THE VALIDITY OF CONTRACTS CONCLUDED BY ELECTRONIC MEANS IN ROMANIAN LAW

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Abstract
The purpose of this paper is to analyze the legislation, doctrinal opinions and relevant case law regarding the validity of contracts concluded by electronic means (e-contracts) in Romania and to contribute to the current stage of knowledge in this matter.
The objectives pursued by the author are:
- identification of the peculiarities of the transposition of the E-Commerce Directive into Romanian legislation;
- identification of problems that could arise from law's interpretation;
- analyzing the relevant case-law in this matter;
- issuing of the de lege ferenda proposals.
According to Romanian Law, an e-contract has the same effects as a contract concluded by traditional means, if the conditions of validity imposed by law have been observed.
In Romanian legislation, the document in electronic form, to whom was incorporated, attached or logically associated an advanced electronic signature based on a qualified certificate not suspended or not revoked at that time and which was generated with the aid of a secure equipment of electronic signature creation is equated in terms of conditions and effects to a document under private signature.

Keywords: *contracts concluded by electronic means, electronic signature, advanced electronic signature, certification service provider, qualified certificate*

I. Introduction

Enhancing the trust in electronic transactions is a necessary condition for the development of a unique digital market, which would be beneficial for citizens, enterprises and public authorities. In order to make this happen, safe electronic services are necessary, ensuring confidentiality, providing legal certainty and the security of transactions, function beyond border lines and are acknowledged by all the activity sectors, and being at the same time, cheap, easy to use and under the strict control of the parties to the transaction.[1]

In Romania, electronic commerce is gradually occupying an important part in the citizens' lives.

The volume of online payment electronic commerce increased in 2011 by 24% year-on-year, reaching the amount of Euro 158.9 mil., according to the date provided by Romcard and supplied by ePayment[2]. In 2011, the highest transactions were in the field of plane tickets – Euro 9,700, tourism packs – Euro 8,800 and software applications – Euro 6,000. The majority of transactions were performed in Romania – 59.8%, but also in Italy – 14.7%, in Spain – 5.8% or in Great Britain - 5%, according to the above mentioned source.

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[1] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Single Market Act, Twelve levers to boost growth and strengthen confidence "Working together to create new growth"{SEC(2011) 467 final}. Accessed at January 20, 2012 at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF, 13.

[2] Românii aleg tot mai mult să cumpere online: comerţul electronic a crescut cu aproape 25% în 2011, accessed at January 20, 2012 at: http://www.mediafax.ro/economic/romanii-aleg-tot-mai-mult-sa-cumpere-online-comertul-electronic-a-crescut-cu-aproape-25-in-2011-9140677/.

In this economical context, the theme of the paper – validity of the contracts concluded by electronic means - is of a great interest, both from the perspective of scientific research and from a practical perspective, as the electronic commerce have gradually expanded, having today a significant share of total world's trade.

Up today, the theme of the legal recognition of the validity of contracts concluded by electronic means was not treated as an independent subject of research, by Romanian doctrine, being mentioned in the the context of analyse of the form of the electronic contract in general[3] or in the context of the proof of the electronic contract[4].

Also, the theme of the proof of the contracts concluded by electronic means, in case of litigation, is treated by the Romanian doctrine in the context of analysing:

- the legal problems caused by introducing and usage of electronic signature in transactions[5];
- the legal regulation of the electronic signature[6];
- the admisibility of the electronic signature as proof[7];
- electronic signature – as means of the will espression by comerciants, part I[8] and part II[9].

As a method of research, the paper starts from analyzing the legal provisions, relevant case law, and the doctrine in the field, focusing on the legal recognition of the validity of contracts concluded by electronic means and on the proof of the contracts concluded by electronic means, in case of litigation. It highlights the particularities of the transposition of the of EU law into Romanian law and outlines the current status of research in Romania.

Finally, the paper draws specific conclusions meant to complement the existing scientific literature on the subject, and to contribute to the development of the Romanian doctrine in this field.

II. Legal recognition of the validity of contracts concluded by electronic means

The subject matter of contracts in the Romanian law was traditionally regulated by the civil code.

Starting from the 1st of October 2011, Romania has a new Civil Code (NCC) [10] which has replaced the old Civil Code valid since 1864[11], setting up a monist conception for the regulation of all private legal relations in a single code.

