

ARTICLE:

DIGITAL EVIDENCE IN THE NEW SWISS FEDERAL CODE OF CIVIL PROCEDURE

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Introduction

Switzerland's first Federal Code of Civil Procedure (CCP) is expected to enter into force on 1 January 2011, replacing the 26 cantonal codes of civil procedure currently applicable. The CCP takes into consideration, in principle, the rapid development of electronic communications. In addition to electronic submissions to the court, the CCP foresees the filing of electronic evidence in evidentiary proceedings. In particular, the CCP provides for the possibility of sending paper records in electronic form, thereby not only accelerating such procedures, but also lowering costs. At the same time, however, there is a need for additional legal regulation, as electronic data must be protected from the risk of manipulation. The present remarks deal specifically with the question of electronic evidence and, further, with that of electronic submissions.

Electronic Evidence

Revised Definition of Documents

Article 168 CCP provides for the admissibility of the following evidentiary means: witness testimony, documents, inspections, expert opinions, written statements, as well as hearings of the parties and declarations. The list is exhaustive; a restricted number applies. In terms of electronic evidence, it is mainly documents that are involved. According to the Message of the Swiss Federal Council on the CCP,¹ the term 'document' is to be understood in a very broad sense. Article 177 CCP provides a list of examples of records that are considered as documents, among which are

included electronic files. Pursuant to the provisions of article 177, the admissibility of digital records must be granted to the same extent as that of traditional records.² The record must be of a character to offer proof of legally relevant facts (probativeness). It is not necessary that its original purpose was to serve as evidence (evidentiary intent).³

The CCP contains no explicit mention regarding the probative force or probative value of digital documents. In this respect, the court is free to make its own assessment of the evidence pursuant to article 154 CCP. One can, however, speak of various digital data carriers with differing degrees of probative value. It is only with regard to public documents that a statutory regulation has been introduced. Article 179 CCP provides that public registers and public documents are considered as conclusive evidence for the facts to which they attest, subject to proof of the inaccuracy of their content. For example, the Civil Registry is maintained electronically as of 1 July 2009 and, pursuant to article 139 para. 1 CCP in conjunction with article 138 CCP, service of notice by the courts may be made electronically. The reversal of the burden of proof accords public registers and documents the highest degree of probative value.

Probative value

The probative value of digital records is determined as a function of their integrity and their authenticity.⁴ Integrity refers to the intactness of the data carriers. Under the criterion of integrity, a distinction is drawn between rewritable and non-rewritable data carriers.

¹ Message of the Swiss Federal Council on the federal Code of Civil Procedure (CCP) of 28 June 2006, Federal Law Gazette 2006, 7221 and following.

² Message CCP (Footnote 1), 7322.

³ Message CCP (Footnote 1), 7323.

⁴ Christoph Gasser and Stefanie Peters, 'Submission of evidence through digital documents in Swiss civil litigation', *Digital Evidence and Electronic Signature Law Review*, 3 (2006) 84 - 88; Reto

Fanger, *Digitale Dokumente als Beweis im Zivilprozessrecht*, Doctoral Thesis, Basel 2005, 152 and following.

Digital records that are recorded on non-rewritable data (CD-Rom, DVD, CD-R, Smartcards) carriers can no longer be altered once they have been recorded, and consequently possess a higher degree of probative value. This contrasts with digital records that have been recorded on rewritable data carriers (chip cards, USB sticks, external hard drives) and are susceptible to subsequent manipulation. Authenticity, on the other hand, refers to the identity of the originator, which is determined by a (digital) signature.

Digitally signed records possess the highest degree of security and probative value against manipulation, regardless of the type of data carrier upon which they are recorded.⁵ Thus, for example, non-rewritable data carriers are considered a less secure category of evidence.

Genuineness and submission of documents

Article 178 CCP sets forth that the burden of proving the genuineness of a document falls to the party by whom it is invoked as evidence, insofar as its genuineness is disputed by the other party. Nevertheless, the disputing party must provide sufficient grounds for its objection. The determining factor will be the degree of security attributed to the digital records.

Pursuant to article 180 para. 1 CCP, documents may be submitted either in the original or in copy. There exists no right to demand the production of the original. Where sufficiently substantiated, the genuineness may be questioned by the adverse party. Where the facts of the case are to be established *ex officio*, the court may demand production of the original.

Copies of originals are also considered admissible as evidence, including, in particular, standard photocopies or printouts of scanned records.⁶ The probative value of the latter is determined in keeping with the free assessment of the evidence by the court. In this context, the court will be called upon to establish, in particular, whether the electronic records in question are rewritable or non-rewritable records.⁷ Further to be noted, is that electronic copies may also possess the

character of originals if they are archived in keeping with the standards set by commercial law. Where this is the case, the question as to whether an original or a copy is involved will tend to be irrelevant.⁸

Form of submissions to the court

It is possible to file submissions with the court with the use of digital signatures. For such submissions, the digital signature is obligatory. A working group within the Swiss Federal Department of Justice is currently occupied with the drafting of the ordinance on electronic transmission of records within the framework of proceedings under the CCP, under the Debt Enforcement and Bankruptcy Act, and under the Criminal Procedure Code.⁹ When transmitted electronically, the record containing a submission and its annexes must bear a recognized digital signature of the sender (article 130 para. 1 and 2 CCP). In addition, in the event of electronic transmission, the court may demand that the submission and its annexes be submitted subsequently in paper form (Article 130 Abs. 3 CCP).

Conclusion

The new Swiss Code of Civil Procedure allows for the admissibility of digital evidence and recognizes, in particular, electronic files as documents, whereby their probative value is contingent specifically on the question of whether they are rewritable or non-rewritable. The CCP further allows for the electronic filing of submissions to the courts. Overall, it thus resolves significant issues for facilitating the handling and use of electronic records.

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⁵ Fanger, (footnote 4), 152 and following; see also Federal Law of 19 December 2003 on Certification Services in the area of digital signatures (Federal Law on electronic signatures; ZertES; SR 943.03).

⁶ Message CCP (Fn. 1), p. 7323.

⁷ Christoph Gasser and Stefanie Peters, "Submission of evidence through digital documents in Swiss civil litigation", (footnote 4), 85.

⁸ Message CCP (Footnote 1), 7323.

⁹ As with the new Federal Code of Civil Procedure,

this ordinance (VeÜZSS) is expected to enter into force on 1 January 2011.