

PHONE NUMBERS, EMOJIS AND GIF FILES AS ELECTRONIC SIGNATURES

Andrei RUSU*

ABSTRACT : *Due to constant technological progress, the conclusion of electronic contracts has become common. Thus, electronic signatures are used to identify the parties and to express their agreement regarding the content of the contract.*

The use of these electronic signatures led to emojis being used in electronic contracts. The judicial cases in which these types of electronic signatures are apparently used, must be analyzed, as it is necessary to determine the probative power of the electronic document that contains this specific signature.

We would also like to mention that a theoretical analysis of GIF files and phone numbers as electronic signatures is necessary in order to prevent certain legal interpretation problems that might arise in future litigation.

KEYWORDS: *electronic contract, electronic signature, probative value, emoji, GIF, phone number.*

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1. INTRODUCTION

The legislative system must be adapted continuously to the needs of the society, in order to correspond with the social reality. Thus, it was necessary for the legislation to include the possibility of the admissibility of electronic means for the settlement of numerous disputes, which would have been difficult to resolve by classical means.

The electronic message represents a new means of communication. As such, messages are transmitted instantly all around the world. Therefore, communicating via images, videos is much more simple and efficient nowadays. Almost every person can use this technology.

New types of communications have been invented, such as GIFs, emojis. Could these types of communications be used to express consent in order to conclude electronic contracts?

*Legal Consultant - Romanian Parliament, Phd Student at the West University of Timișoara, Law Faculty: ROMANIA.

International and national case law (Romania) must be analyzed in order to understand the court's perspective on these types of communication. Also, where the courts have not offered an answer yet, we must research the legal doctrine and theoretically analyze the possible answers. Our view must be open so that we can accept these new changes in order to satisfy the needs of the current society.

2. THE PHONE NUMBER AS AN ELECTRONIC SIGNATURE

In romanian judicial practice, some courts argued that telephone messages were not considered electronic documents. Thus, in a case of the Bucharest tribunal¹, the court made the following assertion: "Considering the provisions of art. 267 Civil Procedure Code, telephone messages are not considered documents in electronic form, because they are subject to the provisions of the special law, Law no. 455/2001 on electronic signatures, which defines electronic documents, and does not regulate SMS as electronic documents. At the same time, telephone messages do not fall into the category provided by art. 289 Civil Procedure Code *Other categories of documents*". The provision contained in art. 267 of the Civil Procedure Code state that "documents made in electronic form are subject to the provisions of the special law".

From our perspective, we consider that the text of the telephone messages represent documents in electronic form because there is a collection of data in electronic form, between which there are logical and functional relationships and which render letters, numbers or any other characters with intelligible meaning, intended to be read by means of a computer program or other similar process. The rationality of the aforementioned statement derives from the provisions of art. 4 pct. 2 codified in Law no. 455/2001 (the exact definition of electronic documents). This equivalence between phone messages and electronic documents is confirmed in a specialized legal paper (Cimpoeru, D., 2013), in which it is mentioned that SMS messages, e-mail messages, represent documents in electronic form.

We also consider that the court made a grave error by stating that SMS messages have to be expressly mentioned in Law no. 455/2001. This particular piece of legislation does not offer examples of electronic documents. The law contains provisions in regards to definitions and the probative value of electronic documents.

Telephone SMS messages are short messages (maximum 160 characters), which are sent from a mobile phone. The phone number from which the message was sent could represent a simple electronic signature, since it allows the identification of the sender. Also, the provisions of European Regulation no. 910/2014 on electronic identification and trust services for electronic transactions on the internal market and repealing Directive 1999/93/EC (eIDAS) state that electronic signature represent electronic data used to sign. As such, a phone number could be considered an electronic signature in EU state countries.