Drafted based on the Civil Code model of the Quebec Province, which was adopted in 1991, NCC preserves the *principle of autonomy of the will*, as basis for the contract, traditionally applied in the Romanian private law.

The principle of the autonomy of the will states the full contractual freedom, both in the sense of the substantive freedom and in the sense of a full *freedom of form*.

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[3] Marcel Ionel Bocşa, *Încheierea contractelor de comerț internațional prin mijloace electronice* (Bucureşti: Universul Juridic, 2010), 246.

[4] Alexandru Bleoancă, *Contractul în formă electronică* (Bucureşti: Hamangiu, 2010), 120.

[5] Camelia-Tatiana Ciulei, "Probleme juridice legate de introducerea semnăturii electronice şi folosirea ei în tranzacțiile încheiate pe internet", *Revista de drept comercial* nr. 2 (2009), 88.

[6] Tiberiu Gabriel Savu, „Consacrarea legală a semnăturii electronice", *Revista de drept comercial* nr. 7-8 (2002), 222.

[7] Florea Măgureanu, „Semnătura electronică. Admisibilitatea ei ca mijloc de dovadă", *Revista de drept comercial* nr. 11 (2203), 137.

[8] Ştefan Mihăilă, Marcel Bocşa, „Semnătura electronică – mijloc de exteriorizare a voinței comercianților (I)", *Revista de drept comercial* nr. 6 (2008), 76.

[9] Ştefan Mihăilă, Marcel Bocşa, „Semnătura electronică – mijloc de exteriorizare a voinței comercianților (II)", *Revista de drept comercial* nr. 9 (2008), 33.

[10] M.Of nr. 511 din 24/07/2009, Republicarea 1 în M.Of nr. 505 din 15/07/2011.

[11] M.Of nr. 271 din 04/12/1864, Republicat în Broşura nr. 0 din 26/07/1993.

The freedom of form (principle of *consensualism*) is expressly regulates by NCC in art. 1178 and in art. 1240.

Thus, art. 1178 from the NCC, expressly stipulates that the *contract is validly concluded based on the mere agreement of the parties* unless the law imposes a certain formality for the valid conclusion thereof.

If the parties imposes a certain formality for the valid formation of an contract and that consensual formality was not observed, the contract will be valid.

But, the will of contracting must be externalized in order to produce legal effects. The "will" remained in thought stage could not produce legal effects.

The will of contracting can be expressed verbally or in writing (art. 1240).

The mere agreement of the parties, unaccompanied by any kind of form, is sufficient for the valid formation of the contract.

The will can also be manifested by a behaviour which, according to the law or based on the convention between the parties, on the practices established between them and on the customs, leaves no doubt as to the intention to produce the adequate legal effects.

In the Romanian law, *consensual contracts are the rule*[12].

As we mention, in the case of consensual contracts, the mere agreement between the parties is sufficient so that the parties validly conclude the contract.

However, most of the times, the parties choose to record their agreement in a document ("*instrumentum*"), in order to pre-establish a proof in relation to the contract existence, as well as to the extent of the parties' rights and obligations, in case of conflict.

In Romanian Law, the contract can be proved only through a document (art. 1950 from the NCC).

For certain types of contracts, called "solemn contracts", the law stipulates the necessity *ad valididatem* to conclude the contract in the form of a writing document with handwritten signature or in a writing document with handwritten signature authentified by a public notary.

In theory, the form of a legal act is that condition which consists in the means of externalizing the manifestation of wills, with the intention of creating, modifying or terminating a concrete civil legal relationship. Lato sensu, "the form of the civil legal act" designates three types of requirements concerning the form: (1) the form required for the validity of the legal act itself – ad validitatem; (2) the form required for probating the legal act – ad probationem; (3) the form required for the enforceability of the legal act against third parties[13].

Unlike the old Civil Code, the new Civil Code expressly use the concept of "*contracts concluded by electronic means*", implicitly acknowledging the existence and validity thereof, and making express reference to the special law in relation to the conditions regarding the form thereof. (art. 1245 NCC)

In our opinion, the term "special law" mentioned in art. 1245 from the NCC designates the law applicable to the contract concluded by electronic means, according to its essence and nature, and not the law which regulates the data in electronic form. The special law which regulates the data in electronic form (Law no. 455/2001) expressly re-enforce the principal of consensualism: "No provision of this Law could be interpreted so that the principal of autonomy of the will and the principal of contractual freedom should be limited" (art. 3).

