THE E-RECORD IN LEGAL PROCEEDINGS: VALIDITY AND EFFECTIVENESS

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Nobody is unaware of the gradual spread of Information and Communication Technologies that allow enterprises, private individuals or the administration[1] to add and use new tools. Concerning this new context, the law needs to face up this new reality with the aim of regulating conditions and legal effects regarding the use of these new tools in the extraprocedural or procedural development, which is the one that interests us as they can be used as instruments or evidences along with the rest of instruments and evidences recognized in the Spanish Civil Procedure Act[2]. Indeed, it has been said that the history of law is determined by three revolutions: the writing, the printing press and the electronic data sorting[3].

However, nowadays it can be stated that we are still looking for the path to achieve a peaceful and harmonious coexistence between the law and new technologies regarding not only the scope of the Substantive Law but also the Procedural Law, in which we must class the topic which concerns us, i.e. the validity and effectiveness that needs to be granted to electronic records as evidences in court proceedings.

Nobody is unaware that evidences are the key of the legal proceeding as they are understood as all activities carry out by involved parties to achieve the conviction of statements made regarding the facts. However, from a procedural point of view, they also refer to all resources that can be used by involved parties in order to convince the person who judges. Among the resources forecast in our Civil Procedure Rules, the evidence considered as the most important is the documentary evidence or the evidence by documents. So, in this paper, we are going to analyze if the electronic record must be

included in the rules regulating the documentary evidence. This has its significance not only regarding the procedure (proposal, contribution and acceptance) but also regarding its processing and assessment.

We are going to make reference mainly to the Act on Civil Procedure of 2000[4] as it lays the foundations of the rest of acts (such as the Act on Administrative Appeals of 1998[5] that refers in its article 60 to civil procedure rules), and the Digital Signature Act of 2003[6], as it includes procedural rules.

Until recent years, the procedural law linked the documentary evidence with the art of writing and with paper format because, during decades, paper was the only way to verify evidences. However, the privileged position of paper documents to reproduce ideas and store them is making way for other devices (see the electronic record, for example)[7]. Nor the legislators nor the Judiciary can turn their back on new devices so it is necessary to reconsider the concept of record and adapt criminal procedures concerning the regulation of evidences[8]. As the Supreme Court stated in its Judicial Decision of 3.11.1997 '*nowadays we are witnessing the decline, in some aspects of life, even in the legal life, of the paper civilization, the hand-written signature and the monopoly of writing regarding the documentary reality. The record as physical object that reflects a factual reality with legal significance cannot be identified only with paper format or with writing as meaning unit'*.

Therefore, gradually with the gaps, inadequacies and defects caused due to the confusion and ignorance of recent advances, the new devices have been adopted in order to mitigate the dissociation between technological advances and their projection in the social coexistence and the legal concepts that regulate[9] them. The concept of record has been extended in order to include new advances. This measure was adopted by the Act on the Legal System applicable to Public Administrations and Common Administrative Procedure of 1992[10], which establishes in its article 45 that *'records issued, regardless of their format, by electronic, computer or telematic means by Public Administrations or records issued*

with copies of originals stored through electronic, computer or telematic means, will be valid and will have the same effect than original records if their authenticity, integrity and preservation can be guaranteed. It must be also ensured that interested parties can gain access to records and fulfil guarantees and requirements requested by this law or others'. The article 26 of the Criminal Code[11] *also states that 'the Criminal Code defines the record as any material format that expresses or includes data, facts or accounts with required standard of proof or any other legal relevance'.* In this sense, please refer to the article 49,1 of the Spanish Historical Heritage Law of 1985[12]. This use as evidences of any element that can contribute to create the legal conviction of facts is allowed if legality, appropriateness and utility requirements for all elements of proof.

The article 30 of the Organic Law on the Judiciary of 1985[13] states that: *'1. Courts are allowed to use any technical, electronic, computer and telematic means for developing their activities and carrying out their functions, in compliance with restrictions established by the Organic Law 5/1992, of October 29*[14]*, and other applying laws. 2. Records issued by technical, electronic, computer and telematic means, regardless of their format, will be valid and will have the same effect than original records if their authenticity, integrity can be guaranteed in compliance with requirements established by procedural laws'.*

The article 90 of the Work Procedure Act of 1995[15] establishes that: *'1. Involved parties can use any evidence regulated by this Act. Records generated through mechanical resources to reproduce words, images and sound will be valid, except if they have been obtained, direct or indirectly, through procedures that violate fundamental rights or public freedoms.'*