There is a requirement, a subscription for a phone service is needed most of the times. If the phone card was bought in a store (over the counter), the phone number does not allow identification of the holder as effectively as the phone number corresponding to the subscription mentioned above. However, we specify that frequent use of the phone number could lead to a possible identification of the person using that number. Therefore, we

¹ Bucharest tribunal Decision from 06.10.2017- <https://www.jurisprudenta.com/jurisprudenta/speta-136kq6rx/>

consider that the Bucharest court erroneously assessed the fact that telephone messages do not represent documents in electronic form and we consider phone numbers as a means of identification (simple electronic signatures). The provisions stated in art. 4 pct. 3 of Law no. 455/2001 confirm the identification requirement of all electronic signatures.

An SMS OTP (one-time password) is a secure authorisation method where a numeric or alphanumeric code is sent to a mobile number (<https://www.smsglobal.com/one-time-password/>). That being said, this one time password represents an added layer of security when logging in to an account online or in order to confirm an action. Therefore, SMS OTP can be used to sign electronic documents. The SMS OTP has to be entered online or in a program in order to confirm the identity of the signatory. Thus, the identity of the signatory is permanently linked to the phone number in the case of SMS OTP. Therefore, the phone number does represent a simple electronic signature in this case as well.

3. THE EMOJI AS AN ELECTRONIC SIGNATURE

In one specific legal case² emojis were used in order to conclude a legal contract. The King's Bench for Saskatchewan (Canada) ruled that the thumbs-up emoji is an electronic signature on a contract for the purchase of flax, in order to accept its purchase. From our perspective this electronic signature has probative value when attached to an electronic document and can also be used in the Romanian legal system.

In brevi, the plaintiff South West Terminal (SWT hereafter) and the defendant Achter Land & Cattle Ltd. (Achter hereafter) had a business relationship lasting many years. On the 26th of March 2021, the parties entered into a sale and purchase agreement whereby SWT agreed to purchase 87 metric tonnes of flax at a fixed price from Achter, to be delivered by the 30th of November 2021.

The representative of the SWT company drew up the said contract, which he signed holographically. He later took a picture of the contract using his mobile phone and sent it via a phone message to the Achter's company representative. Attached to the picture was the message *please confirm flax contract*. Achter's company representative responded using the thumbs-up emoji in a phone message during that long-distance conversation. The deadline was not met by Achter. Thus, he did not send the 87 metric tons of flax to SWT.

The court had to determine whether that sales contract concluded on 26th of March 2021 is a valid concluded act, document. Following the investigation, the Court found that the two parties have had commercial relations since 2015. Also, multiple similar sales contracts were concluded through telephone messages and the parties using the same telephone numbers throughout the contractual relations. *Exempli gratia*, the representative of the SWT company drafted and sent contracts via telephone messages with the text *please confirm terms of durum contract*, and the responses of Achter's representative were represented by the phrases *ok*, *looks good* and *yup*. Therefore, the representative of the Achter company confirmed the conclusion of said contract.

The Court of King's Bench for Saskatchewan stated that the representative of the Achter company delivered the quantity of grains (durum) specified in the contract, at the price and term stated also within it. Thus, the representative of the Achter company

²The King's Bench Decision (Canada), South West Terminal (SWT) v. Achter Land & Cattle Ltd, 2023 SKKB 116 from 08.06.2023.

complied with the contractual conditions contained in the document sent by telephone message. He cannot be considered to have confirmed the receipt of an invoice/receipt, but to have confirmed the conclusion of the grain contract.

The only difference between the grains contract and the one regarding the quantity of flax was represented by the way of confirming the contract, i.e. the emoji instead of the expression *ok, looks good, yup*. The representative of the Achter company claimed that he did not know what the said emoji meant to which the representative of the SWT company replied that it was not important whether or not Achter knew the meaning of the emoji, but what any natural or legal person would understand if they received this reply.

Achter's counsel also claimed that if the Court finds that the respective emoji represents a valid method of confirming the contract, other emojis will be able to be appreciated by other courts as electronic signatures (valid acceptance of contracts). However, the court responded by claiming that the technology is constantly developing and the role of the method used as confirmation cannot be denied. Also, the representative of the Achter company can not fail to comply with the provisions of a contract that he has accepted.

