

# ELECTRONIC DOCUMENTS IN LEGAL PRACTICE

by

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*This paper analyzes several selected topics of material importance relating to electronic documents, e.g. archiving of electronic documents, their enforcement and several possible methods for their dispatching. Furthermore, several types of electronic contracts are briefly described as well. Since it is a matter of fact that the Czech Republic made a radical change in delivering of electronic documents via so-called data inboxes, key aspects of this new and groundbreaking change relating to electronic documents are also very briefly introduced.*

## KEYWORDS

*Electronic document, archiving, emulation, migration, virtualization, enforcement, Czech Civil Procedure Act, electronic signatures, electronic mailing rooms, verification, pre-contractual phase, offer, invitation to bargain, acceptance, consideration, click-wrap agreements, click-through agreements, browse-wrap/through agreements, delivery of electronic documents*

## 1. INTRODUCTION

It is a matter of undisputed fact that the new millennium has brought with it a number of massive changes to the environment of cyberspace. The Czech Republic and its legal framework does not stand out in this fact though it has played an integral part of many European actions amending or otherwise altering the legal paradigm.

It would be immensely difficult to tackle all issues which have arisen so far within the virtual world in the territory of the Czech Republic. From a legal point of view, practical or theoretical questions related to the status of electronic documents are quite interesting. Certainly, one may say the development of attitudes towards the legal status of electronic documents is of

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material importance. However, seeing the practical implications of everyday use of electronic documents, legal aspects of electronic documents foremost should be considered from the standpoint of current applicable Czech law within a broad context.

## **2. DEFINITION AND TARGET OF THE PAPER**

When analyzing electronic documents as such, the term “electronic document” should be explained. Bearing in mind that no definition can be absolutely perfect, emphasis should be put on the fact that “electronic” here means relating to technology and having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. There is also no dispute that a “document” represents each written, visual, sound, electronic or other record in an analog or digital form which came into existence as a result of its creator’s activity, or, more precisely, a collection of digital records that provide information; such information can be either alphanumeric (textual), visual or sound and are created via various information and communication technology (ICT) devices. All characteristic features of electronic documents cannot be listed exhaustively but we can definitely agree that a typical characteristic of electronic documents is the fact that they cannot be used (read) without a special device designed for this purpose. Another vital point when considering the legal nature of electronic documents is that technically there is no difference between an original and a copy of the respective document. This has sizable significance when an electronic document is being used in the process of evidencing.

Whatever approach is taken while examining the nature of electronic documents, there are several issues affecting the concept and characteristic features of electronic documents that are necessary to take into consideration. The most critical issue which exists is the problem of inner and outer security and the integrity of a document. These problems must be closely analyzed in detail so that the persons involved in disposing with the documents do not suffer substantial negative impacts. Nowadays the questions related to electronic documents appear to be positioned in a much greater context than one could have ever imagined. In this regard sharing and dispatching of electronic documents, effective maintenance, back-up and useful and long-term archiving exist as vital concerns. These approaches *de lege lata* will directly determine the future development of the nature and other aspects of electronic documents; this means that the applicable law must adopt to these tendencies and must set up corresponding rules *de lege ferenda* so that the recipients of norms can reliably conform with the rules.

Without any doubt, a number of areas can be found which directly or indirectly relate to the topic of electronic documents. For the sake of consistency and clarity, this paper analyzes several selected topics only. In particular it shall focus on topics which appear to be of material importance, e.g. archiving of electronic documents, their enforcement and several possible methods for their dispatching. It is a matter of fact that electronic contracts can be attributed as a subset of electronic documents. Thus, several types of electronic contracts are briefly described herein as well. Since it is a matter of fact that the Czech Republic made a radical change in delivering of electronic documents via so-called data inboxes, key aspects of this new and groundbreaking change relating to electronic documents are also very briefly introduced.

### **3. ARCHIVING OF ELECTRONIC DOCUMENTS**

Nowadays, it is not possible to concretely calculate the progress of the rise of quantity of electronic documents created in every unit of time. If one tried the result would certainly be flawed as the many factors related to the amount of electronic documents change with every new day. In other words, there are many circumstances influencing this tendency. However, one tendency remains unaffected: the general desire to effectively store information contained in electronic documents. It is a wish of individuals, governments, administrative bodies, and when considered globally it can be said to be a desire of mankind. Certainly, each person has his/her own interest in storing particular information.

