

Electronic legal correspondence in Switzerland: the latest developments

By **Christoph Gasser**

Introduction

Like the rest of the world, the field of law is becoming increasingly digitalized. This trend, which is already significantly more advanced in surrounding countries, has been addressed by the Swiss legislature through various provisions in the federal legal procedures. The specific implementation and use of the new resources is still in its infancy, however. This article discusses the latest developments relating to electronic legal correspondence in Swiss law, with references to Austrian law. In particular, it introduces the reader to the instrument known as the 'SuisseID' and points out the benefits and disadvantages of this new technology.

Electronic Submissions

The Swiss legislator has recently given parties in legal proceedings a number of options for submitting petitions to courts or government agencies in electronic form.¹ These provisions were specified in further detail in the Ordinance of the Swiss Federal Council of 18 June 2010 regarding electronic transmission in criminal and civil processes and in DEBA (Swiss Federal Debt Enforcement and Bankruptcy Code) proceedings.

In an electronic transmission, the document that is submitted must possess a recognized electronic signature of the sender.² Following many unsuccessful attempts to establish an electronic ID, the federal government introduced the SuisseID approximately two years ago, and this instrument has since made significant headway.³ The SuisseID, which can be used to sign documents electronically pursuant to the requirements of the CPC, CCP, and DEBA, is also supported by the Swiss Bar Association (SBA). In Austria, the new technology is already in use by most law firms. The extent to which the SuisseID will be

able to gain acceptance among Swiss lawyers remains to be seen.⁴

Legal Comparison: Electronic legal correspondence in Austria

Austria has a long tradition with respect to the use of electronic legal correspondence with government authorities. Submissions to courts in electronic format have been possible since 1990. Commercial and land registers administered by the courts were added later. This trend received a boost through the creation of a comprehensive statutory basis in procedural law at a national level.⁵

Other factors also contributed to the fact that Austria is now ahead of Switzerland with respect to electronic legal correspondence:

1. Centralized federal data center for large legal applications;
2. Mandatory use of the court electronic legal correspondence system for notaries and attorneys;
3. Strict formalization of payment claims and requests for enforcement;
4. Electronic archiving of records possible in commercial and land register proceedings;
5. Centralized register of residents for government agencies and courts.

These general conditions have produced great benefits for all of the parties involved. They have especially led to cost savings. The standardization of submissions has also significantly enhanced their quality. In addition, the 'Archivum' platform was created to act as a central archive for the benefit of attorneys throughout Austria. This platform allows for the high-quality archiving of records for a period of

¹ Art. 130 CPC (Swiss Federal Civil Procedure Code), Art. 33a DEBA, Art. 110 CCP (Swiss Federal Code of Criminal Procedure).

² Art. 130 CPC para 2, Art. 33a DEBA.

³ Weder, Anonymität noch Radiergummi, digma 2010, 149.

⁴ Andrea Schafer and René Rall, *Mitgliederausweis mit SuisseID: Eine Zwischenbilanz des SAV*, in *Anwaltsrevue* 11-12/2010, 461 and following.

⁵ Sections 89b and 89c of the Austrian Act on Organization of the Courts (AAOC).

between seven and thirty years, which significantly increases legal security.⁶ A similar solution would also be desirable in Switzerland, since it would permit statutory archiving requirements to be met at any time.⁷

From the Swiss perspective, and in light of what the Austrian government has achieved, the objective should be to avoid the implementation of isolated solutions within individual cantons because of the federalist nature of the Swiss government. On the contrary, it would be desirable to have uniform standards that could produce benefits similar to those achieved in Austria in recent years.⁸

Electronic Legal correspondence: from vision to reality

At a conference in Bern on 8 December 2011, the SBA laid out the principles that must be followed in order to help Switzerland achieve paperless, electronic legal correspondence based upon the Austrian model. In Austria, the ability of parties and their representatives to communicate electronically with courts and public prosecutors has already been comprehensively implemented at all levels. This has reduced postage costs within the justice system by euro 9 million per year.

