THE PROBATIVE VALUE OF ELECTRONIC DOCUMENTS. TOWARDS THE SIGNATURE CRISIS?[1]

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1. – The discussion will address the probative value under Italian law of unsigned electronic documents and of those with "weak" electronic signatures, which offer limited certainty as to the authorship of the document. I will not examine the probative value of electronic documents bearing a "strong" signature, as these are less affected by problems of authorship[2]. In fact, Article 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

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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 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, G. FINOCCHIARO, *Una prima lettura del Reg. UE n. 910/2014 (cd. eIDAS): identificazione online, firme elettroniche e servizi fiduciari*, in *Nuove leggi civili commentate*, 2015, 419 ss.

the signature device[3]. In this case, problems are essentially limited to the unauthorized use of such device[4].

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 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

[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 challanged only throught the proceedings of "*querela di falso*", in relation to the authorship of the statements, thus recurring to the same proceedings that Articole 2702 of the Civil Code requires in order to challenge an authenticated signature on an hand-written document. This provision is temperated 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 arsing from these two provisions, see M. GRADI, *Le prove*, in G. RUFFINI (ed.), *Il processo telematico nel sistema del diritto processuale civile*, Milano, 2019, 514 ss.; A. MERONE, *Electronic signatures in Italian law*, in *Digital Evidence and Electronic Signature Law Review*, 2014, 98 s.

[4] M. GRADI, *Le prove*, cit., 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. F. FERRARI, *Il codice dell'amministrazione digitale e le norme dedicate al documento informatico*, in *Riv. dir. proc*., 2007, 425 s.

[5] Cfr. B. CARPINO, voce *Scrittura privata*, in *Enc. dir*., XLI. Milano, 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 G.F. RICCI, *Valore probatorio del documento informatico ed errori duri a morire*, in *Riv. trim. dir. proc. civ*., 2002, 1427 and F. ROTA, *I documenti*, in M. TARUFFO (ed.), *La prova nel processo civile*, Milano, 2012, 669.

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 perspective[6].

2. – 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 document, 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».

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 document[7].

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 discretion[8].

3. – 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

[6] According to an opinion the "traditional" e-mail would be an electronic document without signature (V. DI GIACOMO, *Il nuovo processo civile telematico*. Milano, 2015, 205 ss.; C. IMBROSCIANO, *Prove documentali 2.0: S.M.S., e-mail e messaggi Whatsapp nei processi della famiglia*, in *Fam. dir.*, 2020, 577); according to a different interpretation it would be an electronic document with "weak" signature (F. RUSSO, *Contributo allo studio sul valore probatorio della e-mail*, in *Giustiziacivile.com*, 2019, 17 ss. 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 A. MERONE, *Electronic signatures in Italian law*, cit., 91.

[7] M. GRADI, *Le prove*, cit., 531.

[8] M. GRADI, *Le prove*, cit., 553. *Contra*, F. RUSSO, *Contributo allo studio sul valore probatorio della e-mail*, cit., 17.

documents, as regards the disavowal of the signature governed by Articles 214 and 215 of the Italian Code of Civil Procedure[9]. 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 to electronic ones[10]. 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. – 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 discretion[11].

The interpretative challenge relates to the scope of the provision: the question is whether it applies to unsigned electronic documents with declaratory content[12].

[9] F. FERRARI, *Il codice dell'amministrazione digitale e le norme dedicate al documento informatico*, cit., 425.

[10] F. ROTA, *sub* art. 214, in M. TARUFFO (ed.), *Istruzione probatoria*, Bologna, 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 S. PATTI, *Prove*. Bologna, 2015, 476 ff.

[12] On the distinction between declaratory and non-declaratory documents, v. F. CARNELUTTI, voce *Documento (teoria moderna)*, in *Nov.ss. dig. it*., V, Torino, 1968, 68.

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 document[13], with burden to contest the document on the person against whom the document is produced[14].

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, audio or photographs stored in digital format) and not a digitally represented statement[15].

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 proof[16].

5. – 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 origin[17].

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

[14] Cass. 14 May 2018, n. 11606; Trib. Bologna 11 August 2020, n. 1163, in *Dejure*; Trib. Velletri 16 April 2020, n. 642, in *DeJure*; Trib. Firenze 7 February 2020, n. 370, in *DeJure*.

[15] G. VERDE, *Prove nuove*, in *Riv. dir. proc.*, 2006, 41; L. DITTRICH, *La prova documentale*, in L. DITTRICH (ed.), *Diritto processuale civile*, II, Milano, 2019, 1936 s.; P. FARINA, *La querela di falso. Profili teorici e attuativi*, II, Roma, 2017, 68; A. BONAFINE, *L'atto processuale telematico. Forma, patologie, sanatorie*. Napoli, 2017, 96; A. Merone, *Il disconoscimento delle prove documentali*, Torino, 2018, 203; F. ROTA, sub art. 214, cit., 327; G. IORIO, *L'efficacia probatoria dei messaggi WhatsApp nei processi familiari*, in *Ilprocessocivile*, 2020. For a different opinion, see G. COLOMBO, *Valore probatorio dei documenti e delle riproduzioni informatiche e natura giuridica delle attribuzioni patrimoniali tra conviventi*, in *Corriere giur.*, 2019, 1332.

[16] L. DITTRICH, *La prova documentale*, cit., 1937. According to an opinion the non-challange of the document by the party against whom it is produced would be considered as an "admission": G. VERDE, *Prove nuove*, cit., 41.

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 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 assessment[18].

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. – 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 signed[20].

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 loosing 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 proceedings[21].

Abstract

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[17] Cass. 14 May 2018, n. 11606.

[18] Cass. 6 February 2019, n. 3540; Cass. 18 March 2018, no. 5523, in *Riv. it. dir. lav.*, 2018 II, 590, with favourable obs. R. SILVESTRE, *L'inattendibilità della e-mail tradizionale come documento informatico attestante la paternità del testo*.

[19] M. GRADI, *Le prove*, cit., 534. Conf. A. D'ARMINIO MONFORTE, *I mezzi di prova informatici e la loro efficacia*, in A. D'ARMINIO MONFORTE, M. ROCCHI, *Le prove digitali nel processo. Profili giuridici e informatico-forensi*, Pisa, 2021, 101 ss.

[20] See note 5.

[21] Legal authors underline that Italian system is facing to a "*crisis of the signature*": see, in particular, N. IRTI, Idola libertatis. *Tre esercizi sul formalismo giuridico*, Milano, 1985, 73 ss.

L'Autore si confronta con il tema del valore probatorio dei documenti informatici con firma elettronica "debole" o non firmati, illustrando le disposizioni di legge rilevanti e percorrendo i principali orientamenti di dottrina e giurisprudenza. Secondo l'Autore, per un verso, è necessario distinguere fra documenti dichiarativi e non dichiarativi al fine di determinarne il valore probatorio e, per altro verso, alla luce dell'attuale disciplina il Giudice avrebbe maggiore discrezionalità nel determinare la paternità di un documento dichiarativo elettronico rispetto ad uno analogico

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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.
