

THE CORONAVIRUS LOCK-DOWN: ARE ELECTRONIC SIGNATURES A POSSIBLE SOLUTION UNDER CZECH LAW?

The Czech Republic counts as one of the most radical countries in the European Union when it comes to restrictions on social contacts put in place due to the coronavirus pandemic. Initially, the set of measures introduced mainly restricted private life, including instruction in schools, social gatherings, cultural and sports events, and personal travel. In the beginning of the last week, however, another set of restrictions has been introduced which is having a much more significant impact on businesses, see our client briefing on this topic [here](#). This week, the lock-down measures described in that briefing have been extended to last until at least 1 April, 2020.

The question which is now being asked multiple times every day is whether the traditional process of document execution may be replaced by electronic means. Despite the fact that legislation governing electronic signatures has been around for quite some time already, the answer is unfortunately still not a straightforward one. This briefing considers the position on electronic signatures under Czech law and discusses the possibility of having a contract signing executed remotely during these "working-from-home" times.

FORMATION OF CONTRACTS UNDER CZECH LAW

Generally, an agreement is not required to be in writing for it to be valid under Czech law. Agreements may be validly entered into orally, electronically or in a physical paper document

In the context of business contracting, a reasonable rule of thumb is that the written form would usually not be required unless the contract relates to real estate, to shares in limited liability companies, or unless it attempts to form a right in rem. In those circumstances, however, the mere written form might not be enough as official verification of signatures will often be required as well. As we will explain below, this presents a wholly different level of complexity (see "Points to consider" below).

The second reason why the written form might be required is that the parties have themselves agreed so – such as for the purposes of amendments of previously concluded contracts, notices to be served thereunder, etc. Experience shows that, in day-to-day commercial dealings, the self-imposed written form requirement may actually be confronted more frequently than that imposed by the law.

E-SIGNATURES UNDER CZECH LAW

Where a written form is required, the Czech Civil Code provides that such form shall be regarded as maintained if the signatories act via electronic or other technical means provided that such means allow for the contents of their actions to be reliably captured and the acting persons to be reliably identified.

On its face, therefore, the Czech Civil Code allows for the possibility to execute documents that require the written form, including contracts, electronically, instead of in a classical paper-and-pen way. However, realizing that possibility in a reliable way in practice may be challenging, especially for parties who do not have the requisite technology in place upfront.

HOW TO SIGN ELECTRONICALLY

The simplest way to sign a document electronically is to attach to it so-called "simple electronic signature." No special computer program is necessary for this kind of signature. A simple statement of the signatory's name at the end of an email or a JPG image of his or her hand-written signature attached to a PDF document will suffice to qualify as a simple electronic signature.

However, this kind of signature does not bring the desired level of trust and a document signed this way may be easily changed in the future without the parties knowing about it. Moreover, although there is a certain level of unclarity in Czech case law on this point, it is safer to assume that this sort of signature would not suffice to maintain the written form. Thus, the usage of this type of signature cannot be recommended where the written form is required, either by the law or by the parties' agreement.

As a result, one would need to use electronic signatures with a higher level of security and evidential value. These are either an "advanced electronic signature" or a "qualified electronic signature."

In order to be able to sign with an "advanced electronic signature", the signatory first needs to obtain a certificate. Generally, a one-off third party verification of the identity of the signing person is required prior to issuance of such certificate. This verification is usually done in person (by e.g. checking an ID card). The certificate may be either "commercial" or "qualified". While the commercial certificate may be issued by a wide variety of entities, the qualified certificate brings a higher level of legal certainty and, unlike the commercial one, is recognized by public authorities. As a result, it may be issued only by a selected list of issuers listed at [this link](#).

Consequently, parties caught by the lock-down cannot use this option readily without the travel and social contact needed to obtain the certificate. Our view is that the lock-down rules currently in place in the Czech Republic would not prevent such travel and contact as they contain exemptions for work and business purposes. However, under the current circumstances, it might be more challenging to find an authority issuing the qualified certificate as many of them are currently closed.

