

Case Note

Case note **Greece**

Case No **Court Decision No. 1963/2004**

Name and level of court **Court of First Instance of Athens**

President of Court (1 member) **N. Roussos**

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The sender of an e-mail message is also the editor of the text that accompanies the message, as an internet user's electronic address that is created and chosen by the sender is unique for each address and itself has the character of a manual signature. The mechanical resemblance of the message in a document can be authorized as a private document with a conclusive power against its editor (Articles 443, 444 and 445 of the Civil Procedure Code).

Facts

According to article 93 §1 of the Civil Code,¹

"the members' assembly is the union's superior operation and decides for every case that is not the competence of other union organs".

According to articles 95 and 96 of the Civil Code,²

"the authority for the convocation of the assembly belongs initially to the governance of the Union and, in some specially restricted cases, to the minority of the members, after a previous Court's authorization."

Where the members of a Union are invited to attend a General Assembly without abiding by the legal requirements and by incompetent persons, such a gathering cannot be considered as a General Assembly; so, it is legally non-existent and the decisions made during this assembly cannot be regarded as decisions of a Union's General Assembly, and they are totally null and void. Their invalidity can be invoked by anyone having a legal interest and they cannot be considered invalid due to article 101 of the Civil Code, which requires a

legally convoked General Assembly's decision, opposed however to law or the articles of incorporation.

Furthermore, an electronic document can be defined as the total of the written data in the magnetic disk of a personal computer. These data are resembled in a readable format, after being processed by the Central Processor Unit, either in the computer's screen or in an installed printer. An electronic document does not consist of most of the elements of a (traditional) document under most legal systems, mainly because of the lack of stability during its incorporation into a substance that has life endurance. According to common experience, for the operation of e-mail as a means of communication over the internet, besides the connection with an Internet Service Provider, the usage of a specific password is also required, in order for each user to be identified in the system, either as a sender or a receiver of electronic messages. This password is, in fact, the user's electronic address (e-mail), as it is originally chosen by the user himself in such a way that the specific combination of letters, numbers or symbols (the password) only reflects the user that has chosen it and cannot be legally used by anyone else. The representation of the sender's address in the message makes his identity specific for the receiver of the message, so he cannot be confused with any other user of the same system, while his congruency with the content of the message is indisputable. A crucial fact for electronic mail to come under the rules of articles 443 and 444 of the Civil Procedure Code³ is to understand how it works, because this is not simply an electronic document that is saved in the software of a personal computer or of a document that its representation is transferred by wireless or not (e.g. facsimile transmission). The sending of the

¹ Article 93 of the Greek Civil Code: Union Assembly. *"The members' assembly is the union's superior operation and decides for every case that is not the competence of other union organs. The assembly, if the articles of incorporation do not differentiate, especially elect the members of the governance, decides for the entrance or the rejection of a member, affirms the balance-sheet (financial statement of a union), decides for the alteration of the union's object, for the alteration of the articles of incorporation and the dissolution of the union".*

² Article 95 of the Greek Civil Code: Convocation. *"The administration convokes the assembly in cases specially determined by the articles of incorporation or every time that it is necessary for the interest of the union".*
Article 96 of the Greek Civil Code: *"The assembly is convoked, if requested by as many members as determined in the articles of incorporation. If there is no such prediction, the convocation can be requested by 1/5 of the members after an application, where all matters that shall be discussed are specifically mentioned. If this application is not accepted by the administration, a judge of first instance can authorize the applicants to convoke the assembly and regulate everything concerning the assembly's governance".*

