

Providing Evidence with Electronic Documents in Germany

Project Group Constitution Compatible Technology Development
(provet)

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U N I K A S S E L
V E R S I T Ä T
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Projektgruppe
verfassungsverträgliche
Technikgestaltung



Outline

- **Electronic documents as a means of evidence**
- **Advantages and drawbacks of digital imaging**
- **Suggested solutions**

- Evidence
- Imaging
- Solutions

- **5 Different Means of Proof**
 - Witness
 - Expert Witness
 - Interrogation of a party
 - Deed (Urkunde)
 - Object to judicial inspection
- **Electronic Document?**
 - No deed
 - not in writing
 - only readable by means of technical devices
 - Consequence: object to judicial inspection,
on principal free estimation of evidence

- **Evidence**
- Imaging
- Solutions

- **No Signature**
 - No proof of integrity or authenticity
- **Simple Electronic Signature**
 - No proof of integrity or authenticity
- **Advanced Electronic Signature**
 - Proof of integrity if secure hash- and public key algorithms are applied.
 - No proof of authenticity
 - Qualified certificate not required
 - Secure signature-creation-device not required

- Evidence
- Imaging
- Solutions

- **Genuineness**

- Private document: prima-facie-evidence

Documents are presumed genuine unless there are justified doubts that the signed declaration originates from the holder of the private key,
§ 371a (1) Code of Civil Procedure (CCP)

- Public document: legal presumption of genuineness

Documents are presumed genuine unless the contrary is proven,
§§ 371a (2), 437 CCP

- **Probative value: like deed (Urkunde)**

➤ No free estimation of evidence

- Private document:

proof of declaration contained, § 416 CCP

- Public document:

proof of facts or administrative decisions, §§ 415, 417, 418 CCP

Advantages and Risks of Document Imaging

- Evidence
- **Imaging**
- Solutions

- **Advantages**

- entirely electronic document management
- space-saving archiving
- permanent availability of the documents
- Documents are easy to find.

- **Risks**

- stamps, seals and handwritten signatures lose their functional capability
- source or target document can be falsified
- risk of failures during the transformation process
- limited probative value

- Evidence
- **Imaging**
- Solutions

(Automated) Document Imaging and Destruction of the Paper Originals (Replacing Document Imaging):

- **Legality?**
 - Does the use of scanned documents comply with legal obligations to others?
Given the additional risk, an explicit legal basis is needed.
Such exist for commercial books, tax documents, social security documents.
- **Probative Value?**
 - Is the use of scanned documents advisable in the demonstrator's own interest?
Probative value is not inferable from the legality!

Submission of Written Evidence (Urkunde)

- Evidence
- **Imaging**
- Solutions

- **Submission of Evidence**
 - Presentation of the original, § 420 CCP
 - Exception for public deeds: certified copy sufficient, § 435 CCP
also certified electronic copy
- **Consequence**
 - On principle, rules of written evidence only apply to paper documents.
 - Unqualified for written evidence:
 - Private scanned documents
 - Automatically scanned documents (private and public)Free estimation of evidence; authenticity must be proven.

- Evidence
- Imaging
- **Solutions**

Policies for Proper Digital Imaging

- correspondence of the contents of source and target document
use of reliable scanners
- integrity of the transformed data
security: electronic signatures
- attributable transformation
security: electronic signatures
- operation of transformation system only by authorised persons
security: attribute certificates
- suitability of the target document for legal relations
use of stable standard data formats
- reliability of imaging systems and imaging service providers
audits and certification systems

Suggestions for Legal Solutions (1)

- Evidence
- Imaging
- **Solutions**

- **Proper Digital Imaging**
 - statutory definition of policies for proper digital imaging
 - audits and certification of transformation systems
- **Legality**
 - statutory clarification concerning the legality of Replacing Document Imaging

Suggestions for Legal Solutions (2)

- Evidence
- Imaging
- **Solutions**

- **Law of Evidence**
 - creation of a clear rule concerning the probative value of properly scanned documents bearing a qualified electronic transformation seal:
rebuttable legal assumption to the extent of the statements of the seal
 - correct transformation
 - correct assay of the correspondence of source and target document
 - integrity of the document since transformation

Thank you for your attention!