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Secção I

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The Probative Value of Electronic Documents. Towards the Signature Crisis?

O Valor Probatório dos Documentos Electrónicos. A Crise da Assinatura?

Martino ZULBERTI¹

ABSTRACT: Author faces the problem of the probative value of electronic documents with a “weak” signature or not signed, illustrating the relevant provisions under Italian law and discussing the different interpretations followed by case law and legal writers. In Author’s opinion, on one hand, it is necessary to distinguish between declaratory and non-declaratory documents in evaluating electronic documents and, on the other hand, courts would have more discretion in establishing the authorship of a declaratory electronic document than of a hand-written one.

KEYWORDS: Electronic document; Probative value; Signature.

RESUMO: O Autor analisa o problema do valor probatório dos documentos electrónicos com uma assinatura “fraca” ou não assinada, ilustrando as disposições pertinentes da lei italiana e discutindo as diferentes interpretações seguidas pela jurisprudência e pela doutrina. Na opinião do Autor, por um lado, é necessário distinguir entre documentos declaratórios e não declaratórios na avaliação de documentos electrónicos e, por outro lado, os tribunais teriam mais discricção no estabelecimento da autoria de um documento electrónico declaratório do que de um documento escrito à mão.

PALAVRAS-CHAVE: Documento electrónico; Valor probatório; Assinatura.

SUMMARY: 1. Introduction. – 2. Electronic documents and Italian Digital Administration Code. – 3. Probative value of electronic documents with “weak” signature. – 4. Electronic documents and the discipline of digital reproductions. – 5. The probative value of “traditional” e-mail. – 6. Concluding remarks.

1. Introduction

The discussion will address the probative value under Italian law of unsigned electronic documents and those with “weak” electronic signatures, which offer limited certainty as to who actually signed the document. I will not examine the probative value of electronic documents bearing a “strong” signature, as these are less affected by problems of authorship². In fact, Article

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² Article 1, paragraph 1-*bis*, Italian Digital Administration Code (CAD), refers to the definitions provided by the Regulation (EU) no. 910/14. Article 3, paragraph 1 of such Regulation defines the «electronic signature» as data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign (10); the «advanced electronic signature» as an electronic signature which meets the requirements set out in Article 26 of the same Regulation (11); the «qualified electronic signature» as an advanced electronic

20, paragraph 1-*bis*, first sentence, of the Italian Digital Administration Code (CAD) provides that such documents have the probative value of the hand-written declaratory documents with authenticated signature and paragraph 1-*ter* establishes a *iuris tantum* presumption for such documents that the document belongs to the holder of the signature device³. In this case, problems are essentially limited to the unauthorized use of such device⁴.

It is necessary to consider that, in Italy, judges are not always free to assess evidence. In some cases, the court must weigh the evidence according to fixed criteria without any margin of discretion; this is what is meant by “legal proof” of a fact. In other cases, the principle of free assessment of evidence applies. In others still, the judge is precluded from taking a particular piece of evidence into consideration.

The latter includes the case of the unsigned private hand-written document (“*scrittura privata*”)⁵. In such situation, the signature is considered a necessary

signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures (12). As regards the Italian legislation, Article 1, paragraph 1, lett. s) CAD provides that «digital signature» is «a particular type of qualified signature based on a system of cryptographic keys, one private and one public, related to each other, which allows the holder, through the private key, and the recipient, through the public key, to show and verify the origin and the integrity of an electronic document or a set of electronic documents». On this topic, FINOCCHIARO, Giusella. Una prima lettura del Reg. UE n. 910/2014 (cd. eIDAS): identificazione online, firme elettroniche e servizi fiduciari. *Nuove leggi civili commentate*, 2015, 419 ff.