The burden of proof lies to whoever appeals that defectiveness, because the function of the electronic mail acts to guarantee its credibility and any possible malfunction does not originate from a system flaw but from a third party's intervention

message leads to the congruency of the content of the message and of the sender, in such a way that the message cannot be transferable if it is not accompanied by the sender's electronic address and, of course, if there is no specific and existent receiver. The logical consequence is that in the sending of a message by way of electronic mail, the sender's will is identified with his electronic address so it can be technically possible for the receiver to receive it and, of course, the form or the layout of the will's mechanical representation in the document are of less importance. So, the determination of the electronic address in a unique manner from the user himself and its representation in every sent electronic message is a proof of the editor's identity and, accordingly with what is defined for the traditional document in article 443 of the Civil Procedure Code. Its mechanical representation in a document, according to article 444 paragraph 3 of the Civil Procedure Code, can be defined as a private document, with a conclusive power against its editor, because each user electronic address is unique, that is chosen by the sender himself and it is unique, has the character of a manuscript signature, even though it does not have a signature's traditional form. Thus, the attested copy of an electronically sent message, which exists in the receiver's hard disc, is a full proof that its contents come from its editor-sender, according to what is defined in article 445 of the Civil Procedure Code.

Moreover, the system's operation, as it is above described, is possible to conceal the risk that the specific message was sent by a person different than the one that the specific electronic address belongs to, by using this address (by any means) without the user's approval. The defectiveness of the sent message directly refers to the traditional acts of forgery. The burden of proof lies to whoever appeals that defectiveness, because the function of the electronic mail acts to guarantee its credibility and any possible malfunction does not originate from a system flaw but from a third party's intervention. According to the above-mentioned, article 457 paragraph 4 of the Civil Procedure Code⁴ is narrowed in the similarity between the content of the personal computer hard disc and its mechanical representation, because an electronic message is, for the receiver, an incoming message to his personal computer and, therefore, he can be liable for the validity of a copy of the message that he has received.⁵

In the discussion of the case, the plaintiff asked for the cancellation of the defendant's company's General Assembly's decision due to infringement of law and of articles of incorporation. From the testimonies of the witnesses that testified in court and from the documents that the parties presented, the following things were established: the defendant union was legally established in 1978. It is a typical union of civil law and not a syndicate organisation, as the preservation and promotion of labour, financial, insurance, social and syndicated interests of its members are not included beyond the goals of the union.

Some of the defendant's union members received in their mailbox the following invitation, as an attachment to the sent e-mail:

"Athens, 21 April 2003. Invitation for scheduled General Assembly. The Board of Directors invites the Union's members in the scheduled General Assembly that will take place in Athens, in the Hotel in [...date...], 6.30pm. In case of non quorum the General Assembly will be repeated in the same place in 6.30pm of the same day. The issues of the agenda are: 1. Election of the returning board. 2. Report of the foregoing Board of Directors. 3. Report's approbation. 4. Members' of the Board of Directors release from every liability. 5. Election of members of the Board of Directors and auditors. It is reminded that: 1. According to article 18 of the articles of incorporation, the Assembly is represented by members that have fulfilled their financial duties towards the Union for the year 2002. 2. According to article 20§5 of the articles of incorporation, it is required for the existence of quorum that the present and financially settled members outnumber the absent ones. 3. In case that a member is unable to be present at the General Assembly, he/she can authorise in writing another member to be present and vote on his behalf. Anyone that wishes to be elected is welcome to submit their candidacy until 6th May the latter, in fax number [...] or in the email [...]. The president of the Board of Directors."

³ Article 443 Civil Procedure Code: Elements of private documents. "A private document has conclusive power only when it has the manuscript signature of its editor or, instead of a signature, a mark that he (the editor) drew on the document and is verified by a notary or any other public authority, which confirms that the mark is placed instead of the signature and that the editor declared that he cannot sign".

Article 444 Civil Procedure Code: Official books of merchants and other professionals. "The definition of private documents also contains

a) the books that merchants and professionals are obliged to keep under commercial law or other statutes
b) the books that lawyers, notaries, doctors, pharmacists and nurses are obliged to keep under current statutes
c) photographic and cinematic representations, recordings and any other mechanical representation".

⁴ Article 457 Civil Procedure Code, paragraph 4: "The burden of proof for the validity, if doubted, of photographic or cinematic representations, recordings and any other mechanical representation, lies to anyone who presents and invokes them".

⁵ This has also been held in decision No 1327/2001 Court of First Instance of Athens.

