

# E-signature: Where do we stand today?

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## Key takeaways

- **Electronic signatures are only slowly gaining acceptance in everyday life although Switzerland introduced the first legal basis in 2000.**
- **Cumbersome handling is often used as an argument against the use of electronic signatures. The practical advantages, however, of digitally signed electronic documents are often overlooked: If used correctly and carefully, electronically signed documents can avoid procedural problems of proof, which may arise with paper documents.**
- **Digitalization is progressing in dealings with authorities. In the canton of Zurich, it should be possible to communicate with the cantonal authorities purely digitally, including signing documents, without media discontinuity as of 1 January 2025.**

## Introduction

Digital or electronic signatures ("e-signatures") are an important prerequisite for digital business transactions, both between private individuals and with public authorities. Although Switzerland has regulated electronic signatures by law since 2000, they are only slowly gaining acceptance in practice.

The reasons for this do not always seem entirely clear. Some argue that setting up or using an e-signature is cumbersome. If several parties must sign, this problem can become pronounced. In some cases, there are uncertainties regarding mutual recognition in international relations.

Two recent court rulings provide valuable information on how to handle e-signatures carefully and what advantages can be gained for the court-proof documentation of business cases.

## Legal basis

The legal requirements for the technical properties of electronic signatures were first formulated in 2000 in the form of the Certification Services Ordinance (ZertDV; SR 784.103), which was replaced in 2005 by the Signature Act (ZertES; SR 943.03). The ZertES was completely revised in 2016 (in force since 1.1.2017) and adapted to the state of the art at the time. Within the European Union (EU), the ZertES corresponds with Regulation (EU) No. 910/2014 of 23 July 2014 regarding electronic identification and trust services for electronic transactions in the internal market (so-called eIDAS Regulation).

Two provisions on the use of the e-signature in private legal transactions from the Swiss Code of Obligations (CO) are significant in practical terms: In principle, where a signature is required, it must be written by hand (Art. 14 para. 1 CO), often called "in wet ink". An authenticated electronic signature (QES) combined with an authenticated time stamp, within the meaning of the ZertES, is deemed equivalent to a handwritten signature (Art. 14 para. 2bis CO). Also of note, a signature reproduced by mechanical means is recognized as sufficient only where such reproduction is customarily permitted (Art. 14 para. 2 CO).

Not every contractual document needs to be signed. Many contracts can be concluded without observing any particular form (e.g., purchase contracts for chattel) so that an exchange of e-mails or a scanned signature is completely sufficient. Only where the law or the specific agreement requires written form (e.g., in an assignment of claim case, pursuant to Art. 165 para. 1 CO) must the signature be handwritten. According to the above, this signature can be replaced by a QES.

## Recent case law

### No shortcut where the QES is required

In December 2023, the Zug High Court had to rule on a commercial register block concerning the legal validity of an assignment of shares (ruling of 14.12.2023, case no. Z2 2023 67). Uncertificated registered shares must be transferred by means of a written declaration of assignment. In the specific case, this declaration of assignment was signed via a well-known signature solution. The alleged shareholder (appellant) claimed that the transferor had "directly and personally affixed his signature to the "declaration of assignment" opened in PDF format - in all probability using a tablet pen on a trackpad. This assertion, however, was made only in the appeal proceedings and therefore belatedly. Nevertheless, the court dealt with the legal qualification of such alternative e-signatures. The court ruled in the sense of an obiter dictum that the written form requirement was not fulfilled.

Disputed in legal literature is whether a signature executed on a trackpad and digitized simultaneously can be considered a handwritten signature. Proponents take the view that it is the movement of the hand, not the data carrier (paper, etc.) that is important. The court emphasized that the authors who affirm this must at least require a sufficiently high resolution of the digitized signature as well as the "recording of the intensity of the writing pressure". These are highly technical requirements.

Other authors consider a scanned signature that is subsequently inserted into an electronic document to be sufficient, as it is hardly possible, in the current state of technology, to distinguish a subsequently inserted signature from a scan of a paper document that was previously signed by hand in the conventional manner. The court clearly states that if this minority opinion were to be followed, the provision of Art. 14 para. 2bis CO would become obsolete. This would obviously contradict the meaning and purpose of the law. Accordingly, the minority opinion should be rejected.