However, the Civil Procedure Act of 2000[16] deals with the regulation of evidences in the article 299 and establishes as evidences the records generated through mechanical resources to reproduce words, images and sound as well as instruments that allow store, know or reproduce words, data, figures and mathematical operations carried for countable purposes

or any kind of purposes required by the process. Therefore, there is no doubt that they are evidences; nevertheless, substantivity data are not classified as evidences as the Act only regulates records or documentary evidences related to official records (article 317 and following) and private records (article 324 and following). Articles 382, 383 and 384 deal with other means for reproducing words, images and sounds. They also deal with instruments for filing, knowing and reproducing data, figures and mathematical operations required by the process; therefore, electronic records[17] are regulated by these articles.'

This means that we completely ignore the tendency towards a wide concept of record or towards the unification in the treatment of conventional records or records that can be regarded as electronic or technological records that is reflected in other rules of our legal system, but also in our case law where the judicial decision of the Supreme Court of 22.4.1998 pointed out that *'nowadays the concept of record is defined by the case law of this Court that considers that the legal concept must: be a record in the strict sense of the term, i.e. a record written in a traditional way or other thing, which without being a record, can be similar to a record, for example a floppy disk, a record produced in a computer, a video, a film, etc., with a modern criterion of interaction of new technological realities, as the term 'record' is defined in some dictionaries as anything that allows illustrating or checking something[18]'*. Our doctrine[19] uses mainly a strict concept of record referred to the representation of words written in paper or other material, excluding and giving an special treatment to those instruments that reproduce, film or record words, images and sound, as well as instruments that allow filing, knowing or reproducing words, data, figures and mathematical operations carried out for countable purposes or any kind of purposes required by the process (articles 382, 383 and 384).

At the same time, some conflicts can be pointed out as the Explanatory Statement states that the law forecasts the use of probative instruments, such as formats that nowadays are not conventional, regarding data, figures and calculations. The Explanatory Statement establishes that these new probative instruments need to have a similar consideration than

documentary evidences. However, this conflict seems to be present all along its enacting terms as the Article 812 stipulates that *'Anyone can set up a payment procedure if the payment of arrears, cash and short-term debts that do not exceed 30000 euro and if the debt is proved through: 1. Documents, regardless of their form, class or kind of physical format, signed by the debtor or with his/her fiscal stamp, imprint, mark or any other electronic or physical sign from the debtor'.*

Electronic records and their formats need to be submitted at the time of carrying out the main allegations, although the electronic format, in contrast to paper records, is not examined directly by involved parties and the court as it is processed in compliance with the Article 384 of the Civil Procedure Act[20]. Therefore, electronic records are checked by the court according to the measures proposed by the involved party that submit them or according to the procedure established by the court. In this sense, involved parties know in advance how electronic records are going to be processed and can invoke their rights before the court.

However, this conflict also affects the way of examining and assessing the probative instrument [21]as the Civil Procedure Act[22] establishes in its Article 319 that:

1. In compliance with the following requirements and articles, official records contained in the numbers 1 to 6 of the article 317 will be evidences of the event, fact or state of things of which they provide evidence. They will also evidence the date in which such documentation has been generated and they will evidence the identity of notary publics and other people that can take part in such documentation. 2. As regards administrative documents that are not included in the numbers 5 and 5 of the article 317 although they are considered public records by other rules, the probative force will be established in compliance with the laws that consider them public records. If such laws do not include a specific regulation, all events, facts or states of things stated in administrative documents will be considered true

for the purposes of the judgement pronounced, except if other evidences distort the certainty of records[23].

As regards private records that can be used as evidences in the legal proceeding, the article 319 says that they will be valid *'When their authenticity is not impugned by the party to which they damage.*

2. If the authenticity of a private document is impugned, it will be possible to request an expert collating of words or to suggest any other useful and appropriate mean of evidence.

If the collating verifies the record's authenticity, actions will be carried out in compliance with the third section of the article 320. If the authenticity cannot be proved or evidences have not been submitted, the court will assess it in compliance with healthy criticism regulations.

3. If the party interested in the effectiveness of an electronic record requests or impugns its authenticity, actions will be carried out in compliance with the article 3 of the Digital Signature Act'.