This invitation was sent as an attached document by Mr. A.P., and not by the President of the Board of Directors, as it is required in article 20 paragraph 2 of the articles of incorporation. A.P. was at that time the General Secretary of the Board of Directors and not the Vice President, as he had stated. The electronic message had no other content, and the electronic address of the sender was clearly shown. Based on the previous comments, the representation of this address made the sender absolutely specific to all the recipients of the invitation, which was downloaded to their personal computer's hard disc. Moreover, the representation of the electronic address is regarded as a proof of the editor's identity, because it has the characteristics of his manuscript signature. Thus, the decision that was taken on 8 May 2003 during the General Assembly that was convoked by the above-mentioned unauthorized person was totally invalid. Besides that, there was no proof that all the members of the Union received the above-mentioned electronic mail-invitation, as it appears from the plaintiff members' list, that many members did not have an electronic address account and, consequently, it was not certain that they were aware of the General Assembly's convocation.

As a result, the Court decided that the lawsuit should be accepted and the General Assembly's decision should be declared invalid.

[The appeal should be allowed]

Comments

The Court in the above-mentioned case held that the decisions taken in a Union's General Assembly were invalid because the General Assembly was convoked by an unauthorized person via an e-mail message. Before proceeding to the analysis of some crucial facts that this decision raises, we should first have a general overview of the problem of identity in the internet.

The problem of identity over the internet

In the traditional-physical transactional environment, it is a simple process for someone to prove his identity. Additionally, the use of a manuscript signature is crucial in order for someone to be bound to the content of a document. The clearest expression of a signature, as determined by common sense and knowledge, is when someone writes his name on a document (a 'manuscript signature'). This action is thoroughly understood by anyone; perhaps this is the reason why there has seldom been an attempt to clarify the definition of the legal term 'signature' in any legislative measure.⁶

Although there is not a unified legislation and despite few contrary court decisions, it is acceptable that signatures worldwide serve a similar purpose. As it is given in the US Uniform Commercial Code, the word 'signed' includes "any symbol executed or adopted by a party with an *intent* to authenticate writing"⁷. So, a manuscript signature that is, undeniably, legally effective in all jurisdictions, has three main purposes:⁸

- to provide evidence of the **identity** of the person who signs
- to show the signatory's **intention** that the signature is his signature
- to confirm that with signing he **approves and adopts** the contents of the document.

As far as the identity is concerned, when dealing directly with others, it can be proven by comparing one signature that appears in a document with another signature; the person who signed can recognise his own signature, as it is stated that each signature in the physical world is unique.⁹ That way, a signature can identify the signatory; it represents him to the world, not only by revealing the name but also by the handwriting, because handwriting can disclose things like the level of literacy, the age or even the character of someone, according to graphologists.¹⁰

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⁶ Chris Reed, 'What is a signature', 2000 (3) *Journal of Information, Law and Technology* paragraph 1.1.

⁷ U.C.C. Article 1-201(39).

⁸ Chris Reed, 'Legally binding electronic documents: Digital signatures and authentication', (2001) 35(1) *The International Lawyer* 93.

⁹ Chris Reed, 'Legally binding electronic documents: Digital signatures and authentication', (2001) 35(1) *The International Lawyer* 93.

¹⁰ The true meaning of identity and the status of personal names, though, vary from country to country, even within the fields of European Union. In England, for example, a person does not have any form of official identification to prove his legal name. In civil law countries identification seems to be a more formal procedure, which is why names and signatures seem to have greater value as elements of identification. In Greece everyone, after a specific age, when persons start to obtain their first legal and social rights (mainly in the early adolescence) is obliged to obtain, under the authority and the responsibility of the police, an official identity card which contains almost every element by which a person can be recognized (besides the name, things like date of birth, height, colour of eyes and hair, nationality and blood type are necessary contents of it) and it is supposed to be carried in any time in case needed to prove your identity. In Holland, a name can be changed by deposition in front of a judge and only in the presence of a specific and serious reason, in contrast to England. See Lorna Brazzell, *Electronic Signatures Law and Regulation* (Sweet & Maxwell, 2004), 25-26.

