

# Digital contracting

## Maximising the opportunities for digital contracting in the “new normal”

We make contracts every day, for both professional or personal reasons. If your business appoints a new distributor to explore new markets, you contract. When you agree to deliver work by close of business to a colleague, you contract. Even when you pay for your groceries in the supermarket, you contract.

### A contract = the sum of its parts

Contracting requires an agreement between two or more people or parties with the objective of creating legal consequences, e.g. for parties to commit to one another with regards to the purchasing of something, paying something or to (not) doing something. Under Continental law, for most contracts, the mere agreement (consensus) between parties will suffice for a contract to be valid and binding.

Man has, however, always sought further comfort to demonstrate that a contract actually exists and to enforce its terms on the counterparty, e.g. in court. A ‘handshake deal’ triggers the honour of the contracting parties and constitutes a clearly visible sign to witnesses that a transaction took place. A written deed provides even further comfort, when it’s duly signed by all parties, as it clearly documents the parties’ identities and the object and specific

terms and conditions of the agreement. The form (instrumentum), in this case, provides evidentiary value, although for certain contracts the law can impose a specific form for a contract or deed to be considered valid.

We’ve recently seen a push towards more formalism, e.g. to protect more vulnerable parties, such as consumers or employees, and for specific transactions e.g. patent licenses. Surprisingly, for digital processes and transactions (e.g. digital signature), lawmakers tend to regulate their form and use even more stringently, seemingly ignoring the fact that digital processes and transactions are already (typically) executed in a more secure and controlled environment than their paper or physical predecessors.

### Digitalising the contractual lifecycle

Companies have been operating globally for some time now. With global operations, come global transactions requiring the global presence of business representatives to identify, negotiate and close deals. With time being of the essence, companies have started implementing digital solutions to facilitate contracting, from negotiation through execution. With the onset of COVID-19 and the resulting restrictions on physical contact, digital solutions that enable contracting and therefore business continuity have become a must.

On the market, we see solutions for:

- Contract and document automation
- Contract management and analysis
- Electronic signing
- Deal management
- Electronic storage
- Online payment



We also see, especially in the start-up and scale-up community, new solutions with similar functionalities but specifically tailored to specific sectors and contexts e.g. M&A, Real Estate (PropTech), law firms, etc. As a law firm, [we too leverage digital contracting solutions to support our legal practice and better help clients.](#)

At first, digital contracting solutions mainly focused on establishing or managing the documentation of a contract. More recently, we've also seen solutions

## Smart contracts

As Blockchain technology matures, smart contract solutions are also on the rise. A smart contract is an agreement expressed in the form of programming language. Its added value lies in the fact that it largely performs by itself, independently of the intervention of a third party (e.g. a bank in the case of a payment) or a judge (e.g. in the case of enforcement): if condition X is met, then the smart contract automatically carries out consequence Y. Both parties enjoy the assurance that the effect Y, as programmed in the smart contract, will be executed if the conditions are met, neutralising human arbitrariness.

## The COVID-19 accelerator

Over the years, most businesses have implemented digital (contracting) solutions in one way or another. Nevertheless, only a few companies went fully digital, either because of mistrust (e.g. excluding high-value or sensitive transactions with digital processes or in digital environments), because their business partners hadn't (yet) onboarded digital processes or because other stakeholders totally refused to accept digital documents or digitally concluded documents (e.g. administrations or clerk offices). COVID-19, travel bans and social distancing measures have accelerated the process for many businesses and organisations, out of mere necessity to keep business going.

establishing the conclusion of a contract via video, among other media. The legal value and enforceability of these innovative solutions, and whether or not they'll stand up in court, remains to be tested across jurisdictions.

Existing (generic) videoconferencing and online meeting solutions also facilitate digital contracting, where they're used by the contracting parties to meet and negotiate virtually on the terms of the contract.

Using smart contracts doesn't, in our view, replace the full contracting lifecycle. Typically, we only see smart contracts being used to facilitate the carrying out of an agreement, as parties still tend to conclude a traditional contract first and then translate its terms into programming language for execution. This may, in our view, change in the future as technology evolves, and it'll most likely become possible to agree upon contractual terms directly in a smart contract.<sup>1</sup>



Today, due to (or should we say "thanks to") COVID-19, businesses, as well as authorities and other organisations, have seen and experienced the advantages, rather than the risks (if any), of digital contracting solutions and will likely continue to use and onboard these further, even when the strict necessity for doing so phases out. The "new normal" will undoubtedly maximise opportunities for digital contracting.

<sup>1</sup> For more information on Smart Contracts and Blockchain, see C. VANDE VORST, J. VAN DAELE "Blockchain en smart contracts in de juridische praktijk – Enkele aandachtspunten", T.B.O. 2019, nr. 2, 156-164

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