

## legal memo

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### Is an electronically signed promissory note valid?

**In Mexico there is some doubt as to whether an electronically signed credit instrument in commercial transactions is valid. There are even several conflicting criteria. Thus, certain requirements must be met to be valid.**

Derived from technological advances and the pandemic generated by Covid-19, and with the purpose of not interrupting commercial operations, the electronic signature has gained much strength, as an option by which a person grants his/her consent for the celebration of a certain legal act virtually without his/her signature (handwritten).

In this regard, there is some doubt as to whether it is valid in Mexico to sign a promissory note electronically. Furthermore, we are faced with various criteria that are contrary to each other, with judges who are skeptical in this regard being more frequent.

The promissory note is a credit instrument that in commercial transactions is ordinarily used to document and guarantee the payment of a certain amount. Like any other instrument of credit, the promissory note must comply with certain requirements to be valid and, if applicable, its payment may be claimed from the subscriber.

It should be noted that signing promissory notes electronically is not a new practice. If we think about it, we will realize that the "tickets" or "vouchers" that the bank issues when we make purchases of products or services with a credit card and validate such transaction with our PIN, are, de facto, electronically signed promissory notes.

### How to provide validity?

For an electronically signed promissory note to be valid and, above all, enforceable so that, if applicable, payment can be claimed in court, it is necessary for the document to meet the corresponding formal requirements.

Among other requirements that a promissory note must meet is the **signature of the subscriber**, since only in this way is the unconditional promise to pay the amount stated in the document binding.

Moreover, the signature of the subscriber of the promissory note may be **autographic or electronic**, to the extent that the Commercial Code confers functional equivalence to the former. However, it should be noticed that it is necessary to ensure that the electronic signature complies with the following characteristics:



- a) **Integrity:** understood as the reliability of the method for generating, communicating, receiving, or archiving it, as well as the guarantee that it has not been altered.
- b) **Attribution:** understood as the way in which it can be guaranteed that the signing party is who he/she says he/she is and, consequently, expresses his/her will freely.
- c) **Accessibility:** understood as the possibility that the signature and the document in which it is recorded can be available to the sender, the receiver and other third parties such as a judge.

If the electronic signature complies with these characteristics, the promissory note is valid and judicially enforceable.

### Definition of electronic signature

Article 75 section XXIV of the Code of Commerce classifies negotiable instruments -an operation contained in the General Law of Negotiable Instruments and Credit Transactions-, including promissory notes, as acts of commerce. For its part, the General Law of Negotiable Instruments and Credit Transactions establishes that negotiable instruments are mercantile things, and their acceptance is an act of commerce.

In terms of Article 89 of the Commercial Code, electronic, optical or any other technology may be used in acts of commerce -such as the promissory note- and in their formation.

As mentioned above, one of the formalities of the promissory note is that it must contain the signature of the subscriber, which, in accordance with the commercial legislation, may be validly executed electronically.

Now, the electronic signature is defined by the Commercial Code as "[t]he data in electronic form consigned in a Data Message<sup>1</sup>, or attached or logically associated to it by any technology, which are used to identify the Signatory<sup>2</sup> in relation to the Data Message and indicate that the Signatory approves the information contained in the Data Message, and that it produces the same legal effects as the autograph signature, being admissible as evidence in court."

This electronic signature, also known as simple electronic signature, is used, for example, when a document is signed after having accessed an electronic link (link) through an e-mail to which the signatory accessed with his/her username and password; or through an SMS (Short Message Service) to which the signatory accessed because it was sent to his/her telephone number.

### Advanced or Trusted Electronic Signature

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<sup>1</sup> Data message is information generated, sent, received or stored by electronic, optical or any other technology.

<sup>2</sup> Signatory is the person who holds the signature creation data and who acts on behalf of himself or the person he represents.



As opposed to the simple electronic signature, the Code of Commerce distinguishes the Advanced or Reliable Electronic Signature, which will be considered as such to the extent that it complies with the following requirements:

- I. The signature creation data (Private Key), in the context in which they are used, correspond exclusively to the signatory.
- II. The signature creation data (Private Key) was, at the time of signing, under the exclusive control of the signatory.
- III. It is possible to detect any alteration of the electronic signature made after the time of signing.
- IV. With respect to the integrity of the information in a data message, it is possible to detect any alteration made after the time of signature.<sup>3</sup>

The procedure for issuing and using the advanced or reliable electronic signature allows us to presume that it binds the person using it, ensuring its integrity and non-repudiation by a pair of keys (public and private).

An example of an advanced or reliable electronic signature is the one issued by the Tax Administration Service (SAT), as certifying authority, and although it is essentially used for tax purposes, it is also viable to use it in commercial acts.

**Both signatures produce the same effects as a handwritten signature, so that a promissory note signed electronically is undoubtedly valid and enforceable.**

However, the use of **the advanced or reliable electronic signature**, since it requires a pair of keys for its generation, **is more secure because it is presumed to correspond exclusively to the signatory** and at the time of signing it is under his exclusive control. In this sense, it is advisable that the signing of documents in commercial transactions, such as promissory notes, be done with this type of signature.

In any case, if the signatory does not have an advanced electronic signature and the use of a simple electronic signature is accepted, it is recommended that to attribute and link the signature more securely to the signatory, the signatory be required to sign with his or her own handwriting and not with an image or text in italics.

Therefore, there are solid grounds to sustain that **it is possible and valid to sign a promissory note electronically, using a simple or advanced electronic signature**, since it

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<sup>3</sup> See thesis number I.3o.C.264 C (10a.) of the Third Collegiate Court in Civil Matters of the First Circuit, visible in the Gazette of the Judicial Weekly of the Federation, book 43, June 2017, Volume IV, page 2918, with the following heading and text: "ELECTRONIC SIGNATURE. REQUIREMENTS TO CONSIDER IT ADVANCED OR RELIABLE. Pursuant to Articles 89 and 97 of the Code of Commerce; rules 2, 6 and 7 of the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) on electronic signatures, as well as the Guide for its Incorporation into Domestic Law, the use of electronic signatures in banking transactions constitutes a valid source of obligations for cardholders who are bound to such security mechanism for commercial transactions, since electronic means have made it possible to carry out commercial transactions between persons who are located in different places and that hinders the perfection of the legal act through a handwritten signature. The Model Law establishes the rules to create an electronic signature that, when used, binds the person who issues it, so that its guiding principle is the reliability of its creation, so that it grants certainty to the person who possesses it, that only he or she can use it to constitute a source of obligations. Consequently, in order to be considered reliable, an electronic signature must meet the following requirements: a) The signature creation data correspond exclusively to the signatory; b) The signature creation data were, at the time of signing, under the exclusive control of the signatory; c) It is possible to detect any alteration of the electronic signature made after the time of signing; and, d) With respect to the integrity of the information of a data message, it is possible to detect any alteration of the same made after the time of signing."



is expressly permitted by Mexican commercial law. However, in order to confer greater certainty to the promissory note signed electronically, it is safer and more convenient that the document be signed with an advanced or reliable electronic signature.

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