

Digitalisation process: from electronic signature to archiving

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8 June 2021



| PwC Legal



Introduction

“Digital” Workshop Series

“Digital” Workshop Series

How to prepare for digitalisation



Electronic signatures
14th June 2021



Digitalisation and archiving of documents
21st June 2021

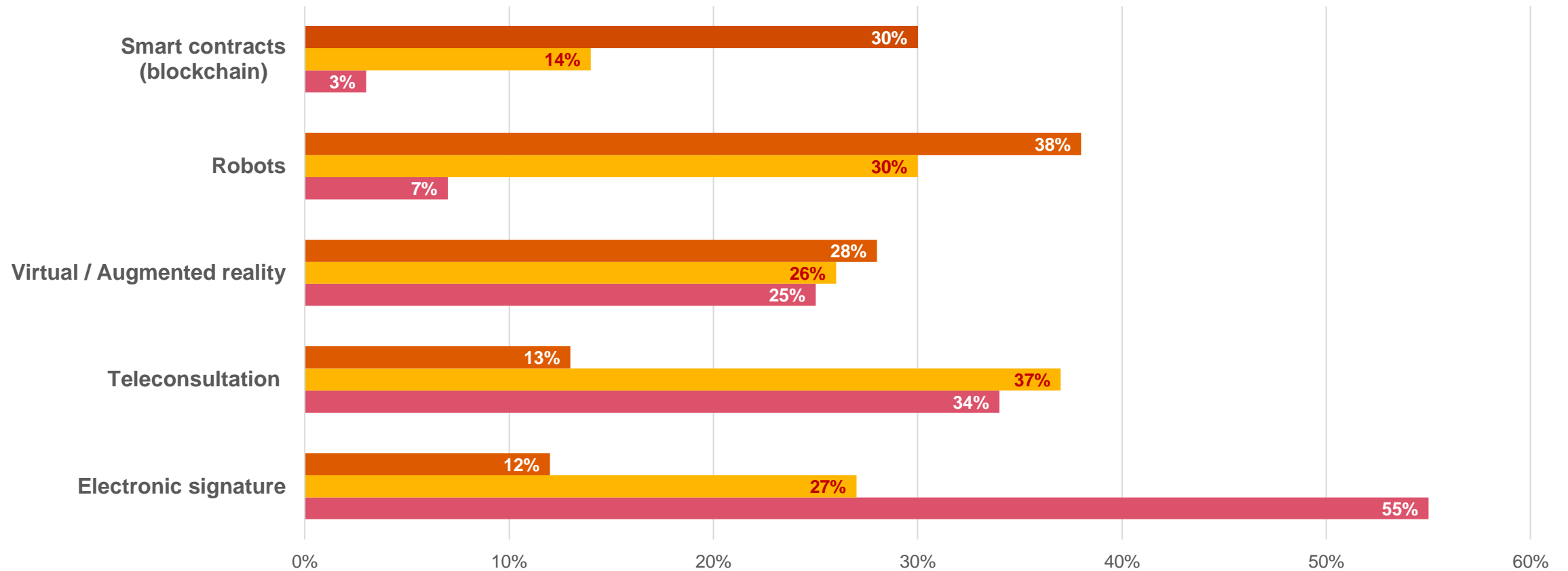


Digitalisation in the insurance sector

What is digitalisation in concrete terms ?

- Digital portals for brokers and customers
- Online subscription of services
- Electronic signatures
- Chatbots
- Online management of claims
- SEO
- Artificial intelligence
- (Real) use of CRMs
- Better flow of information, seamless experience for the customer
- Digital archiving, cloud computing
- Insurtechs / use of blockchain
- etc