Another consideration the court took into account is the fact that the thumbs-up emoji respects the two main functions of the electronic signature, namely the identification of the signatory and the agreement regarding the conclusion of the contract.

Considering the text message conversation between the parties, their custom of entering into contracts through these messages and the meaning of the thumbs-up emoji in Western culture, the court found, using the balance of probabilities as the standard of proof, that a valid flax purchase contract was concluded on the 26th of March 2021.

We appreciate the court's ruling and consider it an innovative one. We note that the telephone number represents a simple electronic signature attached to the electronic message sent (electronically registered)(Cimpoeru, D., 2013) and it is possible to identify the signer (as stated in the paragraphs above). Also, those phone numbers have been used since 2015 to conclude contracts between the two parties. Therefore, a custom regarding the conclusion of commercial acts between SWT and Achter, exists. We also mention the fact that seeing as how the numbers are frequently used, the possibility of other people using the phones to conclude commercial contracts is reduced. Thus, the confidence in the integrity of the document is provided by the continuous use of the telephone numbers. Furthermore there is a higher chance to identify the identity of the parties involved.

In regards to the thumbs-up emoji as an electronic signature, we consider that there is the possibility of identifying the signer via phone number. Also, the signatory approved the content of the document. Thus, the signatory gave his consent to the fact that the content of the document binds him personally and will produce legal effects. Therefore, the hierarchy of the functions of the signature was respected (the approval of the content followed by the identification of the signatory)(Mason, S., 2017).

The Thumbs-up emoji would be considered an electronic signature in the Romanian legal system as well. This assertion is based on provisions of art. 3 point 10 of eIDAS Regulation. The normative act stated produces effects in Romania's internal legislation. Thus, "electronic signature means data in electronic format, attached to or logically associated with other data in electronic format and used by the signatory to sign." Thumbs-up was used to sign, in this particular case (the one analyzed in this article).

According to art. 4 point 3 of Law no. 455/2001 regarding the electronic signature, "the electronic signature represents data in electronic form, which is attached, or logically

associated, with other data in electronic form and which serves as a method of identification". The emoji used in this legal case served as a method of identification, being a simple electronic signature (not a qualified signature). We stated the provisions of Law no. 455/2001 because there is a legal debate between scholars regarding the abrogation of the provisions relating to the definitions stipulated in the aforementioned law and the provisions stated in the eIDAS Regulation (for more information about this debate read Popovici, S., 2019). In regards to the probative power of the electronic document to which this simple electronic signature was attached to, Law no. 455/2001 does not provide a concrete rule. However, we appreciate that the probative value of the stated electronic document is that of *beginning of proof*, due to the reduced possibility of identifying the signatory (for more information regarding the probative value of electronic documents, read Rusu, A., 2020).

The specific type of language used in the conversations between the parties in the case is also used in WhatsApp conversations in Romania. Thus, the thumbs-up denotes an agreement with the statement provided in the electronic message. Indeed, a confirmation of the conclusion of the act with the following text "I, Achter, confirm the conclusion of the contract" would represent an increased degree of document integrity compared to an emoji. However, thumbs-up is a method of approval because it has to be selected from several emojis on WhatsApp. There is no specific thumbs-up button in said application. Also, in most text messaging apps there is no designated button. Facebook messenger has a specific button for thumbs-up precisely because of the frequency of using this emoji to confirm an aspect in the conversation. So Achter selected his emoji, going the extra step of knowing its meaning. We also note that we should not be overly restrictive about language when entering into distance business contracts, as this would affect the flow of business, commerce. Thumbs-up is a simple electronic signature sufficient to confirm the content of a contract.

Conditioning the existence of a qualified electronic signature for the conclusion of commercial contracts would be excessive. The efficiency of commercial relations would decrease considerably if qualified electronic signatures were imposed. This is due to the excessive time spent to attach the said signature to each offer, counteroffer, acceptance.