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[12] Constantin Stătescu, Corneliu Bîrsan, *Drept civil. Teoria generală a obligaţiilor* (Bucureşti: ALL, 1997), 25

[13] Gheorghe Beleiu, *Drept civil român. Introducere în drept civil. Subiectele dreptului civil* (Bucureşti: Şansa, 1995), 149.

Therefore, if the contract concluded by electronic means is a sale-purchase contract, then the special law regulating the form of such contract *ad validitatem* is the law applicable to that sale-purchase contract in general.

The validity of the contract concluded by electronic means is expressly mentioned in Romanian law, by art. 7 (1) from Law no. 365/2002 on electronic commerce[14], also:

"*contracts concluded by electronic means produce all the effects that the law recognizes in relation to contracts, when the conditions requested by the law concerning the validity thereof are satisfied"*.

The Law no. 365/2002 on electronic commerce was adopted in the process of transposition of the Directive 2000/31/EC of the European Parliament and Council from the 8th of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")[15] into national law.

The art. 7 (1) from Law no. 365/2002 on electronic commerce consecrates in the national law the *principle of equivalence of the tradition paper-based data with the data in electronic form*, representing a transposition of the provisions of art. 9 from the Directive on Electronic Commerce. Art. 9 from the Directive on Electronic Commerce imposes on the Member States the obligation to watch that their legal system makes possible the conclusion of contracts by electronic means. Member States especially watch that the legal regime applicable for the contractual process does not hamper the use of electronic contracts and does not lead to the lack of legal effect and validity of the contracts because of the conclusion thereof by electronic means. The Directive on Electronic Commerce imposes a negative obligation on Member States, in the sense that the conclusion of a contract by electronic means is not a reason for declaring that a contract does not fulfil the conditions concerning the form.[16]

The principle of the form equivalence is applied to the entire process of concluding a contract, including to the offering, negotiation, and offer acceptance phases.

In the Romanian law, in order for the contracts concluded by electronic means to be valid, the prior agreement of the parties regarding the use of electronic means is not necessary.

In base of art. 7 (1) from Law 365/2002 and art. 1178 NCC, we consider that, in Romanian law, ***a contract concluded by electronic means for which the special law did not impose a special form ad validitatem, is presumed to be valid, independently of the type of electronic signature incorporated, enclosed or attached to it.***

But, the validity of a contract is independent by the proof of the contract. A contract could be validly conclude, but could be impossible to prove it.[17]

As we mention above, in Romanian law, the contract must be proved by documents.

So that, in the cases when a contract is concluded by electronic means, then, in order to prove the contract, all the legal conditions necessary for the data in electronic form to be legally assimilated to the paper document with handwritten signature must be complied with. The same is the case for data in electronic form, other than contracts, and for which the law stipulates *ad validitatem* or *ad probationem* the written form of the manifestation of the will.

[14] M.Of nr. 959 din 29/11/2006, Republicare.

[15] JO L 178/1 din 17.7.2000, 13/vol. 29, page 257.

[16] Apostolos Gkoutzinis, *Internet Banking and the Law in Europe. Regulation, Financial Integration and Electronic Commerce* (Cambridge: University Press, 2006), 186.

[17] Alexandru Bleoancă, op. cit., 121.

III. The proof of the contract concluded by electronic means. Document. Electronic signature.

In the Romanian law, the proof of concluding contracts by electronic means and of the obligations resulting from such contracts is subject to the dispositions of the common law in terms of proof and to the dispositions from Law no. 455/2001 on the electronic signature[18] (art. 7 paragraph 3 from Law no. 365/2002).

Until the 1st of October 2011, in Romania, the matter of probation in the civil law relations was regulated by art. from 1169 to art. 1206 from the Civil Code and by art. from 167 to art. 241 from the Code of Civil Procedure[19].

NCC entered into force on the 1st of October 2011 and it no longer contains a special chapter about probation.

A special chapter dedicated to probation can be found in the new Code of Civil Procedure, which will become effective on the 15th of July 2012[20] (NCCPr.).

Thus, in art. 259 from the NCCPr, *the document* is defined as any writing or other registration which includes data about a legal act or fact, irrespective of the material support thereof or the means of preservation and storage thereof.

Moreover, the NCCPr make a distinction between the paper document, the computing support data and the data in electronic form.