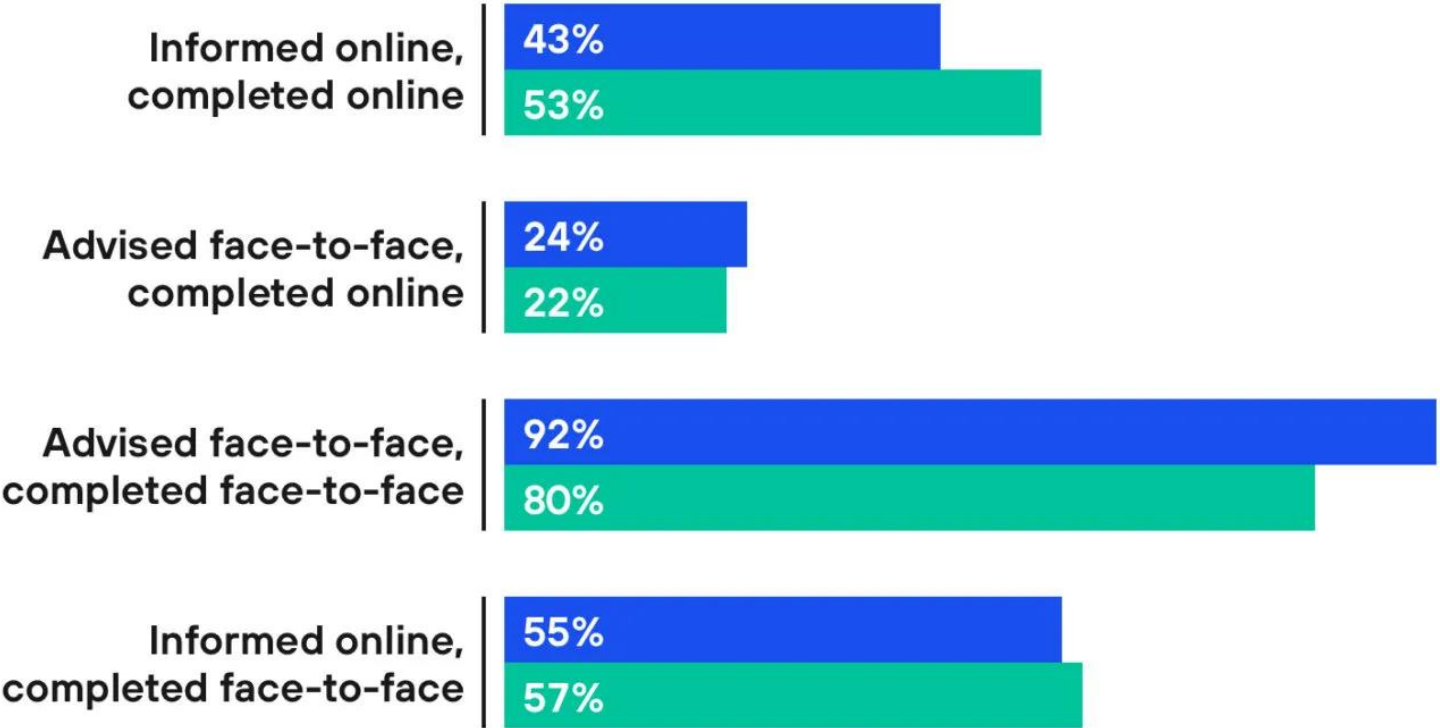
Have the following technologies already been integrated into the customer journey ?



Source : CXP Group : l'innovation numérique, enjeu clé de l'assurance pour 2020

Every second person has at some time taken out an insurance policy online

In which way did you conclude your insurance policies in the past?



All

16 to 29 years



Have you ever taken out an insurance policy online?

Source: Bitkom Research 2019 (www.bitkom.org)

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How to prepare for
digitalisation



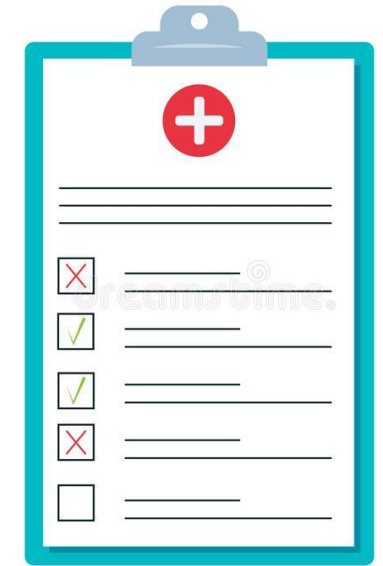
The reality is, many digital transformations fail because companies aren't integrating their business and technology strategies from the start.

Chris Bedi,
CIO of ServiceNow

Introspection

Explore your own organisation

- What documents are you currently using?
- What are your current processes (onboarding, renewals, termination, etc)?
- What steps must a customer follow before enjoying a service?
- Is it efficient? What are my current challenges and what do I need to improve?
- Etc.