Examining all the facts, we consider that the court correctly ruled that there is a valid concluded contract. Also, taking into account all the presented evidence, the Romanian courts would have considered that the specific legal contract was validly concluded. Thus, thumbs-up represents a simple electronic signature and the document to which it is attached has minimal probative value (beginning of proof) because the signature is not uniquely linked to the signer. However, this simple electronic signature together with the telephone number (another simple electronic signature), the frequency of entering into business relations under almost identical conditions between the same parties (business custom), the specific online language, the purpose of the thumbs-up as an emoji (an aspect is confirmed), the constant use of a messaging app by the parties for the conclusion of legal acts is sufficient evidence to consider the contract as valid.

4. THE GIF FILE AS AN ELECTRONIC SIGNATURE

If we substitute the thumbs up emoji used in the aforementioned legal case with a GIF, would the contract be valid? Would a GIF represent an electronic signature? From our

perspective, in order to answer these questions we must examine the type of GIF attached to the electronic document (message).

According to the Cambridge Dictionary a GIF represents a type of computer file that contains a still or moving image (<https://dictionary.cambridge.org/dictionary/english/gif>). Also, GIF is the abbreviation for "Graphic Interchange Format". Therefore, a GIF is an image or a succession of images (video). GIF files also allow images or frames to be combined, creating basic animations (<https://www.adobe.com/creativecloud/file-types/image/raster/gif-file.html>). As a specific limitation, we mention that GIF files do not have audio. These files are small and quick to load. This represents the primary reason why GIFs are preferred to normal images or animations. Unfortunately, the colour palette is limited to 256 items. This means that images may have a low resolution or seem blurry.

GIFs were not used in order to sign electronic contracts. Usually, these files are utilized to create web graphics, logos, memes, online animations, etc (<https://www.adobe.com/creativecloud/file-types/image/raster/gif-file.html>). Images and videos can represent electronic signatures. The aforementioned statement is in accordance with art. 4 point 3 of Law no. 455/2001 and art. 3 point 10 of European Regulation no. 910/2014. Thus, images and videos do represent data in electronic format and can be used to identify the signatory and to sign an electronic document (the approval of the terms and conditions of a contract) in the Romanian legal system. This assertion regarding the validity of the GIF file as an electronic signature, also extends to EU member countries (eIDAS Regulation is mandatory).

GIF files do represent still or moving images. Therefore, these files could be used theoretically as simple electronic signatures. There are two quintessential conditions that need to be met in order to use the GIF file to sign an electronic contract, from our perspective: the GIF file has to identify the signatory (the one using it in order to sign the document) and it has to somehow represent approval of the terms and obligations derived from the contract.

To answer the question regarding the substitution of the thumbs up emoji with a GIF in the King's Bench case, a GIF that represents a still or moving image of a random person or an animation making the thumbs up gesture could be used in order to sign the phone message. Consequently, the electronic contract would be considered valid. This assertion derives from the fact that this particular GIF together with the phone number represent two simple electronic signatures that help identify the signatory. Also, this GIF file does represent approval of terms and obligations stated in the contract for the same reason that the thumbs up emoji represents approval. It's a particular online language used to confirm certain aspects. The frequency of usage of this GIF compared to the thumbs up emoji in online chatter is not necessarily of interest for the validity of the contract. That being said, the frequency of usage of this GIF file between the two parties in the conclusion of multiple contracts is important. Thus, a GIF in which a person does make the thumbs up gesture is a valid simple electronic signature. The probative value of an electronic document which contains this particular simple electronic signature is that of beginning of proof in the Romanian legal system, due to the reduced possibility of identifying the signatory.

We also consider that other GIF files could represent valid electronic signatures. *Exempli gratia*, a still image, moving images (video with no sound) or an animation that depicts a character making the *ok* gesture could represent a valid electronic signature (provided the other requirements mentioned in the above paragraph are met). Also, a GIF file

that shows a character nodding their head or saying *ok, looks good, yup, yes, etc* (even if there is no sound) could be considered a simple electronic signature. If this latter GIF file contains subtitles, then the approval of the signatory in regards to what is contained in the electronic contract, is more certain. The logic derives from the fact that the image or video is doubled by a written confirmation (*ok, yes, etc*). Therefore the gesture of confirmation is consolidated by the use of a written visual cue, seeing as how the GIF files do not support audio.