If all this is not enough, the Digital Signature Act of 19.12. 2003[24] makes things even more difficult as it includes procedural regulations[25]. The section 3 of the Article 326 of the Civil Procedure Act makes reference to the Digital Signature Act and regulates the probative value of private records. It also establishes that *'when the party interested in the efficacy of an electronic record requests or impugns its authenticity, actions will be carried out in compliance with the article 3 of the Digital Signature Act'.*

This Act defines in its article 3.5 the electronic record as '*a document written in electronic format that include data signed electronically*[26]'. This definition has been criticized as it does not make reference to a true concept of document because it forgets those documents

in digital format that are not considered electronic records because they do not have digital signature[27].

An advanced electronic signature is a digital signature that allows identifying the signatory and detecting any subsequent change in the signed data. The advanced electronic signature is linked to the signatory and to the data and the signatory can have exclusive control over it. A recognized digital signature is an advanced electronic signature based on a recognized certificate and generated through a safety device that creates signatures[28].

However, the section 4 establishes that the recognized digital signature will have, with regard to data recorded in an electronic format, the same value than the hand-written signature with regard to data in paper format. In my opinion, this is a big error because it puts on the same level two different realities that are completely different (for example the hand-written signature is easier to falsify, and the digital signature is not noticeable in contrast to hand-written signatures that can be seen and their originals can be interpreted in different ways, etc.)[29]

On the other hand, the section 6 of the article 326 points out that the following can be electronic records:

a. Official records: they are signed electronically by civil servants who are legally authorized to bear public, legal, notarial or administrative witness. They need to act within the scope of their competences in compliance with requirements established by relevant rules. It only points out that records need to be signed electronically but it also makes reference to recognized electronic signatures because, otherwise, the judicial authority will not accept them as official records.

b. Records issued and signed electronically by civil servants or public employees during the exercise of their civil service in compliance with specific legislation.

c. Private records.

The value and legal effectiveness of records will depend on their nature, in compliance with applicable legislation (article 7.3.)

The format in which they are signed electronically will be valid as evidence before court. We believe that the electronic format can be submitted without being considered documentary evidence because it is a kind of evidence forecast in the Article 229. a) of the Civil Procedure Act *'instruments that allow filing and knowing or reproducing words, data, figures…'*

If it is impugned the authenticity of the recognized electronic signature, with which data included in the electronic record have been signed, it will be checked that the certification service provider, which issues electronic certificates, fulfils all requirements established in the Act regarding guarantee of services. The aim is to check the effectiveness of digital signatures and, particularly, the preservation and integrity of information generated, as well as the signatories' identity. If it is impugned the authenticity of the advanced electronic signature with which are signed data included in electronic records, it will be applied the Article 326,2 of the Civil Procedure Act[30] (it will be suggested to collate the letters although it is very difficult to collate them in electronic records) or any other useful and appropriate evidence (expert collating that will be assessed in compliance with healthy criticism regulations).

As we have already said the differentiated treatment that is developed in contrast to the traditional documentary evidence is carried out in compliance with assessment rules[31]. However, electronic records are subject to healthy criticism regulations; in this sense, it is often said that it is encouraged to carry out traditional ways of assessment[32].

As regards procedural regulations, we could assert:

a. That the writing and paper age need to open a path towards the new technologies age. Involved agents must contribute to the maturity of new technologies. For example, the law needs to set up a clear and precise regulation on new technologies. This seems to be developed regarding the substantive law; however, sometimes our procedural regulations only make things even more confusing regarding the legal treatment of new technologies.

b. That as an example of the previously mentioned, we can analyze the Civil Procedure Act of 2000 that regulates value and effectiveness of official and private records, ways and instruments to reproduce images, words and sounds, and instruments that allow knowing and filing data and figures of importance for the legal proceeding.

c. That our Civil Procedure Act is based on a traditional concept of documents with own identity and independent of other evidences, such as electronic records. In this sense, if we make a literal interpretation, electronic records are excluded as evidences and are subject to the article 382 and following referred to instruments of shooting, filming and other instruments that can file, know or reproduce outstanding data for the legal proceeding.

d. That, despite of it, it is undeniable that electronic records share similar features with traditional records: they are movable properties that have physical independence of their author and media where they are generated. They can appear in court through their incorporation in any certain format.

e. That, despite of it, subsequent acts such as the Act on Tax, Administrative and Social Measures of 27 December 2001[33] adds the article 7 to the Act of 28 May

1862 on Notaries[34] where it is stated that '*Public instruments established by the article 17 of the Act on Tax Measures will be considered as public instruments despite of being written in electronic format with advanced electronic signature of the notary. They can also be signed by involved parties in compliance with the Act on the use of digital signature on the part of notaries and other complementary rules'*. The Digital Signature Act[35], of 19 December 2003, regulates the documentary evidences (article 3,8). The Act on Information Society and E-Commerce Services[36], of July 11, 2002, also regulates documentary evidences.