In relation to electronic documents one should take into account the fact that electronic documents are difficult to store due to the fact that hardware ages. This aging can be described as substantial and almost, due to many observable factors, uncontrolled. Another issue is that hardware media have not been developed to be absolutely stable so the problems with reading the stored information on such hardware cannot be easily avoided. Technically stated, the current state of the art does not allow us to be as self-confident as one might *prima facie* expect, especially with reference to the fact that hardware directly relates to an operating system under which all applications are run. Nevertheless, it would be very incorrect to reckon that current technologies offer no suitable solutions to effectively resolve this dilemma.

Generally speaking, three main principles of digital archiving do exist and can be listed as follows: 1. Emulation, 2. Migration, and 3. Virtualization. As per general understanding, these principles imply far broader ana-

lysis than this paper can offer. Therefore, it is crucial to mention several basic elements at least.

As far as emulation is concerned, the very essence of this principle lies in development of emulators of older systems in new systems. Irrespective of financial expenses which are, without any hesitation, rather high, the biggest problematic issue here is the fact that the original software must be archived. Without the archiving of the original software, no archiving of the respective data can be possible. In the perspective of the Czech Republic, this method has been predominantly used by the respective state bodies and other authorities. There is, however, confirmed doubt that from a long term perspective this method of archiving resulting from this emulation principle is unfeasible.

Greater emphasis has been paid to a relatively reliable and effective method based on the migration of the data. Migration of the data can be realized in either constant or solely ad hoc transfer of data. Migration in this context shall mean a periodical transfer of digital information from one HW/SW configuration to another. In comparison to the model analyzed hereinabove, no original software is needed, i.e. no original software needs to be periodically archived. Nevertheless, this method is not without risks. In the first place, we are talking about a high standard of time capacities required from the personal substrate managing the whole process of archiving electronic documents. This means, inter alia, employees responsible for effective archiving must constantly control the validity of the data as well as the technical feasibility of the migration. Secondly, no dispute arises that migration seems to be rather more dependent on the organization's ICT infrastructure (e.g. networking etc.).

Thirdly, when dealing with proper implementation of successful archiving mechanisms, one should not forget to take into account a method resulting from a so-called virtualization. It can be argued, to a certain extent, that this is a combination of emulation and migration. What is more, virtualization shows special features in terms of its risks. To be exact, this method of archiving does not seem to be generally suitable for all formats but rather several selected formats only (e.g. JPEG, PDF). Another tiresome worry which arises here is that a specific interpretational structure must be created so that the whole system can operate smoothly.

Considering the above mentioned, migration of the data seems to be one of the most effective methods for a smooth accomplishment of the archiving process in a large majority of cases. By all means, special characteristics of electronic documents, especially those for which such electronic documents

have been created as well as other features must be taken into account in every particular case. Electronic documents have their own life cycle and usually contain many specific patterns, parameters or even metadata so several key issues also need to be considered foremost. These may include, inter alia, effective administration of electronic documents, easy and friendly access to a database of electronic documents, security and maintenance of the stored electronic documents, etc. Financial and time parameters and other outer factors do certainly have a key impact as well.

#### 4. ENFORCEMENT OF ELECTRONIC DOCUMENTS

As per clarity, the below analysis tries to identify several key moments relating to the enforcement of electronic documents pursuant to current applicable Czech law. Needless to say, the Czech legal framework constitutes an integral part of the European *acquis communautaire* and therefore one may conclude that the below analysis can be proportionately applied to the legal framework in other EC countries. However, several special features of enforcement of electronic documents can be found only in the Czech legal system.

Following the concept of enforcement, one may say that electronic and documentary documents are legally deemed to be equal. Moreover, this principle is based in respective provisions of the Czech Civil code.<sup>1</sup> This interchangeability is vital for further analysis of enforcement itself.

It is a matter of general practice that enforcement of electronic documents represents a procedural series of methods for “establishing” or “asserting” of electronic documents. Standardized rules for such enforcement can be found in the respective provisions of the Czech Civil Procedure Act,<sup>2</sup> according to which (cit.): “A motion may be done either in writing, or orally. A written motion is delivered in a documentary or electronic form via public data network, by telegraph or by fax.” It must also be borne in mind that pursuant to the provisions of the Civil Procedure Act<sup>3</sup> any motion that contains a petition concerning the merits and that is delivered by way of a telegraph must be completed in writing within three (3) days (this fashion of counting of this period results from the generally binding rules for count-

<sup>1</sup> Cf. Act. No. 40/1964 Coll., civil code, as amended.