Other GIF files could be used in order to sign electronic documents if the parties have frequently concluded contracts in almost identical conditions. If the GIF does not include a universally accepted gesture or reply, it is mandatory for the parties to have used interchangeable GIF files (equivalent ones, high degree of similarity between them), regularly, in order to approve the content of electronic contracts. For example, a GIF file that depicts someone winning a running race could represent a valid confirmation (electronic signature) if prior to it's use, a GIF of someone winning a car race was utilized by the same parties, to conclude another electronic document and a GIF file of someone winning a bicycle race was used to conclude another contract. How frequent the parties use these certain GIFs in order to confirm different electronic contracts does represent a high degree of importance.

Animated signatures GIFs are used regularly in order to sign e-mail documents. The e-mail adress does represent a simple electronic signature according to the High Court of Cassation and Justice in Romania (highest court)³. In addition, this electronic signature is recognized as such in multiple legislations (including EU state member countries). As mentioned in the paragraphs above, a GIF is a still or moving image and could be an electronic signature. If an animated e-mail signature is attached to an e-mail (the animation or still image represents the equivalent of the handwritten signature in electronic form), then it is easier to identify the signatory and determine the approval of the electronic document. This aspect is doubled by the use of an e-mail adress. As such, this GIF (image or animated e-mail signature) combined with e-mail adress (another simple electronic signature) do confirm the intent of the signatory to conclude an electronic contract. Thus, animated e-mail signature does represent a valid simple electronic signature.

This research paper was not created in order to limit the courts prerogative to interpret law. The intent was to offer a perspective, guidance on how the GIF can be interpreted when attached to a specific electronic document. Therefore, the courts can interpret freely, case by case if GIF files represent valid simple electronic signatures used to conclude contracts.

5. CONCLUSION

Regarding the phone number as an electronic signature, we concluded that in most cases, the phone number is a valid means of identifying the signatory. Thus, if an SMS message is sent there is the possibility of identifying the sender. This aspect is also confirmed in legal doctrine (Cimpoeru, D., 2013). Also, SMS OTP (one time password) is used as an added layer of protection and it is linked directly to the identity of the person

³ Decision number 34/2016 of the High Court of Cassation and Justice (solving some legal issues), point 105, published in the Official Monitor Part I, number 18 from 09.01.2017.

using the phone number. Therefore, the phone number can be used as a simple electronic signature.

The thumbs-up denotes an agreement with the statement provided in the electronic message. As such, this emoji represents a simple electronic signature and the document to which it is attached has minimal probative value (beginning of proof) because the signature is not uniquely linked to the signer. That being said, this simple electronic signature must be analyzed together with other electronic signatures. Also, the following aspects are of significant importance: the frequency of entering into business relations under almost identical conditions between the same parties, the specific online language, the purpose of the thumbs-up as an emoji, the constant use of a messaging app by the parties for the conclusion of legal acts, etc.

The GIF must be analyzed case by case in order to determine if it does represent an electronic signature. Also, there are two primary conditions in order to use the GIF file to sign an electronic contract: the GIF file has to identify the signatory and it has to somehow represent approval of the terms and obligations derived from the contract. If these aspects are met, then the GIF file can be used as an electronic signature. For example, the GIF that contains the image of someone showing the thumbs up gesture, represents a valid means of approval (electronic document).

We note that the number of disputes of this type will increase significantly as a result of technological progress. Almost any person can enter into an electronic contract due to the ease of transmission of information. Thus, the courts will have to be prepared to provide solutions for multiple problems. Also, there is a need to examine the probative value of different types of contracts signed using simple electronic signatures such as biometric signatures, perhaps other emojis or GIFs.

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