³ Article 20, paragraph 1-*bis* CAD provides that documents signed with advanced electronic signature or qualified signature are evaluated as «plain proof», that can be challenged only through the proceedings of “*querela di falso*”, in relation to the authorship of the statements, thus recurring to the same proceedings that Article 2702 of the Civil Code requires in order to challenge an authenticated signature on a hand-written document. This provision is tempered by the subsequent paragraph 1-*ter* which provides a presumption the qualified or digital signature device has been used by its owner. On the interpretative questions arising from these two provisions, see GRADI, Marco. Le prove. In: RUFFINI, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffrè, 2019, 514 ff.; MERONE, Aniello. Electronic signatures in Italian law. *Digital Evidence and Electronic Signature Law Review*, 2014, 98-99.

⁴ GRADI, Marco. Le prove. In: Ruffini, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffrè, 2019, 522, who underlines that paragraph 1-*ter* of Article 20 CAD allows the proof of the unauthorized use without the need of recurring to the proceeding of “*querela di falso*”. Conf. FERRARI, Francesca. Il codice dell’amministrazione digitale e le norme dedicate al documento informatico. *Rivista di diritto processuale*, 2007, 425-426.

⁵ Cfr. CARPINO, Brunetto. Scrittura privata. In: *Enciclopedia del diritto*, XLI. Milano: Giuffrè, 1989, 805, who observes: «The signature is therefore essential element in order to connect the document to whom is indicated as author. A document without signature is not able, in principle, to have juridical value, as the absence of the signature is to be considered as refusal to take the authorship of the document and of the statement». See also RICCI, Gian Franco. Valore probatorio del documento informatico ed errori duri a morire. *Rivista trimestrale di diritto e procedura civile*, 2002, 1427.

element thereof. In fact, the signature is what makes the statement incorporated in the document attributable to a specific person.

Although there are plenty of circumstances (Articles 2705 ff of the Italian Civil Code) in which even unsigned documents (such as telegrams or private records) have probative value, such cases are specific and cannot be extended by analogy to other types of documents, regardless of whether they are hand-written or digital.

To determine the probative value of electronic documents, one must refer to Article 20 CAD and Article 2712 of the Italian Civil Code. These provisions grant the judge differing margins of discretion and there are discordant opinions as to when recourse should be made to one rather than the other.

The analysis of the probative value of the unsigned or “weakly” signed electronic document is aimed at providing an answer to the widely debated question surrounding the probative value of a simple e-mail. Similar to a text or Whatsapp message, these documents fall within the category of electronic documents and may be considered unsigned or bearing a “weak” signature, depending on one’s perspective⁶.

2. Unsigned electronic documents and Italian Digital Administration Code

Article 20, paragraph 1-*bis*, second sentence, CAD disciplines the probative value of a document in «all other cases», namely the ones in which the document’s probative value is not regulated by the first sentence of the same provision. It thus governs cases in which the document is not signed with a “strong” electronic signature.

For both types of documents, the provision states that the probative value is subject to the discretion of the court, which must take into account the document’s «security, integrity and alterability».

⁶ According to an opinion the “traditional” e-mail would be an electronic document without signature (DI GIACOMO, Vincenzo. *Il nuovo processo civile telematico*. Milano: Giuffrè, 2015, 205 ff.; IMBROSCIANO, Chiara. Prove documentali 2.0: S.M.S., e-mail e messaggi Whatsapp nei processi della famiglia. *Famiglia e diritto*, 2020, 577); according to a different interpretation it would be an electronic document with “weak” signature (RUSSO, Federico. Contributo allo studio sul valore probatorio della e-mail. *Giustiziacivile.com*, 2019, 17 ff. and, in case law, Trib. Prato, 15.4.2011, in *Foro it.*, 2011, I, 3198; Trib. Mondovì 7.6.2004, in *Nuove leggi civ. comm.*, 2005, I, 938, with obs. by M. LUPANO, *Natura dell’«e-mail», sua efficacia probatoria nella normativa vigente e nel d.lg. 7 marzo 2005, n. 82*). For further references, see MERONE, Aniello. Electronic signatures in Italian law. *Digital Evidence and Electronic Signature Law Review*, 2014, 91.