The electronic legal correspondence system is fast, cost-effective, quality-enhancing, secure, and reliable. The SBA therefore demands that framework regulations be created at the federal level for electronic archiving management within the cantons. The federal government is authorized to do so based upon the new legal procedures. According to the SBA, attorneys, government agencies, and courts should also work on establishing a statutory requirement for electronic submission and receipt. A centralized electronic file management system would also be desirable in the view of the SBA. Thus the federal government should make the technical vehicle available and should define the interfaces as well as the format, while the cantons should retain sovereignty over the contents. This would limit the

⁶ Statutorily prescribed archive pursuant to Art. 91 c AAO; cf. <http://www.archivium.at/>.

⁷ Art. 9 Ordinance on the Management and Preservation of Business Records (Swiss Business Records Ordinance; SR. 221.431) of 24 April 2002.

⁸ Georges Chanson, Elektronischer Rechtsverkehr – Blick über die Grenze nach Österreich, *Anwaltsrevue* 11-12/2011, 488 and following.

intervention into cantonal areas of authority to the level of technical specifications.

The SBA therefore wishes to continue to motivate and provide political support to the federal government for removing the obstacles currently standing in the way of electronic legal correspondence, to create the necessary statutory foundations that authorize the federal government to undertake purposeful measures for providing the technical conduits for electronic legal correspondence, as well as at least partially financing these.⁹

SuisseID

The Attorney SuisseID is the first standardized electronic proof of identity in Switzerland that enables both a legally valid electronic signature and secure authentication.¹⁰

First practical experiences with the SuisseID

The SuisseID has since been launched, and has already been widely disseminated and well received among attorneys based upon an initiative by the SBA. The process of ordering a SuisseID has been constantly improved since the launch, and should not be a problem for most people.

One of the primary areas of application for the SuisseID is the signing of e-mails. With this signature, the recipient can verify firstly that the e-mail actually originates from the sender, and secondly that the message has not been changed. The process of signing e-mails is clearly explained, and should not present significant problems to anyone who works with the Windows operating systems and Microsoft Outlook.

The provider of the SuisseID offers a secure e-mail certificate, which in addition to signing e-mails and electronic data also enables the encryption of e-mails and attachments. The introduction of this secure e-mail certificate entails various restrictions, however. For example, both the sender and the recipient of such e-mails must use a SuisseID with a secure e-mail certificate.

Another primary area of application for the SuisseID is the signing of electronic data. From the perspective of an attorney, of course, electronic submissions to

⁹ Andrea Schafer, 'Durchklick' - Elektronischer Rechtsverkehr (ERV): von der Vision zum Durchbruch? - Der Ball liegt bei den Behörden, *Anwaltsrevue* 2/2012, 97 and following.

¹⁰ <http://www.suisseid.ch/>.

government agencies must also be mentioned. It should be noted that a timestamp service must still be manually installed to allow precise tracking of the exact time of signature for the electronic document.¹¹

Using the SuisseID for e-mail correspondence with evidentiary force

Since 1 January 2011, the SuisseID has enabled legal correspondence with the civil courts and the prosecutorial authorities. Digital certificates ensure greater legal security in e-mail correspondence, since their characteristics allow for clear identification of the sender as well as authorization of a user's rights, ensure that information cannot be changed, and guarantee the confidentiality of information, while also ensuring that the correctly purported¹² sender cannot contest the information.

Pursuant to article 177 of the CPC, all documents that are suitable for proving legally material facts are considered as records. Such documents likewise include electronic files.¹³ Under evidentiary law, suitability as a source of information is sufficient here.¹⁴ E-mail is an electronic file and is suitable for containing legally material facts; thus it can be considered as a record within the meaning of article 177 of the CPC.

In legal correspondence, then, a copy of e-mail can be submitted on a data medium or as hard copy.¹⁵ As is the case for other records, the evidentiary value of e-mail is subject to the discretion of the court in its evaluation of evidence.¹⁶ It makes no difference whether an e-mail is submitted as a copy or as an original. In both variants, the original integrity of the data must be secured. In contrast to paper documents, which cannot be easily falsified, e-mails can be easily changed. It is precisely here that digital

certificates can be used to track changes to e-mail and help prevent forgeries.