<sup>2</sup> Cf. Section 42 Par. 1 of the Act no. 99/1963 Coll., on civil procedure, as amended. This provision in Par. 1 further provides (cit.): “A motion may be done either in writing, or orally. A written motion is delivered in a documentary or electronic form via public data network, by telegraph or by fax. The motion may be entered orally into the minutes only in cases of a petition for commencement of proceedings on approval to enter into marriage, in proceedings on determination or denial of parenthood, in proceedings in determination whether an adoption of a child requires a consent of the parents, of adoption proceedings and in proceedings that can be commenced without a petition and in cases of petitions for enforcement of decisions issued in these kinds of proceedings.”

ing the time encompassed in the Czech Civil code);<sup>4</sup> if a written motion was submitted by fax or in an electronic form, it shall be necessary to complete it within the same period (i.e. three days) by submitting its original or, as the case may be, by submitting a written motion of the identical text.

Another important fact is that in the case that the above motions were not completed during the provided three day period, they shall not be taken into account by the respective court. If the chairman of the panel (or the sole judge, as the case may be) decides so, the participant of the proceeding enforcing the electronic document at issue must provide the court with the original (a written motion of the same text) of other motions done by fax. This system aims to guarantee procedural checks and balances for all participants.

Despite the fact that the above agenda seems to be quite clear, it should be noted that several problems cannot be ruled out. The biggest inconsistency that should be mentioned while analyzing the enforcement of electronic documents is the fact that historically, i.e. in the period from 1 July 2000 to the year 2005, there was no difference between motions submitted with or without advanced electronic signatures in the Czech Republic. This was finally changed by adoption of the decision of the Constitutional court.<sup>5</sup> According to this key and landmark decision, pure linguistic interpretation of Section 42 of the Civil Procedure Act (please see above) cannot be seen as sufficient. Further, this decision unequivocally stated that any submission provided electronically with an advanced electronic signature is fully equal to a submission provided in a documentary form. Logically, this means that a submission provided electronically without an advanced electronic signature is not equal with a traditional paper-form submission.

Continuing from the above-mentioned, electronic signatures can take a variety of forms. All of these forms have the aim to clearly demonstrate the intent of the signing party to validly authenticate the electronic document. Advanced electronic signatures as mentioned above are not special, nor significantly more secure or advanced than any other form of electronic signature. The crucial factor here is proving that an electronic signature affixed to

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<sup>3</sup> Cf. Section 42 Par. 3 of the Act no. 99/1963 Coll., on civil procedure, as amended. This provision in Par. 1 further provides (cit.): "A motion containing a petition concerning the merits delivered by telegraph must be completed in writing within three days; if a written motion was submitted by fax or in an electronic form, it shall be necessary to complete it within the same period by submitting its original or, as the case may be, by submitting a written motion of the identical text. If these motions were not completed during the provided period, they shall not be taken into account by the court. If the chairman of the panel decides so, the participant must provide the court with the original (a written motion of the same text) of other motions done by fax."

<sup>4</sup> Cf. Section 101 et seq. of the Act no. 40/1964 Coll., civil code, as amended.

<sup>5</sup> Cf. Decision of the Constitutional Court ref. no. IV. ÚS 319/05

a message has been sent by its owner, i.e. a person for which such a signature has been created. Nevertheless, according to the Czech legal framework, an advanced electronic signature<sup>6</sup> is the only possible means that can evoke the contemplated procedural legal effects.<sup>7</sup> The rationale behind this is that such a signature offers, inter alia, the highest standard of verification, and, certainly, unique authenticity of the person who has signed the electronic document.

When analyzing particularities of electronic signatures as such, it should be noted that this complex system has been used (although not as widely as expected) within the system of electronic mailing rooms (in Czech: ePodatelny). Enforcing of electronic documents here represents a special procedure for which it is typical that a submission itself can be made electronically; however, annexes cannot be lodged electronically (due to lack of verification). This means any annexes to an electronic submission must be, pursuant to the current Czech law, submitted in accordance with Section 42 Par. 3 of the Civil Procedure Act (please see above).

## 5. ELECTRONIC CONTRACTS AS ELECTRONIC DOCUMENTS

Electronic contracts, as mentioned hereinabove, do take on the nature of an electronic document and are vital for commerce and everyday business worldwide. A treatise concerning electronic contracts is sometimes considered as a separate mass of law uniquely developed in the spheres of cyberspace. Thus, commenting on all the typical features and peculiarities of contracts in their electronic form would definitely surpass the immediate objective of this paper. Thus, some selected key aspects of electronic contracts are analyzed below.