While the computing support data is accepted as proof in the same conditions as the paper document, if it complies with the conditions stipulated by the law, *the data in electronic form* are subject to the dispositions of the special law.

The special law in the matter of data in electronic form is the Law no. 455/2001 on the electronic signature, which implemented in the internal law the Directive 1999/93/EC of the European Parliament and Council from the 13th of December 1999 on a Community framework for electronic signatures [21] (Directive on electronic signatures).

The term "data in electronic form" is defined by Law no. 455/2001 on the electronic signature as a collection of data in electronic form among which there are logical and functional relations and which render letters, digits or any other characters with legible significance, destined to be read using software or a similar procedure.

Consequently, a data in electronic form can be the following: an e-mail, the terms and conditions posted on a website and any other document drafted in electronic form, if they can be read using computer software or a similar procedure.

At the transposition of the Directive on the electronic signature into the Romanian law, the Romanian legislator change the name of the article "Legal effects of electronic signature" with the "Legal effects of the data in electronic form".

The Law no. 455/2001 on the electronic signature expressly lists the conditions that a data in electronic form must be fulfil in order to be legally assimilated to a written paper with handwritten signature.

The data in electronic form to which an *extended electronic signature,* based on a *qualified certificate,* not cancelled or not revoked on the respective moment and created by a *secure signature-creation-device* was incorporated, enclosed or logically associated, will be assimilated in terms of its

[18] M.Of nr. 429 din 31/07/2001.
[19] Broşura no. 0 from 26/07/1993.
[20] M.Of nr. 485 din 15/07/2010.
[21] JO L 13, 19.01.2000, 12.

conditions and effects, to the *written paper with handwritten signature (art. 5 from the Law no. 455/2001)*. This provision establishes the principle of the equivalence of the electronic signature with the handwritten signature, in the conditions in which the electronic signature is *extended, based on a qualified certificate,* not cancelled or not revoked on the respective moment and created by a secure signature-creation-device. This concept corresponds to the terms "qualified electronic signature" from the Directive on electronic signatures.

In art. 262 paragraph (2) from the NCPrC, it is mentioned that an electronic signature is not valid unless it is reproduced in the conditions stipulated by the law. But, the Law no. 455/2001 regulate the force of evidence of an electronic signature and not the validity.

In our opinion, this wording contradicts art. 5 paragraph 2 from the Directive on electronic signatures, according to which an electronic signature will not lack legal effectiveness and will not be rejected as evidence in justice for the mere reasons that:

- *It is presented in electronic format* or
- It is not based on a qualified certificate or
- It is not based on a qualified certificate issued by a certified provided or certification services or
- It is not created by a secure signature-creation-device.

De lege ferenda, we consider that the text of art. 262 paragraph 2 from NCPrC should be replaced with the following: "The force of evidence of an electronic signature is regulated by the special law on electronic signatures".

This modification appears necessarily in the context of the recent jurisprudence, when by Decission no. 1077/2007, the Bucharest Court of Law – 6th Commercial Section ascertained that the e-mail correspondence which was intended to be used in order to establish the recognition of a debt rising from a consensual contract cannot be taken into account as evidence, in relation to the dispositions from art. 5 and subseq. from Law no. 455/2001 on the electronic signature, because the submitted e-mail did not have any extended electronic signature included, enclosed or associated to it[22].

In our opinion, the Decision issued by the Bucharest Court of Law overruled the dispositions of art. 5 paragraph 2 from the Directive on electronic signatures and *rejected* as evidence a data electronic form on the grounds that the document was in electronic form and did not have enclosed any extended electronic signature based on a qualified certificate, created by a secure signature-creation-device. Taking into account that the respective data in electronic form was not intended to be used for proving the existence of a contract or of an act in relation to which the law stipulated ad *validitatem* the written form, instead was intended to be used for proving the recognition of a debt (proof that could be made with witnesses, interrogatory, presumptions), the correct solution would have been the appraisal of the proof as admissible and the qualification thereof as a "commencement of a proof in writing".

In doctrine[23], it was asserted that the data in electronic form to which an electronic signature was associated, which is not an extended electronic signature or which is not based on a qualified certificate or which is not created using a secured signature generation mechanism, can be assimilated in terms of its effects and conditions, to the commencement of a proof in writing and it can be supplemented by other means of probation in order to make the proof of the respective legal relationship.