The highest level of electronic signature (and thus the most technologically secure) is the "qualified signature," which, pursuant to the eIDAS Regulation, has the equivalent legal effect of a handwritten signature in all EU Member States. In order to use this signature, the signatory must own a chip card, USB token or a similar signature creation device. Both the advanced as well as the qualified signature ensure that any change to the signed document is visible and thus bring a much higher level of legal certainty.

Unlike in other EU Member States, Czech law also acknowledges a so-called "recognized electronic signature." However, this is not an independent signature level itself, rather, it is merely a local term of art referring to either a qualified electronic signature or an advanced signature based on a qualified certificate. Importantly, when submitting electronically executed documents to public authorities, Czech laws require the signature to be at the level of the recognized electronic signature.

POINTS TO CONSIDER

There are certain cases in which electronic signatures cannot or should not be used even if parties have the requisite technology in place.

The first thing to consider is what type of document must be signed. If Czech law requires an officially verified signature of a document (e.g. in relation to share purchase agreements regarding shares in a limited liability company), there is, at the moment, no reliable way to achieve such a signature through electronic means. A new Act on the Right to Digital Services

has been introduced to this end, however, the provision which will allow documents requiring an officially verified signature to be executed electronically will only come into effect in 2022. Similarly, agreements which must be made in the form of a notarial deed (such as Memorandum of Association/Foundation Deed of a limited liability company or a joint-stock company, or agreements on an enterprise charge) also cannot be executed electronically. Lastly, if there is a requirement for a document to be apostilled, this may not be achieved electronically either. If a transaction involves this type of documents, the signing simply cannot be achieved remotely to a full extent.

Another point to consider is the question of governing law of the document to be executed electronically. After all, even after the adoption of the eIDAS, it is still the national laws which determine the legal effect of electronic signatures. In cross-border transactions involving parties from various jurisdictions or with documents governed by laws other than Czech law, an assessment of whether an electronic signature may be used by the parties must be carried out. Similarly, if there is a possibility of litigation, enforcement or any other action in relation to the document which would be conducted outside of the Czech Republic, the form of the original executed document may be important and must be taken into account prior to the execution of the document as well.

E-SIGNING PLATFORMS

An alternative to obtaining the qualified or advanced electronic signature is to create an account within an e-signing platform which generates signatures (such as DocuSign, Eversign or SignNow). Even though there are a variety of issues the parties need to take into consideration before using them (data protection, functionality, compatibility, compliance with regulations etc.), usage of such platforms will indeed simplify and speed up execution arrangements and keep a record of who signed when. Unfortunately, at the moment, these platforms do not seem to be interoperable and thus one and the same platform should be used by all parties signing the document. Nonetheless, at least some of the platforms should be able to offer all eIDAS-compliant electronic signatures and thus can arguably be used in the Czech Republic even for documents requiring the written form. In any case, the parties should always check whether the other electronic signature on the document which they are about to sign is valid and whether it has got the requisite security and evidential level.

WHAT LIES AHEAD

At the moment, not many businesses in the Czech Republic own an account on an e-signing platform and there has to date been very limited demand for electronic execution in complex, multi-party or multi-jurisdictional deals. This may change significantly due to the challenges connected with the spread of coronavirus. It is fair to say that larger business organizations in the Czech Republic often have got advanced or qualified signatures in place, although these are often only used in dealings with governmental agencies. It is quite possible that the lock-down imposed in relation to the Covid-19 pandemic might accelerate the deployment of these tools into business to business communications as well, including contract execution.

However, even though a rapid increase in electronic signing processes may be expected, a broad adoption of e-signature processes, in particular in cross-border situations, could still be hindered by the limitations outlined above.

If you are interested in this topic in other jurisdictions, please see our global briefing: [Coronavirus: Electronic signatures: when can these be used? A global perspective.](#)

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