Legal Due Diligence / Asking yourself key questions

QUESTION 1

Should our documents be (i) accepted, (ii) signed or (iii) neither ?



When is a signature legally mandatory?

Requirements for valid contracts

For most contracts:

1. Consent to essential elements of the contract (e.g. via “opt-in”)
2. Legal capacity
3. Valid subject-matter
4. Valid cause

But..... certain legal provisions, regulations or guidance require a signature on some specific documents

Obligation to sign

➤ Law on insurance contracts

- amendment agreement for the transfer of an insurance life contract (Article 199§1)
- agreement signed by policyholder, the insurer and the pledgee if an insurance contract is pledged. The beneficiary who has accepted the benefit of the contract must also consent to such pledge (Article 117)
- amendment agreement to the insurance policy for the beneficiary to accept the benefit of the contract (Article 122). The beneficiary, the policyholder and the insurer must sign such agreement.

➤ Guidance from the CAA

Evidence : How to enforce contractual obligations?

How to prove validity in case of litigation?

Written evidence principle: need for

1. A notarised deed; or
2. A private agreement (i.e. written & signed incl. electronically)

Exemptions to principle:

1. Value of contract below EUR 2,500
2. Litigation between traders=any means of evidence accepted
3. Party has *prima facie* evidence (e.g. email, invoice, unsigned document) and other evidence (witness and/or presumptions)
4. Contractual derogations or variations by the parties

Insurance sector

Article 16 of the law on insurance contracts:

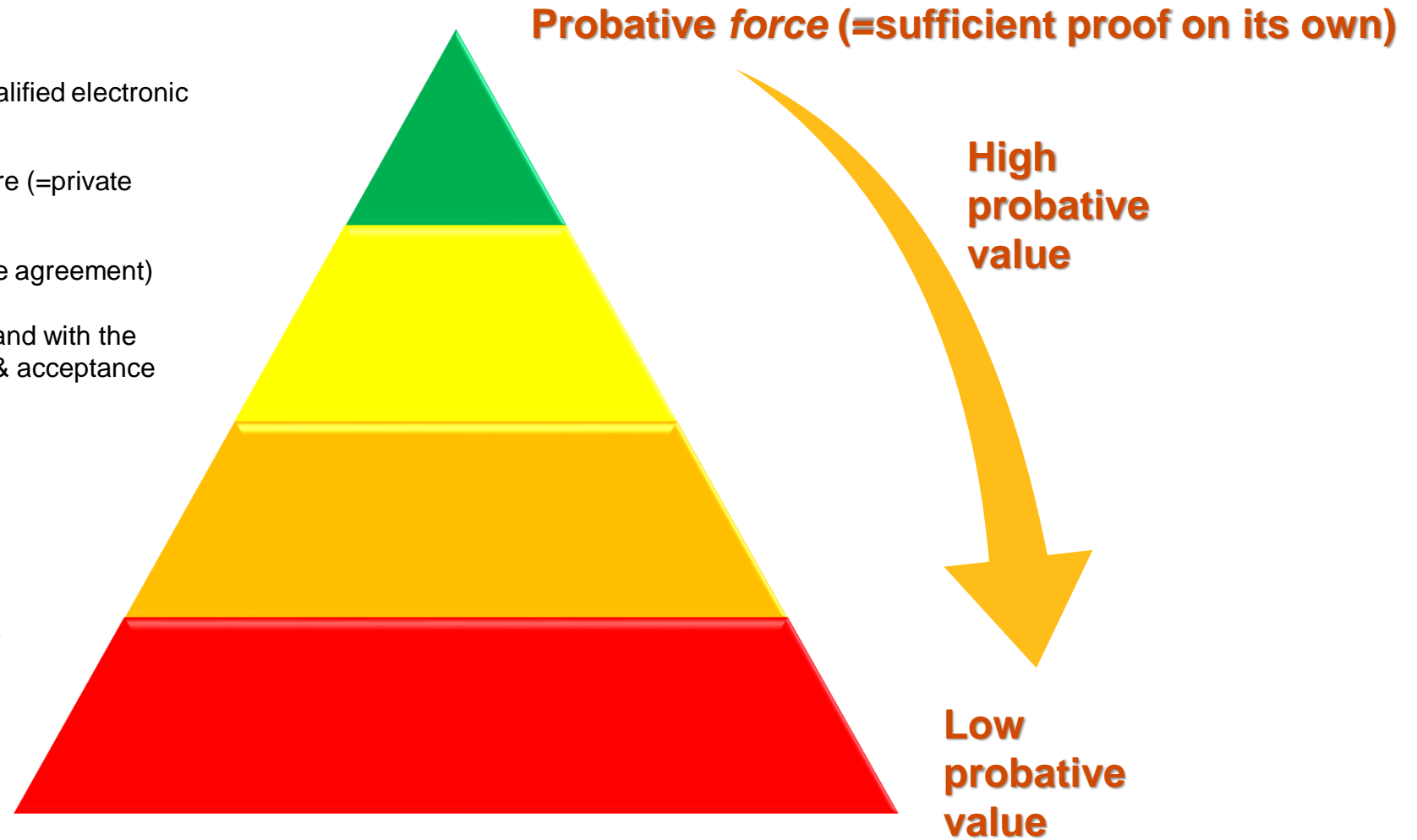
“With the exception of admissions and sworn statements, and irrespective of the value of the commitments, the insurance contract as well as its amendments are proved between parties **in writing**. No witness or presumptive evidence against the content of the act is admitted.”