The commencement of a proof in writing is regulated by art. 304 from the NCPrCP in the section called "Proof by witnesses", being defined as any writing, even *unsigned* and undated, which

[22] Tribunalul Bucureşti, Dosar 43787/3/2006, accessed at January 20, 2012 at: http://www.euroavocatura.ro/jurisprudenta/1252/Corespondenta_prin_email__Semnatura_electronica__Creanta_nelichida.

[23] Florea Măgureanu, op.cit, 141.

comes from a person against which the respective writing is enforceable or from the one whose successor in title is such person, if the writing makes the claimed fact credible. The commencement of a proof in writing can make the proof between the parties only if it is supplemented by other means of probation, including by the proof by witnesses or by presumptions.

Given the dispositions of art. 5 paragraph 2 from the Directive on electronic signatures, according to which a signature cannot be refused as evidence on the grounds that it is an electronic one, we also consider that a data in electronic form which does not fulfil the legal conditions in order to have the force of evidence of a *written paper with handwritten signature* will have the legal value of the commencement of a proof in writing, with the mention that this qualification is valid only in the cases when the respective data in electronic form is not used in order to make the proof of a contract. The assimilation of such "incomplete" data in electronic form with the commencement of a proof in writing is correct even if one cannot certainly establish that the data in electronic form comes from the party against which it is enforceable, because the commencement of a proof in writing is not a stand-alone proof. The same is in the case of the traditional commencement of the proof in writing, when additional pieces of evidence are necessary in order to establish whether the handwritten mentions belong to the person against whom they are enforceable.

The data in electronic form, to which an electronic signature was logically incorporated, enclosed or attached, *recognized* by the person against whom it is enforceable, has the same effect as the *authentic act* between the ones subscribing to it and those who represent their rights (Art. 6 from Law no. 455/2001). That is, if the a data in electronic form is recognized by the party against whom it is enforceable, it will have the legal value of an authentic document even if it is not accompanied by an electronic signature in extended form, even if it is not based on a qualified certificate and/or even if it is not created by a secure signature-creation-device. In our opinion, this category also includes contracts concluded by electronic means on whose grounds the parties started executing their mutual obligations. Thus, if the parties established by e-mail the contents of an advertising service supply contract, the e-mail has a simple electronic signature and the Performer fulfilled its obligations as agreed by e-mail, and the Beneficiary made the payment of the price, even partially, we consider that the respective contract was duly concluded, even if the two parties did not sign their own e-mail correspondence with extended signatures based on qualified certificates.

In the cases when, according to the law, *the written form* is requested as a probationary condition or as a condition of validity of a legal act, a data in electronic form fulfils this requirement if an extended signature based on a qualified certificate and created by a secure signature-creation-device was logically incorporated, enclosed or attached to it (art. 7 from the Law no. 455/2001). There is no need for the certificate to be unsuspended or non-revoked at such time as was expressly lists on the conditions necessary to assimilate a data in electronic form with a *written paper with handwritten signature* detailed at art. 5 from the Law no. 455/2001. In our opinion this difference is an error in the legislative procedure, because there is no reason to regulated differently those types of electronic signature. *De lege ferenda*, at art. 7 from the Law no. 455/2001 should be added that the qualified certificate on which is based the extended signature must be "unsuspended and non-revoked" when the written form is requested as a probationary condition or as a condition of validity of a legal act, also.

In a relatively recent case, by Decision no. 358/2009, the Court of Appeal from Suceava appraised that the resignation delivered to the employer by e-mail does not fulfil the conditions of a written notification required ad validitatem by art. 79 paragraph 1 from the Labour Code, because the

e-mail lacked an extended signature based on a qualified certificate and created by a secure signature-creation-device, logically incorporated, enclosed or attached to it.[24]

In our opinion, a written document with handwritten signature can be amended by a data in electronic form if the latter has a qualified electronic signature logically incorporated, enclosed or attached to it.

We could resume, that the Romanian law knows three types of electronic signatures which, in relation to the dispositions of art. 5 paragraph 2 from the Directive on electronic signature, should be accepted as a means of probation, the court of law being empowered to assess their force of evidence, on a case to case basis:

1. "Simple" Electronic signature

According to the Law, the *electronic signature* represents data in electronic form, enclosed or logically associated with other data in electronic form and which serves as an identification method.