Firstly, it should be reiterated that the Czech legal system provides no express provision regulating special aspects of electronic contracts. Thus, some background can be found in the provisions of Civil and Commercial code of the Czech Republic which provides for interpretational rules as well. As far as the judicature practice of the respective courts is concerned, it is a matter of fact that no landmark case regarding the electronic contracts is present in the Czech legal framework. Considering these facts, theoretical and practical elements of electronic contracts as compared to documentary contracts should be analyzed.

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<sup>6</sup> Please see Section 11 of the Act no. 227/2000 Coll., on electronic signature, as amended.

<sup>7</sup> However, quite surprisingly, advanced electronic signatures have not been found in wide usage among Czech companies or individuals. This fact is quite hard to explain but IT experts argue that the biggest problem which prevented advanced electronic signatures from their mass expansion has been their more so their technical complexity than price (advanced electronic signature can be obtained for ca. EUR 10 p.a.)

For the sake of clarity it is important to state that electronic contracts show the same lifecycle as “normal” documentary contracts. Here we are basically talking about their (i) formation and (ii) fulfillment. There have been many theories investigating the pre-contractual phase of electronic documents.<sup>8</sup> Nonetheless, three main stages of the formation of an electronic contract can be traced. They are the offer (not: Invitation to bargain), acceptance (consent and prohibition of acceptance by silence or inactivity) and finally consideration.<sup>9</sup> Once these three major elements are fulfilled, one may anticipate that the electronic contract has been formed (provided that other requirements for a valid contract formation were fully observed). As far as the contract fulfillment is concerned, this stage belongs predominantly to the execution phase of the lifecycle of the electronic contract.

In order to show that electronic contracts have a nature of an electronic document, demonstrative list of some types of electronic contracts should be presented.

There are several types of electronic contracts that show their own distinguishing features: (i) Shrink-wrap agreements, (ii) Click-wrap agreements, (iii) Click-through agreements and last but not least (iv) Browse-wrap / through agreements.

Shrink-wrap agreements generally demonstrate license agreements or other terms and conditions of a contractual nature. An interesting fact about shrink-wrap agreements is that they can only be read and accepted by the consumer after opening the product (typically a box in which a respective CD/DVD is inserted. The term “shrink-wrap” describes the plastic wrapping used to coat software boxes containing the CD/DVD. As far as the legal implications of the shrink-wrap agreements, their legal nature is not very clear and is contested rather regularly.<sup>10</sup> The biggest concern when analyzing the substance of shrink-wrap agreements is their binding force. The question is whether they can be considered effective immediately after purchase of the plastic box containing the CD/DVD with respective software or after successful installation of the software into the computer (this means after assenting to the terms and conditions of the software license agreement). Pursuant to the Czech legislation there is no express provision regulating this situation. Resulting from the contractual principles and interpret-

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<sup>8</sup> For further information on this topic please visit the websites of law servers or, for example <http://www.internationallawoffice.com/newsletters/detail.aspx?g=78a1e2c9-9392-4bae-8e80-739a3eac137b>, or <http://www.rogerclarke.com/EC/ECDefns.html>

<sup>9</sup> Consideration is anything of value in the common sense, promised to another contracting party when making an electronic contract. It can generally take the form of money, physical objects, services, promised actions, or even abstinence from a future action.

<sup>10</sup> For a broader context please consult the landmark case: *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996)



ational rules of the Czech legislation one should conclude that shrink-wrap agreements shall gain their legal force immediately after assenting to the software license agreement and not by simply purchasing the box. The only exception could be that the license agreement was known to the purchaser before installing the software (e.g. the license agreement was printed onto the box or was presented in the shop in a visible manner).

On the other side, click-wrap agreements are formed entirely in an on-line (virtual) environment. Click-wrap agreements are intended to be a substitute for direct bargaining (bargaining face-to-face). The substance of this type of electronic contracts lies in a special requirement for them to be valid. This means that click-wrap agreements require clicking with a mouse (or any other similar device) on an on-screen icon or button to signal a party's acceptance of the contract. In practice there are two main types of these agreements: (i) Type and Click - a contracting party must type "I accept" or other specified words in an on-screen box and then click a "send" or similar button to signal acceptance of contractual terms and (ii) Icon Clicking - a party simply clicks an "I accept," "I agree," "I assent" or similar icon to indicate acceptance of the terms and conditions. Naturally, the latter method implies considerably lower threshold of protection of the whole transaction. The most important task for lawyers dealing with the cases in which the click-wrap agreements are involved is to define the moment from which these agreements are binding and thus enforceable. It has not been contested that click-wrap agreements are legally binding as long as the user (one of the contracting parties of the transaction) had an opportunity to review the terms and conditions before assenting to them via clicking on the "I agree" or similar button.

