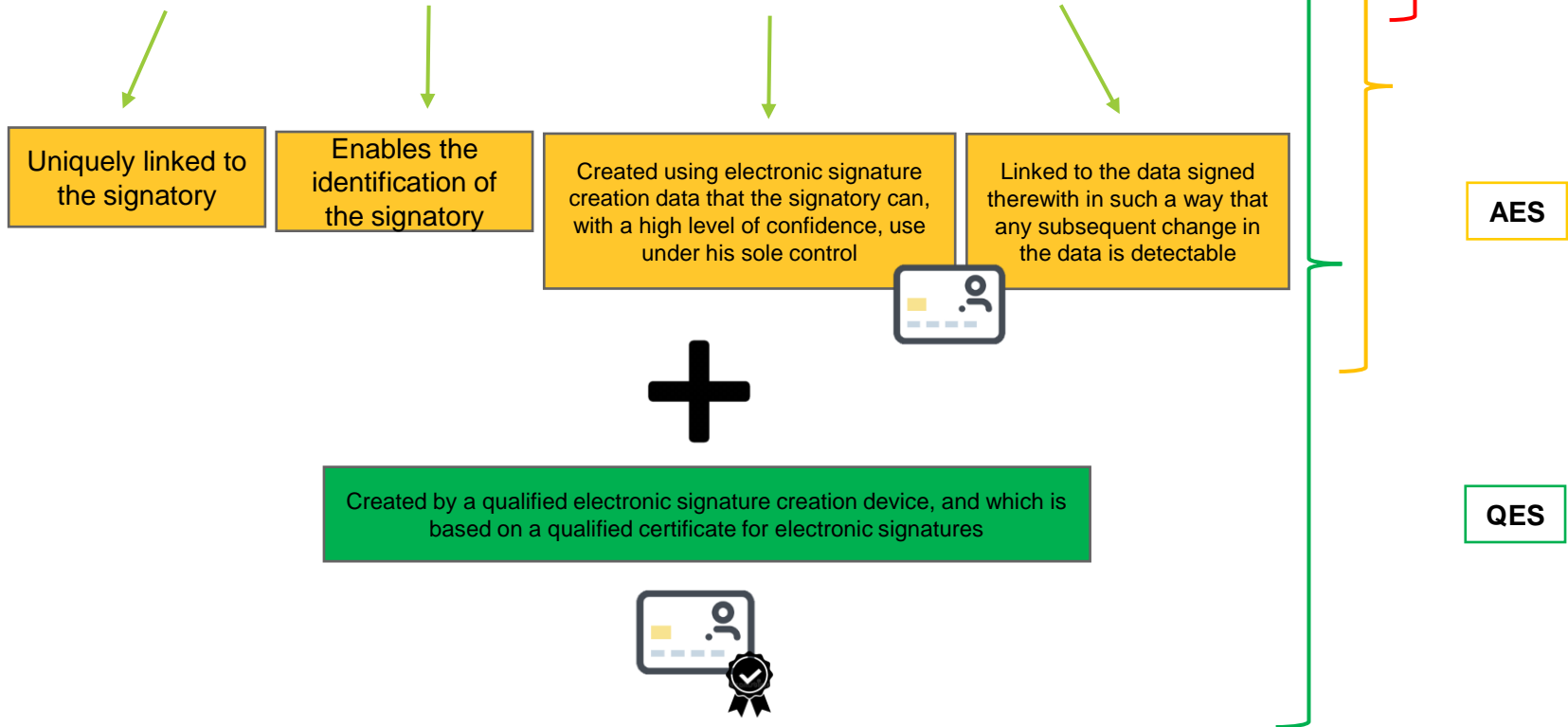
- **eIDAS Regulation:** introduces the definition of the 3 different types of electronic signatures + the legal effects of electronic signatures (Art. 25 et seq.)

- ✓ The law applicable to an electronic signature is the **law applicable to the electronically signed contract** (determined by the parties in the form of the contract, or the law of the country where the contract was concluded or, where applicable, the Rome I Regulation).

I. Characteristics of the electronic signature

2. Different types of electronic signatures (a)

“Data in electronic form which is attached to or logically associated with other data in electronic form which is used by the signatory.”



2. Different types of electronic signature (b)

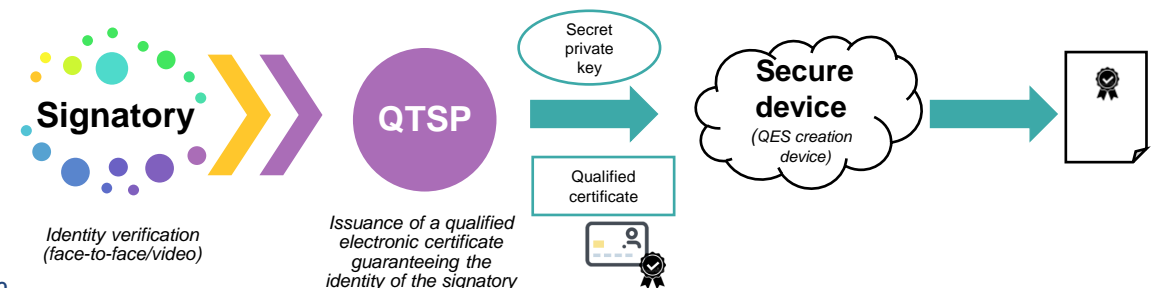
I. Characteristics of the electronic signature

