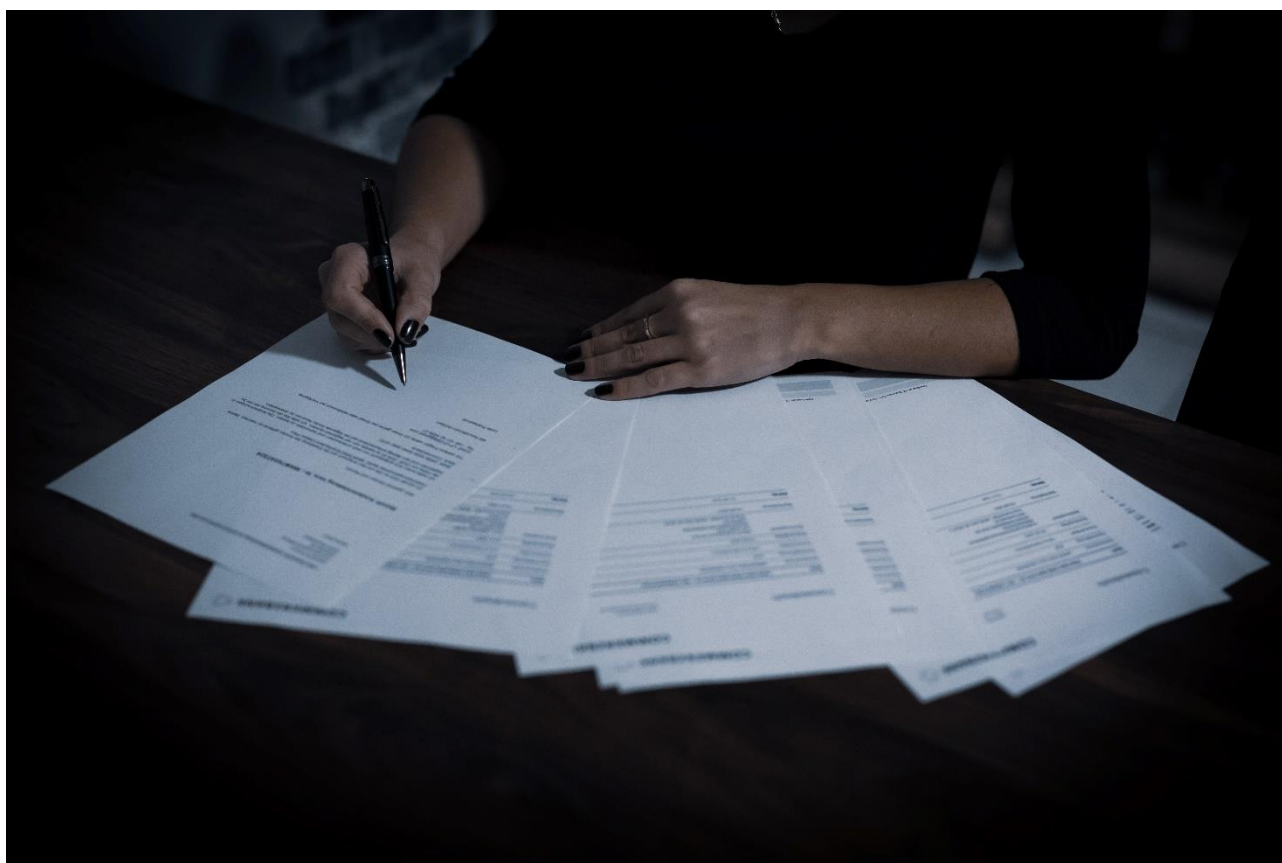


INSIGHT

**DISTANCE CONTRACTS AND E-SIGNATURES – A NEW PARADIGM IN
MACAU?**

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After three weeks of lockdown caused by the most recent Covid-19 outbreak in the Special Administrative Region, Macau is now slowly reopening and restarting its businesses. As many sectors require in-person work, given the importance of gaming and tourism for the local economy, several companies have resorted to sending their employees home on unpaid leave. Conversely, other businesses, more prepared for the lockdown, have structured their services so that their employees continue to telework. Given that Macau has, since 2005, a legal regime of electronic documents and signatures (established by Law 5/2005, dated 8 August), one cannot but wonder what further developments are necessary to dematerialize the legal trade, especially with regards to potential future lockdowns.