The norm does not expressly regulate the source aspect of the document, but it is clear among interpreters that authorship must be established in order to attach any probative value to the document⁷.

In this freedom of assessment, the criterion for linking the document to a specific person will vary. In the case of a “weak” electronic signature, the signature itself will provide the basis for establishing authorship; in the case of an unsigned electronic document, the linking factor is determined by the judge, also according to his discretion⁸.

3. Probative value of electronic documents with “weak” signature

It is worth mentioning that there is a problem with the interpretation of the electronic document bearing a “weak” electronic signature. According to some, the provisions on the probative value of electronic documents should be integrated with those applicable to analogue documents, as regards the disavowal of the signature governed by Articles 214 and 215 of the Italian Code of Civil Procedure⁹. In application of these provisions, the party against whom the document is filed must challenge the authenticity of the “weak” electronic signature. If such party fails to disavow the signature, the judge must consider the document attributable to said party, without any margin of discretion. In the event of a disavowal, however, the party who produced the document must request that the signature be verified, otherwise the document loses all probative value and cannot be considered by the judge.

In both scenarios, the court would be precluded from using its discretion in determining the document’s probative value. This, however, does not seem consistent with what is stated in Article 20, paragraph 1-*bis* CAD, which establishes the principle of freedom of assessment of the digital document bearing a “weak” electronic signature.

It is therefore preferable to adhere to the contrasting opinion, which rejects the applicability of the rules on the disavowal of hand-written private documents

⁷ GRADI, Marco. Le prove. In: Ruffini, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffrè, 2019, 531.

⁸ GRADI, Marco. Le prove. In: Ruffini, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffrè, 2019, 553. *Contra*, RUSSO, Federico. Contributo allo studio sul valore probatorio della e-mail. *Giustiziacivile.com*, 2019, 17.

⁹ FERRARI, Francesca. Il codice dell’amministrazione digitale e le norme dedicate al documento informatico. *Rivista di diritto processuale*, 2007, 425.

to electronic ones¹⁰. Consequently, in application of Article 20 CAD, the origin of the electronic document bearing a “weak” electronic signature should be, in any case and necessarily, freely appraised by the judge, even when the signature’s authenticity is challenged by the other party.

4. Electronic documents and the discipline of digital reproductions

Another relevant provision regarding the probative value of an electronic document is Article 2712 of the Italian Civil Code, which scope of application concerns not only hand-written representations, but also digital reproductions, establishing they are undeniable proof of the facts and items represented if the person against whom they are produced does not disavow them. According to most – if a document’s authenticity has not been challenged – such circumstance constitutes legal proof, i.e. proof excluded from the court’s discretion¹¹.

The interpretative challenge relates to the scope of the provision: the question is whether it applies to unsigned electronic documents with declaratory content¹².

A first orientation argues that any unsigned electronic document should fall within the scope of application of Article 2712 of the Italian Civil Code; the probative regime of binding evidence provided therein would also govern the question of origin of the statement contained in the document¹³, with burden to contest the document on the person against whom the document is produced¹⁴.

A different approach limits the scope of this provision: it should only apply to matters concerning the digital representation of facts or items (such as video,

¹⁰ ROTA, Fabio. Sub art. 214. In: TARUFFO, Michele (ed.). *Istruzione probatoria*, Bologna: Zanichelli, 2014, 329.

¹¹ The statement is debated, being discussed whether the “plain proof” provided by article 2712 of the Civile Code is to be considered or not as evidence subject to court’s discretion: see PATTI, Salvatore. *Prove*. Bologna: Zanichelli, 2015, 476 ff.

¹² On the distinction between declaratory and non-declaratory documents, v. CARNELUTTI, Francesco. Documento (teoria moderna). In: *Nov.ss. dig. it.*, V, Torino: Utet, 1968, 68.

¹³ FINOCCHIARO, Giusella. Ancora novità legislative in materia di documento informatico: le recenti modifiche al Codice dell’amministrazione digitale. *Contratto e impresa*, 2011, 500, who raises the question how to conciliate two provisions which would regulate the same issue.