f. That the lawmaker should have recognized the electronic record as a new kind of record similar to standard or traditional public, private or official documents. In contrast with the Digital Signature Act, the lawmaker has opted for classifying electronic records with digital signature as simple formats of different types of traditional documents.

g. There is no problem in using electronic records as evidences. However, if we take into account that an electronic record can be easily generated or modified, it is required to combine technical procedures and legal rules in order to achieve that a business signed in paper have the same scope and effectiveness as a business signed by electronic means.

h. It is obvious that behind this legal position there is a distrustful towards these electronic instruments that are rather incomprehensible although, in some cases, can be safer than traditional documents. It has been said that: 'The Justice of the 21st Century cannot be based on methods and instruments of past ages. As it is stated in the Civil Procedure Act, it is required a *'new civil justice characterized by its effectiveness'* that embodies new technologies. The civil procedure is really important as it is a reference for other areas of law and it is the ideal framework to receive and use different kinds of technological tests which open a world full of new

possibilities for a new legal discipline focused on evidences. Therefore, the 'Technological Proof' is aimed at being a useful operating instrument for achieving a more dynamic, updated and efficient procedure[37]'.

References

[1] In the Royal Decree of 21.2.2003, on telematic notifications and registers and on the use of telematic means to replace the submission of certificates by citizens, underlies the promotion of a new administrative culture in which the paper is going to be replaced by telematic reports, whenever it is possible.

[2] Díaz Fuentes, Antonio: *La prueba en la nueva Ley de enjuiciamiento civil: tratamiento y práctica*. Barcelona: Bosch, 2002.

[3] Losano, Mario G.: *Los grandes sistemas jurídicos: introducción al derecho europeo y extranjero*. Madrid: Debate, 1993.

[4] Act 1/2000, of January 7, on Civil Procedure.

[5] Act 29/1998, of July 13, on Administrative Appeals.

[6] Act 59/2003, of December 19, on E-Signature.

[7] Gómez de Liaño González, Fernando: *El Proceso civil*. Oviedo: Forum, 2005

[8] Guillermo Ormazabal: *La aplicación de las nuevas tecnologías en el proceso civil español*.

[9] Álvarez Cienfuegos Suárez, José María: "Las obligaciones concertadas por medios informáticos y la documentación electrónica de los actos jurídicos". Act, 4.1992

[10] Act 30/1992, of November 26, on the Legal System applicable to Public Administrations and Common Administrative Procedure.

[11] Organic Law 10/1995, of November 23, on the Criminal Code.

[12] Article 49,1. As regards this Law, a record is defined as any kind of document written in natural or conventional language, and any sound or image graphic record, on any format, including data carriers. No original copies of publications are excluded.

[13] Organic Law 6/1985, of July 1, on the Judiciary.

[14] Organic Law 5/1992, of October 29, on Regulation of the Automated Treatment of Personal Data (In force until January 14, 2000).

[15] Revised Text of the Work Procedure Act (approved by Legislative Royal Decree 2/19995, of April 7).

[16] Act 1/2000, of January 7, on Civil Procedure.

[17] Oliva Santos, Andrés de la: *Consideraciones procesales sobre documentos electrónicos y firma electrónica*. It must be highlighted that an electronic device can be presented to the court without considering it as evidence. This is possible because it is a special device, in compliance with section 2 of the Article 299 of the Civil Procedure Law.

[18] See SSTS dated 24.3.1994 (RA 2175), ed. 30.11 1992 (RA 9458); STS dated 12-6-1999 (RJ 1999/4735) among others.

[19] Moreno Navarrete, Miguel Ángel: *La prueba documental*. Marcial Pons: Madrid, 2001, p.367.

[20] Act 1/2000, of January 7, on Civil Procedure.

[21] Andrés de la Oliva Santos. Ob.Cit. (See reference 17)

[22] As regards evidences in legal proceedings, the following documents are defined as official records:

> Any kind of judgements and judicial proceedings, as well as the statements issued by clerks.
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> Documents authorized by notaries in compliance with national law.
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> Documents issued by Official Brokers and certificates on the transactions in which interested parties took part. Certificates need to be issued in accordance with the Register Book that must be up to date in compliance with national law.
>
> Certificates issued by the Property and Companies Registers on entries in the property register.
>
> Documents issued by public staff legally authorized to bear witness regarding the decisions taken in the course of their duties.
>
> Documents issued by public staff legally authorized to bear witness regarding regulations and proceedings carried out by State bodies, Administrations or other bodies. Documents need to make reference to archives and registers of Government bodies, Public Administrations bodies or other bodies governed by public law.