Pursuant to article 178 of the CPC, however, general doubts regarding the authenticity of e-mail are not presumed due to ease of falsification. Evidence of authenticity must be produced only after a substantiated complaint by the opposing party. If SuisseID digital certificates are used, then these can be utilized as evidence of authenticity.¹⁷

Authentication using the SuisseID

In addition to qualified digital signatures, the SuisseID also serves as electronic proof of identity. Rather than employing a username and password, the user can log in to obtain access to on-line services by using the SuisseID and a PIN. Providing only the owner of the SuisseID can log in and, in particular, is able to successfully prevent others from abusing their SuisseID and PIN, this in principle increases security. One factor that must be considered, however, is that the SuisseID requires the presence of a card scanner, which may not only be by-passed, but which in any case restricts its scope of use.¹⁸ Moreover, if on-line services therefore offer a parallel log-in option with username and password, this will further mitigate the gain in security.

The SuisseID itself contains merely the name of the person and a serial number. Additional user features are stored with the IdP service¹⁹ of the SuisseID provider. These features can be retrieved only with the user's express consent – or by somebody that has obtained sufficient information to masquerade as the user.

The SuisseID therefore also serves as an instrument for authentication. As the SuisseID becomes more widely employed, an increasing number of on-line vendors will use this form of log-in. A number of services already exist in the area of e-government.²⁰

¹¹ Christian Leupi, *Erste Praxiserfahrungen mit der SuisseID*, *Anwaltsrevue* 11-12/2010, 464 and following.

¹² Cf. Stephen Mason, *Electronic Signatures in Law* (3rd edition, Cambridge University Press, 2012), 286-292.

¹³ Annette Dolge in: Karl Spühler/Luca Tenchio/Dominik Infanger [eds.], *Basler Kommentar, Schweizerische Zivilprozessordnung*, Basel 2010, CCP 177 N 7.

¹⁴ 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.

¹⁵ Annette Dolge in: Karl Spühler/Luca Tenchio/Dominik Infanger [eds.], *Basler Kommentar, Schweizerische Zivilprozessordnung*, CCP 180 N 8-10.

¹⁶ Message of the Swiss Federal Council on the federal Code of Civil Procedure, 7323.

¹⁷ For more on this topic, see Adrian Rufener, *Mit der SuisseID zum beweiskräftigen Mailverkehr*, *Anwaltsrevue* 11-12/2010, 466 and following.

¹⁸ Regarding by-passing of card scanners by thieves, see, e.g., Stephen Mason *Electronic Banking: Protecting Your Rights* (PP Publishing, 2012).

¹⁹ The IdP (Identity Provider) is the party that creates and stores digital identities.

²⁰ For more on this topic, see Christian Leupi, *Erste Praxiserfahrungen mit der SuisseID*, *Anwaltsrevue* 11-12/2010, 486.

Deadlines in electronic correspondence with government agencies

In contrast to the analog world, electronic correspondence with government agencies depends not on the date that a document was sent, but rather the date of confirmation of receipt. Thus, even though confirmation is generally generated and sent promptly, there is a dependency on the informatics system. This is a disadvantage that must be accepted under the law in force.

It is worth noting that depending upon the procedural law (CPC, CCP, Swiss Federal Administrative Procedure Act [APA]) and the court (cantonal courts, federal courts), there are slightly different formulations of the regulations on compliance with deadlines and delivery methods of delivery. A harmonization of these regulations in the interests of legal security would be a welcome development.²¹

Conclusion

Given the increasing digitalization of legal correspondence, it is time to efficiently and pragmatically exploit the opportunities for electronic legal correspondence that have been created by the legislature. The SuisseID in particular is a very promising instrument for ensuring security in electronic legal correspondence.

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²¹ For more on this topic, see Christian Leupi, Erste Praxiserfahrungen mit der SuisseID, *Anwaltsrevue* 11-12/2010, 335.