Article 62-8 of the law on insurance contracts

For contracts concluded remotely (e.g. via a web platform), the insurer bears the burden of proof notably in respect of the policyholder’s consent to enter into the contract

Evidence : Not all evidence is equal!

- Notarised deed (*acte authentique*)
- Document with a handwritten signature or a qualified electronic signature (=private agreement)
- Document with an advanced electronic signature (=private agreement)
- Document with an electronic signature (=private agreement)
- Document accepted via an electronic platform and with the possibility to prove the reliability of the system & acceptance
- Copy of signed documents sent by fax
- Copy of signed document sent via post
- Copy of document with a scanned signature affixed thereto
- E-mail with proof of receipt / Documents & data stemming from an IT system (e.g. SAP)
- Invoice / account statement without signature (sent by non-registered post)
- E-mail without acknowledgement of receipt



Signed or accepted? Main take-aways

1. Signatures are **not always necessary** for contract validity.
2. Companies will be able to **prove validity** by any means of evidence (e.g. logs, emails, witness) for B2B contracts.
3. A signed contract is however **easier in case of litigation** and companies need to retain sufficient evidence of validity.
4. When a signature is neither necessary nor highly useful to enter into an agreement, one can obtain the **counterparty's consent** (incl. online) to the agreement
 - a contract concluded by such electronic acceptance can only amount to **prima facie evidence** (*commencement de preuve par écrit*) as opposed to a private agreement (*actes sous seing privé*)
 - the party on which the burden of proof lies (i.e. the insurer in respect of the contract's existence and amendments thereto) has to be able to evidence the counterparty's acceptance on the essential elements of the contract for a judge to acknowledge the existence of a contract
5. Prudent approach to be adopted if **multinational elements present**

Legal Due Diligence / Asking yourself key questions

QUESTION 2

Are there any legal hindrances to digitalisation?



Any legal hindrances to digitalisation?

➤ **Remote conclusion of insurance contracts – A show stopper or a mere constraint?**

- Definition of “remote conclusion of contracts”
- Timing of conclusion
- Communication of information before being bound by a remote contract
- Consumer has a right to request information on paper

➤ **IDD - Digital process needs to take into account additional constraints**

- Duty to advise
- Additional paperwork (KID – IPID)
- Difficulties for complex and structured products
- Client consent / personalised online space?
- Paper document or durable medium (under specific conditions)
- No uniform EU implementation

Any legal hindrances to digitalisation?

➤ **KYC**

- KYC may be a challenge in a full digital environment
- Identification via electronic signature?
- Personal platform to upload documents

➤ **Check ID cards online?**

- Almost never fully digitalised
- Luxtrust certificate?
- New e-Wallet proposition of the EU Commission (European Digital Identity)

Legal Due Diligence / Asking yourself key questions

Question 3

If a signature is required:

- can it be signed electronically?
- If yes, which type of electronic signature should be used (simple vs advanced vs qualified) ?

Session 2

Question 4

How should the signed documents be kept ?

What safeguards should be put in place to keep the probative value of digital documents ?

Session 3

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Conclusion

Questions ?

Thank you for your attention



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