Article 318. Ways to generate evidences through official record:

> Official records will have probative force, according to the article 319, if they are submitted in the original format or through a reliable copy or certificate. If interested parties submit an uncertified copy of official records, it could be considered valid whenever its authenticity is not impugned, in compliance with article 267.

[23] Article 320. Challenging of official records' probative force. Collating or verification:

> 1. If the authenticity of an official record is challenged, it is required to carry out the following steps in order to make it valid:
> Reliable copies, certificates or statements will be collated or verified in comparison to the originals, wherever they may be.
>
> Policies issued by official brokers will be collated with the entries in the Register Book.

2. Verification or collating of official records with their originals will be carried out by the Clerk in the archive or premises where originals or arrays are located. Interested parties or their defence lawyers can be present, and they will be summoned for this purpose.

3. If after the collating or verification, it is proved the authenticity of the copy or statement, expenses derived from the collating or verification shall be paid by the one who requested the verification. If the judge considers the challenging as vexatious, he is authorized to fine the one who requested the verification with 20,000-100,000 peseta.

[24] As the result of two communications issued by the European Commission -the one on 'A European Initiative in Electronic Commerce' of April 16, 1997, and the other on 'The Need for Secure Electronic Communication: Towards a European Framework for Digital Signatures and Encryption', of October 1997-, the European Commission presented on May 13, 1998, a Proposal for a European Parliament and Council Directive on a common framework for digital signature. The elaboration of the EC Directive was not finished yet, but the Spanish lawmaker considered that it was necessary to regulate in our legal system the e-signature in an urgent way through the Royal Decree 14/1999, of September 17, on Digital Signature, in compliance with the common position of the European Council. This Royal Decree-Law included in the Spanish legal system the Directive 1999/93 of the European Parliament and of the Council, of December 13 1999, establishing a Community framework for digital signatures, even before it was enacted and published in the Official Journal of the European Communities.

After being ratified by the Spanish Congress of Deputies, it was agreed to convert the Royal Decree-Law 14/1999 into a Bill, with the aim of being subject to a public inspection and being discussed in the Spanish Parliament in order to improve it. Nevertheless, this initiative was not carried out because the Houses finished their term of office in March 2000.

In this context, it was started the processing of a new legal text, the current Act 59/2003, of December 19, on Digital Signature. This Act is the result of the commitment acquired in the 5th Term of Office and it brings the framework established in the Royal Decree-Law 14/1999 up to date thanks to some modifications that have been proved to be necessary since it came into effect internationally and in our country.

[25] The Directive 99/92 sets up the Community framework for digital signature, but national legislations have legal authority to establish the legal areas where digital signatures and electronic records can be used. At the same time, it does not affect to those national rules on freedom to assess evidences.

[26] A wide meaning is included in the Art. 3 of the Royal Decree of 16.2.19996 that regulates the use of electronic, computing and telematic techniques in the State General Administration and in the Higher Council of Computing to Promote E-Government. This new definition defines the record as any identified and organized entity that includes text, graphics, sounds, images or any other kind of information that can be stored, edited, extracted and shared between information processing systems or users as a differentiated unit.

[27] Andrés de la Oliva Santos: "Consideraciones procesales..." (ob.cit.).

[28] In compliance with the Article 11 of the Digital Signature Act 'they are electronic certificates issued by a service provider that guarantee to check the signatory's identity, the authenticity and integrity of the signed text, as well as the confidentiality of its generation, storage and communication'.

[29] Andrés de la Oliva Santos. Ob.Cit. (See reference 17).

[30] Act 1/2000, of January 7, on Civil Procedure.

[31] Barrero Rodríguez, Concepción: *La prueba en el procedimiento administrativo*. Aranzadi: Navarra, 2006.

[32] Sanchís Crespo, Carolina: "Los contornos de la prueba en el nuevo proceso civil". In *Revista de Derecho* Universitat de Valencia, no. 1, November 2002.

[33] Act 24/2001, of December 27, on Tax, Administrative, and Social Measures.

[34] Act of May 28, 1962, on Notaries

[35] See reference 6.

[36] Act 34/2002, of July 11, on Information Society and E-Commerce Services.

[37] Urbano Castrillo, Eduardo de; Magro Server, Vicente: *La prueba tecnológica en la Ley de Enjuiciamiento Civil.* Navarra: Aranzadi, 2003.