One way or the other, the act of affixing a signature to a document shows clearly the intention of the signatory to be bound by the content of the signed document and that makes it the cornerstone of an effective transaction

Probably the main function of a manuscript signature is the expression of intent. Intention may vary, according to the type of the transaction; so, a signature might signify approval, authorization or confirmation. One way or the other, the act of affixing a signature to a document shows clearly the intention of the signatory to be bound by the content of the signed document and that makes it the cornerstone of an effective transaction.¹¹ Hence, signatures can offer security to transactions in many ways. It is not only that they authenticate the document and ensure its integrity; it is also the fact that they bind the signatory to the terms of the document regardless the fact that he has not read it at all.¹² An important feature of a valid signature is that it can provide evidence to reveal the signatory's intention to adopt the contents of the document as if they were his own.¹³ In that way, repudiation becomes really hard for someone who has signed a document, and the status and validity of a signature can only be questioned in the case of forgery.¹⁴

So, the need for security is a necessary condition for the growth of electronic communication, and failing to deal with it could have a disastrous effect on the notion of a secure and safe electronic environment.

Hence, it is not irrelevant that there has been a quite respectable amount of legislative activity in both regional and international level for developing the legal framework of electronic commerce, and particularly in the field of electronic signatures law.¹⁵ Legislation is moving

towards promoting a favourable business environment; this can only be achieved by amplifying the confidence regarding the prospects of e-commerce and building trust between the contracting parties. A concrete legal base will enhance the concept of security, and this will have positive effects in the financial market, and for business and consumers as well; this has been reflected in many guiding principle documents of states and organisations.¹⁶

The recognition of electronic signatures is a great step towards the accomplishment of these objectives. There are many categories of electronic signatures, some of them really simple and other more complex that require knowledge of mathematics, algorithms and cryptography. But even digital signatures, which are indeed difficult to forge, can be easily misused.¹⁷

The role of Certification Authorities

The solution to the problem of the verification of the identity of a party is given by the operation of Certification Authorities. A rather broad definition of the term is given in the European Directive for electronic signatures, where certification authorities are described as "entities or legal or natural persons who issue certificates or provide other services related to electronic signatures".¹⁸ In fact, these certificates are the digital equivalent of physical ways of identification documents and they are produced after a specific process by Trusted Third Parties. This way, digital signatures are the future in every electronic

¹¹ See reference to note 9.

¹² *L'Estrange v. Graucob*, [1934] 2 K.B. 394.

¹³ Stephen Mason, *Electronic Signatures in Law* (LexisNexis Butterworths, 2003), 2.110 - 2.117, and Chris Reed, 'What is a signature', 2000 (3) *Journal of Information, Law and Technology*, paragraph 3.1.3.

¹⁴ Baker & Hurst, *The limits of trust: Cryptography, Governments and electronic commerce* (The Hague, London, Boston: Kluwer Law International, 1998) 246.

¹⁵ Lorna Brazzell, *Electronic Signatures Law and Regulation* (Sweet & Maxwell, 2004) 1. See also Stephen Mason, *Electronic Signatures in Law* (LexisNexis Butterworths, 2003), and Chapter 15, which is entitled "A comparison of electronic signature laws".

¹⁶ Characteristic examples are two documents that are some of the first attempts to regulate cyberspace: as far as US is concerned, 'A framework for global electronic commerce' (by President William J. Clinton and Vice President Al Gore Jr, Washington DC, 1997); in the field of European Union, 'A European initiative in electronic commerce' [Com (97) 157, 15 April 1997].