Indeed, public services in Macau still largely work with physical documents – there have been, however, steps towards dematerialization of the justice and public administrations, namely Law 2/2020, dated 30 March, developed by Administrative Regulation 24/2020, dated 20 July (on electronic governance). More recently, Law 5/2022, dated 20 June has regulated the sending of procedural documents and payment of court costs by electronic means, and Law 6/2022, dated 20 June has provided for the display by electronic means of documents required to drive vehicles.

Regarding distance contracts and the use of e-signatures, the Law 5/2005 establishes the legal regime of electronic documents and signatures – although this legal diploma defines the legal effects of electronic documents and signatures, as alluded to above, it is not yet sufficiently settled in the legal commerce in Macau, as we shall see below.

The Law 5/2005 defines “electronic document” as the result of electronic data processing for the purpose of reproducing or representing a person, thing, or fact – such a document in electronic form shall not be denied legal effect by virtue of that fact. Furthermore, “electronic signature” is defined as the group of data in electronic form that, connected or logically associated to an electronic document, may be used as a method of making known its authorship.

Three separate types of e-signatures exist under the law – (simple) electronic signatures (“SES”), which fall under the definition provided above, advanced electronic signatures, and qualified electronic signatures. An “advanced electronic signature” (“AES”) is defined as the type of electronic signature that is unequivocally

associated to the holder, allowing his/her identification, created with means he/she can maintain under his/her exclusive control and is in such way connected to the document it was placed on that any subsequent changes are detectable. Although an AES may provide a stronger proof of association with its holder, it has essentially the same evidentiary value as a SES under the law.

Finally, a “qualified electronic signature” (QES) is defined as an advanced electronic signature method based on a qualified certificate and created by a secure-signature-creation device, effectively guaranteeing, according to internationally recognized standards, the protection of the signature against fraudulent use. A QES is equivalent to a handwritten signature, is able to replace stamps, chops, marks or any identifying signals of the holder of the QES or of whom he/she is representing, and also creates the presumption that (1) the person using the QES is its holder and acts in the capacity and with the powers mentioned in the certificate; (2) the QES was affixed with the intention of signing the electronic document; and (3) the contents of the electronic document did not suffer changes which are not detected since the moment the QES was placed. Therefore, QES is the only type of e-signature that is given full evidential value by law regarding the declarations therein attributed to its author (without prejudice to arguing and demonstrating the falsity of the document), provided that the electronic document is susceptible of representation as written declaration – i.e. it must be susceptible of being produced in physical form. At present, only the Macau Post and Telecommunications Bureau may provide accredited certification in Macau, under the “eSign Trust” services. On the other hand, distance contracts are only defined and legally regulated in the Law on the Protection of Consumer Rights and Interests (Law 9/2021, of 12 September) as contracts concluded between a consumer and a merchant, without the simultaneous physical presence of the two, through the exclusive use of distance communication techniques from the negotiation to the conclusion of the contract, within the framework of a distance model for the supply of goods or provision of services for which the merchant is prepared. The law lays down formal and substantial requirements for distance contracts, in particular as regards to pre-contractual information to be provided to the consumer by the merchant in good time and in a clear, accurate and comprehensible manner.

It should be noted, however, that the Law shall apply to legal relations, concerning the supply of goods or services, established between merchants and consumers taking place in Macau, and that the provisions of the Law 9/2021 do not apply to all distance contracts, excluding in particular contracts for banking, insurance

and other financial services; contracts for the construction, sale or other rights in respect of real estate (including rental); contracts for the supply of foodstuffs, beverages or other goods for current consumption in the household; contracts for passenger transport services, among others. Consequently, the legal regime for distance contracts is currently circumscribed to consumer contracts, with the large majority of distance contracts still governed by the Macau Civil Code.

In conclusion, the legal commerce requires solutions that provide greater security and legal certainty in commercial transactions, particularly as regards proof of statements made by the parties and the binding nature whenever parties sign a distance contract. Although the private commerce currently has sufficient legal framing in Macau to overcome the limitations and constraints of another lockdown, the practical application of electronic signatures in Macau is still hindered by the fact that, on the one hand, there is currently only one certification authority and, on the other hand, the recognition of other international certifications is not yet flexible enough. The latter point, coupled with the growing modernization and computerization of public services, could boost Macau as a modern and dematerialized jurisdiction, as desired by the local government.

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