¹⁴ Cass. 14.5.2018, n. 11606; Trib. Bologna 11.8.2020, n. 1163, in *DeJure*; Trib. Velletri 16.4.2020, n. 642, in *DeJure*; Trib. Firenze 7.2.2020, n. 370, in *DeJure*.

audio or photographs stored in digital format) and not a digitally represented statement¹⁵.

This second approach seems to be the only one compatible with Article 20, paragraph 1-*bis* CAD, which recognizes the principle of freedom of assessment in relation to documents bearing a “weak” electronic signature as well as unsigned documents. If one were to maintain that all electronic documents are governed by Article 2712 of the Italian Civil Code, there would be no margin for judicial discretion.

The declarative and unsigned electronic document is therefore to be considered subject to the regime of freedom of assessment by the court, and not that of legal proof¹⁶.

5. The probative value of “traditional” e-mail

These interpretive uncertainties are shared by case law, particularly in relation to the question of the probative value of traditional e-mail.

Some case law holds that e-mail messages are regulated by Article 2712 of the Italian Civil Code, so that if unchallenged by the party against whom it is produced, it would also be fully probative also in terms of its origin¹⁷.

A different line of reasoning holds, however, that e-mail messages cannot be qualified as a digital reproduction under Article 2712 of the Italian Civil Code, and the probative value of such documents is regulated by Article 20, paragraph

¹⁵ VERDE, Giovanni. Prove nuove. *Rivista di diritto processuale*, 2006, 41; DITTRICH, Lotario. La prova documentale. In: DITTRICH, Lotario (ed.), *Diritto processuale civile*, II, Milano: Wolters Kluwer, 2019, 1936 f.; FARINA, Pasqualina. *La querela di falso. Profili teorici e attuativi*, II, Roma: Romatre-Press, 2017, 68; BONAFINE, Alessio. *L'atto processuale telematico. Forma, patologie, sanatorie*. Napoli: Jovene. 2017, 96; MERONE, Aniello. *Il disconoscimento delle prove documentali*, Torino: Giappichelli, 2018, 203; ROTA, Fabio. Sub art. 214. In: TARUFFO, Michele (ed.). *Istruzione probatoria*, Bologna: Zanichelli, 2014, 327; IORIO, Giovanni. L'efficacia probatoria dei messaggi WhatsApp nei processi familiari. *Ilprocessocivile*, 2020. For a different opinion, see COLOMBO, Giorgio. Valore probatorio dei documenti e delle riproduzioni informatiche e natura giuridica delle attribuzioni patrimoniali tra conviventi. *Corriere giuridico*, 2019, 1332.

¹⁶ DITTRICH, Lotario. La prova documentale. In: DITTRICH, Lotario (ed.), *Diritto processuale civile*, II, Milano: Wolters Kluwer, 2019, 1937. According to an opinion the non-challenge of the document by the party against whom it is produced would be considered as an “admission”: VERDE, Giovanni. Prove nuove. *Rivista di diritto processuale*, 2006, 41.

¹⁷ Cass. 14.5.2018, n. 11606.

1-*bis* CAD: the probative value of an e-mail is to be decided by the court, in accordance with the principle of freedom of assessment¹⁸.

This is the dominant opinion among legal authors, according to which traditional e-mail cannot be included in the discipline of the probative value of electronic representations, since «an e-mail is still a document written by someone and certainly not a digital reproduction»¹⁹.

6. Concluding remarks

In the light of the above considerations, two conclusions can be drawn.

On one hand, the digital document containing a statement whose authorship is not certain, whether because it is unsigned or because it bears a “weak” electronic signature, does have probative value in contrast with the hand-written statement that has no value when it is not signed²⁰.

On the other hand, in consideration of the trend of some case law, one cannot exclude that the judge will consider himself bound to consider the document as attributable to the party against whom it is produced, should such party fail to disclaim his authorship.