SES		AES		QES	
+	-	+	-	+	-
Simple to use, low-cost, no special requirements	Low level of security and warranty, low legal effect	More secure (eIDAS requirements), file evidence	Several types of AES +/-, reliable, no presumption of reliability	= handwritten signature, EU recognition, trusted third party intervention (QTSP)	Expensive, technically demanding
What for? Standard form contracts with limited legal/financial risks (adhesion contracts, general terms and conditions, terms of use), internal documents, etc.		What for? Certain commercial contracts, employment contracts, NDAs, etc.		What for? When required by law, contracts of significant financial value, one-off transactions, in the absence of trust between the parties, etc.	

Low legal effect
+
Falsifiable document

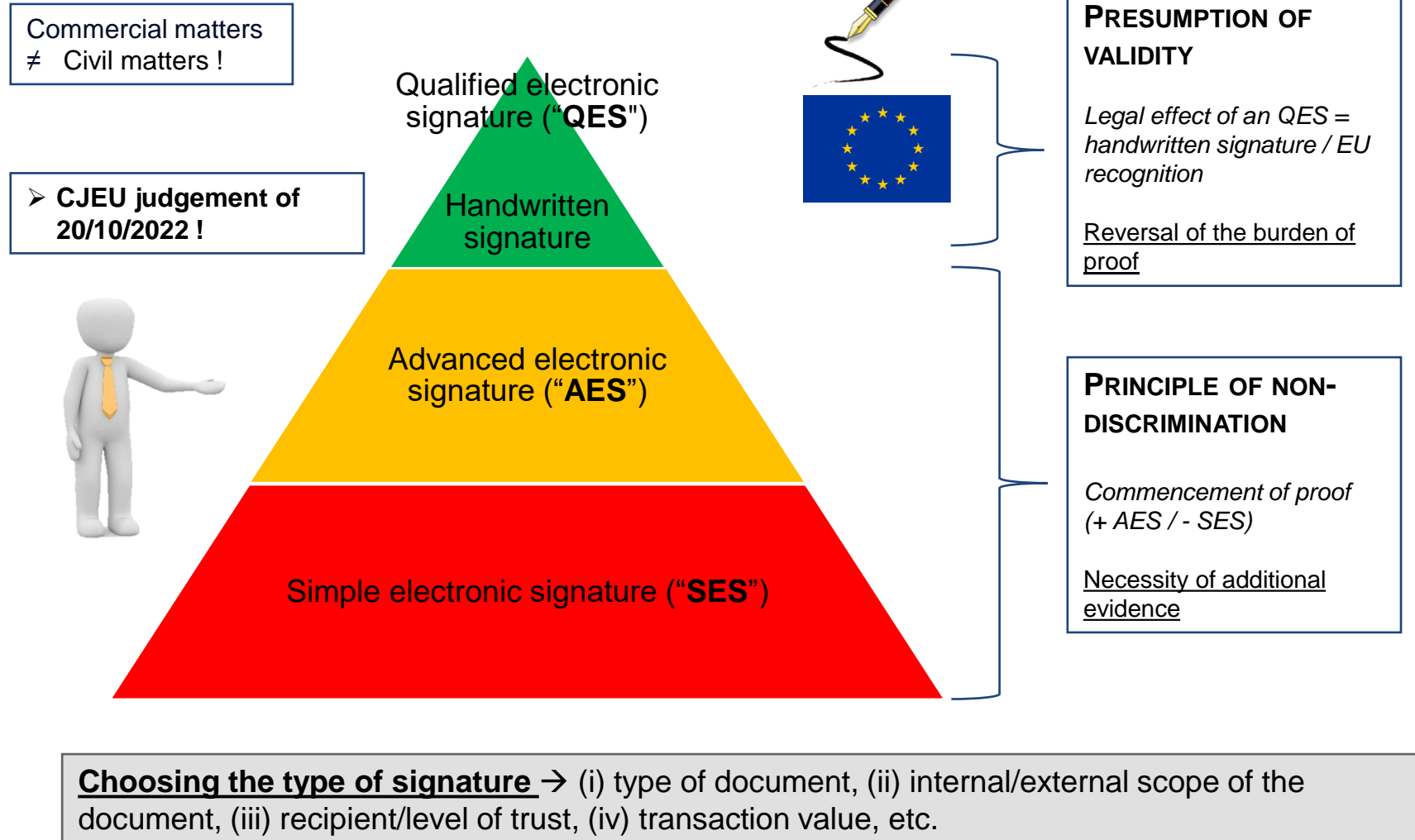
Average legal effect

Equivalent to a handwritten signature



3. Probative value of the different types of electronic signatures

I. Characteristics of the electronic signature



I. Characteristics of the electronic signature

4. Documents that can (or cannot) be signed electronically

➤ Documents that cannot be signed electronically:

- ✗ Deeds to be signed before a notary, including contracts creating or transferring property rights in real estate;
- ✗ Agreements requiring the intervention of courts, public authorities or professionals exercising a public authority; and
- ✗ Pledge agreements or guarantees outside the professional or commercial context.