### Advantages of QES in the law of evidence

In November 2023, the Swiss Federal Supreme Court had the opportunity, in BGer 5A\_439/2023 of 23 November 2023, to shed light on questions relating to the authenticity of private documents. Specifically, it dealt with the question of whether the lower court could rightly demand the submission of the original of a written acknowledgement of debt. The creditor had submitted a copy of an invoice as a legal title in the provisional legal opening proceedings, pursuant to Art. 82 of the Federal Act on Debt Enforcement and Bankruptcy (DEBA). This copy of the invoice bore the debtor's handwritten signature next to the date and the note "Bon pour accord".

In civil proceedings, the following rules apply to documentary evidence, which also apply to the procedure for provisional legal opening:

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| Art. 8 CC            | Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.   |
| Art. 82 para. 1 DEBA | If the claim is based on an acknowledgment of debt, established by public deed or confirmed by signature, the creditor may request provisional dismissal of objection ("provisorische Rechtsöffnung").  |
| Art. 178 CPC         | The party invoking a physical record must prove its authenticity if this is disputed by the opposing party; the opposing party must give adequate grounds for disputing authenticity.   |
| Art. 180 para. 1 CPC | A copy of the physical record may be produced in place of the original. The court or a party may request that the original or an officially certified copy be produced if there is justified doubt as to the authenticity of the physical record. |

The wording of the two provisions of the Civil Procedure Code (CPC) is anything but clear. In an earlier decision, the Federal Supreme Court explained the correct meaning as follows (BGE 143 III 453 E. 3): Art. 178 CPC concerns authenticity in the narrow sense, i.e., it deals with the question of whether the document actually originates from the person who is recognizable as its author. This applies in particular to documents that are signed. Art. 180 CPC then concerns authenticity in the broad sense, i.e., the question of whether the content of the copy and the original match. The submission of the original allows the court to determine whether there are

any discrepancies between the copy and the original.

In the specific case, the debtor argued that it appeared to him that his signature had been transferred from another document to the copy of the invoice in question. He did not provide any substantiation for this assertion. However, without a credible justification, the lower court was not allowed to reject the copy of the invoice in application of Art. 180 CPC. The provisional dismissal of objection (provisorische Rechtsöffnung) should therefore have been granted. The debtor would then have been entitled to bring an action for release from a debt (Art. 83 para. 2 DEBA).

This is where the practical advantages of the e-signature become apparent. In the case of an acknowledgement of debt in PDF form, not only the authenticity of the e-signature (QES), but also the integrity of the PDF signed with the QES could be verified very easily as part of an inspection. To be sure, a document signed by a QES does not qualify as a certified copy. Nevertheless, it is technically possible to verify with a high degree of probability whether someone has subsequently changed the signed document (for example by copying in a signature or a note from another document). If the author of the e-signature wants to prove to the court that the document was forged, he must provide reliable evidence that he was unable to sign the document at the time in question (e.g., due to a stay in hospital without access to the application for signing, etc.).

In other words, setting up an e-signature may be more time-consuming than signing with a ballpoint pen. Compared to the analog world, however, the e-signature can score points with greater (evidentiary) legal certainty. Of course, one thing must not happen: the loss of access data to unauthorized third parties. Clearly, this applies to all essential digital functions such as e-banking and others.

## **Outlook**

### **Zurich administrative procedure goes digital**

In October 2023, the Zurich Cantonal Council decided to amend the cantonal Administrative Procedure Act (VRG). Once it comes into force (expected on 1.1.2025), submissions can be submitted electronically, and orders issued by the authorities can also be communicated electronically. This process applies in particular to the administrative authorities of the canton, the municipalities and the districts, the bodies of cantonal public institutions (e.g., the University of Zurich and Building insurance institution), and the bodies of cantonal public corporations (e.g., ecclesiastical bodies or municipal special-purpose associations).

This submissions system will make it possible to communicate electronically with the administrative authorities in the canton in administrative procedures without media discontinuity.

**Future improvements by the legislator**

Mutual recognition of the Swiss and EU QES would certainly be desirable for business transactions with international parties. The preliminary draft of the ordinance on electronic procedural acts in Zurich cantonal administrative procedures (VeVV) provides, for example, that in the case of electronic government services, aimed at foreign nationals without a foreigner's identity card, identification can also be carried out using an electronic identity in accordance with the eIDAS Ordinance.

Author: Markus Winkler (Counsel)

**No legal or tax advice**

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**Markus Winkler**

Counsel  
Attorney at law, Dr. iur., Dr. sc. math. ETH

Pestalozzi Attorneys at Law Ltd  
Feldeggstrasse 4  
8008 Zurich  
Switzerland  
T +41 44 217 92 59  
[markus.winkler@pestalozzilaw.com](mailto:markus.winkler@pestalozzilaw.com)



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