Very similar to click-wrap agreements are so-called click-through agreements. There are only few differentiating criteria. The most notable is that click-through agreements are commonly considered as more complex and more time-consuming to be validly formed. Words that clearly indicate acceptance with the terms and conditions include the same turns of phrase ("I agree"; "I consent"; "I accept" etc.) and words that clearly indicate rejection generally include "I disagree"; "I don't accept"; "I decline" etc. For the sake of completeness it should be stated that several words are not suitable for these contracts. The reason for this is the fact that they cannot express unambiguous and clear assent or disapproval with the terms and conditions. Such words include "Process my order"; "Continue"; "Next page"; "Submit"; "Enter"; or "Download". For successful business framework these expressions are strongly advised not to be used in virtual contracting. Just like

with click-wrap agreements, the click-through agreements should offer several facts to demonstrate their “legal purity” and subsequent certainty that they can evoke contemplated legal binding effect. This usually includes opportunity to review terms (display of terms, assent to terms, opportunity to correct errors at any step of the transaction, ability to reject terms (button as “I disagree” are presented next to approving buttons etc.), ability to print the terms before assenting to them etc. Similarly to the click-wrap agreements, the click-through agreements are legally binding as long as the user had an opportunity to review the terms before assenting to them.

To make this analysis complete it should be noted that sometimes practicing lawyers have to tackle the legal status of so-called browse-wrap or browse-through agreements as well. Set out the terms and conditions to which the user must agree in exchange for using the site (a browse-wrap license is part of a website and users of the site assent to the contract when visiting it). Sometimes, there does not necessarily need to be a direct way of signaling assent with the terms. One of the typical features is that any acceptance of the agreement (if it comes), must be contingent on the mere act of browsing a particular website. Although the European judicature is still absent, American courts<sup>11</sup> have developed quite a well-organized manual to understand this type of electronic contract. For better understanding, some examples of these browse-wrap clauses can be illustrated:

**SITE TERMS** By accessing Nokia World Wide Web pages you agree to the following terms. If you do not agree to the following terms, please notice that you are not allowed to use the site

**CONDITIONS OF ACCESS** By accessing this website and any pages thereof, you agree to be bound by the terms and conditions below. If you do not agree to the terms and conditions below, please discontinue access immediately.

As far as the enforceability of the browse-wrap agreements, this must be analyzed solely ad hoc on a case-by-case basis. To be exact, there are no “bright-line” rules to identify whether each particular browse-wrap clause can be seen as enforceable. In the case of doubt, the whole hierarchy of interpretational rules of theory of law comes to the issue.

## 6. DELIVERY OF ELECTRONIC DOCUMENTS

There are a number of methods for successful delivery of electronic documents from the very traditional to brand new. The “classic” way is to store an electronic document on the carrier (e.g. a CD) and dispatch it by post. Of

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<sup>11</sup> Please consult for example one of the landmark cases: *Specht v. Netscape*. No. 01-7860 (L) (2d Cir., October 1, 2002.

course, this method is believed to be the slowest. Modern technologies have brought several new methods, such as dispatching electronic documents via electronic mail or via electronic mail with an advanced electronic signature (please see above). Uploading electronic documents on particular private or commercial servers has also found its way into use especially among users not paying so much attention to security issues. To this category belong ftp servers, specially designed form deliveries or instant messaging as well. In addition to the aforementioned, the Czech Republic implemented a brand new system of official dispatching of electronic documents in 1 July 2009. This method is realized via so called data inboxes pursuant to the Act no. 300/2008 Coll., on electronic legal acts and documents authorized conversion.

Official delivery with state authorities is carried out via secured channels and publicly protected methods which are preferred. It is also important to add that several acts require specific procedures for the dispatching of electronic documents. However, currently the major method is offered by the Information system of the data inboxes pursuant to the above Act no. 300/2008 Coll.

## **7. CONCLUSION**

Electronic documents represent quite a broad area of law to investigate. They exist, as explained above, in a number of forms. It is believed that their usage keeps increasing as the virtual world moves towards new paradigm with numerous new elements. As far as the *de lege ferenda* view, one may expect higher value of specification towards the unified standard of electronic documents as well the adoption of other specific norms for tackling several unresolved issues concerning electronic documents.