¹⁷ Such an occasion is very likely to happen in internet auction sites, where the identity of the account holder is not always easy to be verified. The infamous case of Andrew Tyler is suggestive. He was 13 years old when his mother, Ingrid Tyler, had an account number in the popular on-line auctions site eBay. It was discovered that the boy could not stop spending, as he had purchased items worth almost US\$3m from the site using his mother's account number, without anyone realising it was not his mother. His mother finally found out when she received the bill for her teenager's internet shopping spree. This incident can become educative from many aspects. Because the security of the key is of major importance in the creation of digital signatures, which are based on public key cryptography, there should be some type of protection policy based on new technology means that could ensure the safety of private keys. For example, biometrics can be used for this purpose as well in order to effectively restrict access to keys. Smart card systems are also a relatively new effort to protect private keys by requiring a fingerprint scan in order to access the key. Other systems are and will be tried in the future in order to secure electronic environment and lead it, through the use of digital signatures into commercial prosperity.

¹⁸ Directive 1999/93/EC of the European parliament and of the Council of 13 December 1999 on a community framework for electronic signatures, OJ L13/12, 19.1.2000, Article 2(11). A similar definition is also given in the UNCITRAL Model Law on electronic signatures (2001), Article 2(e), which defines a certification service provider as 'a person that issues certificates and may provide other services related to electronic signatures'.

communication and probably the only means to help us ensure the integrity of commercial transactions in the cyber world.

Bearing all these things in mind, one could say that this interesting case is one of the first in Greek case law that raises a number of serious questions about electronic signatures. Nevertheless, the reasoning of the court lacks in a series of critical issues.

Whether the e-mail was signed

Probably the simplest form of electronic signature is the typing of a name, initials, surname or even a pseudonym on to an electronic document; as long as it identifies the signatory, this typing mechanism would be sufficient to be characterised as a signature.¹⁹ Even if it can be legally recognised as an electronic signature, though, it still has almost no practical value. This is exactly the point in the above-mentioned case. Given the fact that anybody can sign with any possible name at the bottom of an e-mail, it is apparent that nobody can trust this type of signature for an important transaction, since there is no verification that the name used for signing really exists or an authentication that the content of the message is in agreement with the willingness of the person with that name. The same thing happens with the e-mail address itself, as the users can easily alter their real name and use any other name, fake or pseudonym, pretending that this other name is the sender. Therefore, a method of verification of the sender's identity is more than necessary.

Security issues: The role of Certification Service Providers

As stated before, the use of Certificate Service Providers and the technical methods used by them in order to ensure security and integrity in on-line transactions are the most significant means available nowadays that can guarantee the identity of a party and validate the content of an electronic message. This is a very important fact of electronic transactions and, unfortunately, the Court's decision seems to neglect it in its reasoning.

The characteristics of an authentication certificate are that:²⁰

- to identify the certification authority
- to identify the subscriber
- to contain the subscriber's public key
- it is signed with the certification authority's private key.

As to the legal status and recognition of electronic signatures, this is addressed in article 5 of the European Directive.²¹ According to the first paragraph of the article, in addition to recital (20) and (21) as well, an advanced electronic signature should be treated as legally equivalent to a handwritten signature if the requirements for a handwritten signature are fulfilled; moreover, it underlines the fact that electronic signatures have to be used as evidence in legal proceedings.²²

To sum up, one could notice that the Court correctly reached the conclusion that the General Assembly's decision should be declared invalid, although this conclusion was based on a rather simplified and, consequently, false reasoning.

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¹⁹ Stephen Mason, *Electronic Signatures in Law* (LexisNexis Butterworths, 2003) 80.

²⁰ Stephen Mason, 'Electronic Signatures: The technical and legal ramifications', (2000) 10(5) *Computers and Law*, 39.

²¹ Directive 1999/93/EC on a community framework for electronic signatures, OJ L13/12, 19.1.2000.

²² The decision in the case of AS Valga Kulmutusvaguinite Depoo (in bankruptcy), Administrative Matter No 2-3/466/03, of the Administrative Chamber of Tallinn Circuit Court, 12 June 2003, in Estonia, underlines that digitally signed documents must be considered equivalent to handwritten in court proceedings. See translation into English and commentary by Viive Näslund 'Case Report', *e-Signature Law Journal*, Volume 1, Number 1, 35 - 39.