In this scenario the signature seems losing its traditional central role to link the content of a document to its author not only taking in account the new forms of imputation, but also considering that a declaratory electronic document, even unsigned or bearing a “weak” electronic signature, could be used as evidence in civil proceedings²¹.

REFERENCES

CARPINO, Brunetto. Scrittura privata. In: *Enciclopedia del diritto*, XLI. Milano: Giuffré, 1989.

CARNELUTTI, Francesco. Documento (teoria moderna). In: *Nov.ss. dig. it.*, V, Torino: Utet, 1968.

¹⁸ Cass. 6.2.2019, n. 3540; Cass. 18.3.2018, no. 5523. In: *Rivista italiana di diritto del lavoro*, 2018 II, 590, with favourable obs. SILVESTRE, R., *L'inattendibilità della e-mail tradizionale come documento informatico attestante la paternità del testo*.

¹⁹ GRADI, Marco. Le prove. In: Ruffini, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffré, 2019, 534.

²⁰ See note 5.

²¹ Legal authors underline that Italian system is facing to a “*crisis of the signature*”: see, in particular, IRTI, Natalino. *Idola libertatis. Tre esercizi sul formalismo giuridico*, Milano, 1985, 73 ff.

- COLOMBO, Giorgio. Valore probatorio dei documenti e delle riproduzioni informatiche e natura giuridica delle attribuzioni patrimoniali tra conviventi. *Corriere giuridico*, 2019, 1325-1333.
- DI GIACOMO, Vincenzo. *Il nuovo processo civile telematico*. Milano: Giuffré, 2015.
- DITTRICH, Lotario. La prova documentale. In: DITTRICH, Lotario (ed.), *Diritto processuale civile*, II, Milano: Wolters Kluwer, 2019, 1864-1954.
- FARINA, Pasqualina. *La querela di falso. Profili teorici e attuativi*, II, Roma: Romatre-Press, 2017.
- FERRARI, Francesca. Il codice dell'amministrazione digitale e le norme dedicate al documento informatico. *Rivista di diritto processuale*, 2007, 415-432.
- FINOCCHIARO, Giusella. Una prima lettura del Reg. UE n. 910/2014 (cd. eIDAS): identificazione online, firme elettroniche e servizi fiduciari. *Nuove leggi civili commentate*, 2015, 419-428.
- FINOCCHIARO, Giusella. Ancora novità legislative in materia di documento informatico: le recenti modifiche al Codice dell'amministrazione digitale. *Contratto e impresa*, 2011, 495-504.
- GRADI, Marco. Le prove. In: Ruffini, Giuseppe (ed.). *Il processo telematico nel sistema del diritto processuale civile*, Milano: Giuffré, 2019, 461-578.
- IMBROSCIANO, Chiara. Prove documentali 2.0: S.M.S., e-mail e messaggi Whatsapp nei processi della famiglia. *Famiglia e diritto*, 2020, 568-580.
- IORIO, Giovanni. L'efficacia probatoria dei messaggi WhatsApp nei processi familiari. *Ilprocessocivile*, 2020.
- IRTI, Natalino. *Idola libertatis. Tre esercizi sul formalismo giuridico*, Milano, 1985.
- MERONE, Aniello. *Il disconoscimento delle prove documentali*, Torino: Giappichelli, 2018.
- MERONE, Aniello. Electronic signatures in Italian law. *Digital Evidence and Electronic Signature Law Review*, 2014, 85-99.
- PATTI, Salvatore. *Prove*. Bologna: Zanichelli, 2015.
- RICCI, Gian Franco. Valore probatorio del documento informatico ed errori duri a morire. *Rivista trimestrale di diritto e procedura civile*, 2002, 1423-1429.
- ROTA, Fabio. Sub art. 214. In: TARUFFO, Michele (ed.). *Istruzione probatoria*, Bologna: Zanichelli, 2014.
- RUSSO, Federico. Contributo allo studio sul valore probatorio della e-mail. *Giustiziacivile.com*, 2019, 1-38.

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