➤ All other documents can, *a contrario*, be signed electronically



II. Practical issues

Question 1: In which scenarios do the parties find themselves in court?

II. Practical issues

Judgements	Facts	Objecting party	Type of signature
CJUE judgement of 20/10/2022, ECLI :EU :C :2022 :815	Documents issues in the context of a tax audit by the competent authorities	Company subject to the tax audit	AES
CA Riom, ch. Soc, 04/10/2022 n°21/02517	Amendment to an employment contract containing a non-compete clause	Former employee	AES
CA de Paris 13/10/2022 RG n°20/04051	Bank transaction – unpaid credit instalments	Client	AES
CA Amiens, ch. Des Prud'hommes 05, 30/092021, n°20/00945 and n°20/00983	Employment contract	Employee	AES

➔ When the disputed amounts are rather low, there is a certain reluctance to take legal action to challenge the validity of an electronic signature!

II. Practical issues

Question 2 : Is one original sufficient in the case of an electronically signed document by all parties of the same contract?

- Principle : as many originals as there are parties with a distinct interest
 - Exception : one original suffices for electronically signed documents ✓
 - Specific case : amended law of 10 August 1915 → specific requirement of two originals for certain commercial companies
- ➔ Parties are advised to decide how they sign before the execution of their contract (handwritten or electronic - *instrumentum*)
- ➔ It is not advisable to mix handwritten and electronic signatures in the same contract

II. Practical issues

Question 3 : Is it useful to include a convention of proof in order to guarantee the validity of an electronic signature? If so, in what form?

- **YES** → Contractual freedom allows to specify that the parties are bound by the contract and mutual recognition of the value of electronic signatures affixed
- The content of the convention of proof should focus on its legal value → recognition of the electronic commitment
- Usefulness recognised by the **Douai Court of Appeal - 28 avril 2022 / n° 22/472**

→ **However...** There is a risk that the convention of proof does not apply when the electronic signatures of the agreement in question are declared invalid. **Alternative:** hand-sign the convention of proof as a separate agreement.

II. Practical issues

■ Douai Court of Appeal (April 2022)

“ The parties expressly agree and recognize that the documents signed electronically according to the process described above constitute the originals of the documents; that they are established and conserved in conditions of integrity; that they are perfectly valid between them and constitute literal proof within the meaning of article 1364 and following of the civil code. In this respect, the parties undertake not to contest the admissibility, non-enforceability or probative value of the elements contained in the documents signed electronically, on the basis of their electronic nature alone. Consequently, the electronic documents referred to in these agreements shall be deemed to be proof of their content, of the identity of the signatory or signatories, of the legal or factual consequences arising from each electronic document signed.”

(translated and underlined by us)

Conclusion:

In the absence of a separate document (QES or wet ink), it is always useful to include a convention of proof in all documents intended to be signed electronically !



II. Practical issues

Question 4 : What type of evidence can be used to strengthen a prima facie case of SES or AES?

✗ nothing provided
 {

 eIDAS Regulation
 Law of 2000
 Luxembourg case law

- A signature which is **not presumed reliable** (SES & AES) = written convention of proof (“imperfect” signature), but it is possible to prove by extrinsic elements (e.g., accepted invoice, testimonial evidence, commercial correspondence, account statements sent periodically) that the conditions of validity of the Civil code are indeed fulfilled

Some French case law

II. Practical issues

➤ Amendment to an employment contract containing a non-compete clause (AES)

CA de Riom 4 octobre 2022 n°21/02517 : **A screen capture of an unidentifiable site** which, without authentication or certification as to the author of the electronic signature, **without a link or reference to the amendment** in question, does not constitute a reliable process for identifying the employee's signature guaranteeing its link to the agreement to which it is attached → **prima facie evidence in writing**

➤ Banking transaction (AES)

CA de Paris 13 octobre 2022 RG n°20/04051 : **The information provided** (transaction reference number, name of the service provider, attestation of the identification of the signatory, their e-mail address and date) by the service provider (not QTSP) together with the identity card of the person concerned, their payslip and a telephone bill did indeed **justify the reality of the agreement**.

➤ Employment contract (SES/AES)

CA Amiens, ch. Des Prud'hommes 05, 30 septembre 2021, n°20/00945 and CA Amiens, ch. Des Prud'hommes 05, 30 septembre 2021, n°20/00983 : In the presence of an employment contract signed with a private individual, a professional should take into account the following elements: **(i) provide documentation of the process implemented; (ii) the certifications to which it has been subject; (iii) the signature block; (iv) the convention of proof.**

→ Judges will base their decision on the **evidence** available to them!



Conclusion

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Q&A



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