The scope of this definition also covers the writing of one's name in an e-mail correspondence, the scan of the holograph signature, the signatory's biometric data.

The problem with these techniques is posed by their intrinsic low level of security: given the fact that a biometric or scanned signature is always the same and is not univocally connected to the signed message, anyone (the recipient itself) can gain possession of the data, can record it in their own personal computer and can take the place, without authorization, of the real owner, in order to send messages[25].

Thus, a "simple" electronic signature certifies only the sender's consent regarding the contents of the data in electronic form, without being able to exactly establish whether or not the contents was changed. Also, the reproduction of such signature can be performed by anybody.

The legal definition does not stipulate that the electronic signature must come only from a natural person, which means that a legal entity can also be the holder of an electronic signature.

The definition provided by the Romanian law is similar to the one provided by the Directive 1999/93/EC of the European Parliament and Council from the 13th of December 1999 on a Community framework for electronic signatures (Directive on electronic signatures).

2. Extended electronic signature

The extended electronic signature represents that electronic signature which cumulatively fulfils the following conditions:

a) is uniquely related to the signatory;

b) provides the identification of the signatory;

c) is created by means under the sole control of the signatory;

d) is related to the data in electronic form, to which it makes reference, so that any ulterior modification thereof is identifiable.

As can be seen from the above definition, the extended electronic signature is the correspondent of the advanced electronic signature, regulated by the Directive on electronic signatures and provided certainty both in relation to the identification of the signatory and to the data integrity.

The scope of the extended electronic signature also includes the digital signature.

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[24] Curtea de Apel Suceava, Decizia nr. 358/2009, accessed at January 20, 2012 at: http://www.legi-internet.ro/jurisprudenta-it-romania/decizii-it/semnatura-electronica/semnatura-electronica-validitatea-unui-inscris-in-forma-electronica-martie-2009-curtea-de-apel-suceava.html.

[25] Ştefan Mihăilă, Marcel Bocşa, "Reguli uniforme privind cometul electronic (III)", *Revista de drept comercial* nr. 2 (2010), 31.

3. The extended electronic signature *based on a qualified certificate and created* by a *secure signature-creation-device. (qualified electronic signature)*

The qualified certificate represents a certificate that includes the following issues:

a) the indication of the fact that the certificate was issued as a qualified certificate;

b) the identification data of the certification service provider, and its citizenship, for natural persons, respectively its nationality, for legal entities;

c) the name of the signatory or his/her pseudonym, identified as such, and other attributes specific to the signatory, function of the purpose for which the qualified certificate is issued;

d) the signatory's personal identification code;

e) the signature verification data, which corresponds to the signature creation data, under the sole control of the signatory;

f) the indication of the beginning and end of the validity period of the qualified certificate;

g) the identification code of the qualified certificate;

h) the extended electronic signature of the certification service provider issuing the qualified certificate;

i) if applicable, the limits for the use of the qualified certificate or the value limits of the operations for which it can be used;

j) any other information established by the regulatory and supervising authority specialized in this field.

and which is issued by a certification service provider which fulfils the following conditions:

a) has the financial means and material, technical and human resources adequate for guaranteeing the security, reliability and continuity of the provided certification services;

b) ensures the fast and safe operation of the information recording stipulated in art. 17, especially the fast and safe operation of a service for suspending and revoking the qualified certificates;

c) ensures the possibility of accurately determining the date and time of the issuance, suspending or revocation of a qualified certificate;

d) checks, by adequate means, compliant with the legal dispositions, the identity and, if the case may be, the specific attributes of the person to whom it issues the qualified certificate;

e) uses staff which holds specialized knowledge, experience and skills, necessary for the supply of the respective services and, especially, which has management skills, specialized knowledge in the field of electronic signature technology and sufficient practical experience in relation to the corresponding security procedures; moreover, it should apply the adequate administrative and management procedures in line with the acknowledged standards;

f) uses products associated to the electronic signature, with a high degree of reliability, protected against modifications and which ensure the technical and cryptographic security of the activities involving the electronic signature certification;

g) adopts measures against the falsification of certificates and guarantee confidentiality during the process of generating the data for signature creation, in the case when certification service providers generate such data;

h) preserves all the information concerning a qualified certificate for minimum 10 years since the expiry date of the certificate, especially in order to be able to make the proof of the certification in case of litigation;

i) does not store, reproduce or reveal to third parties the signature creation data, except for the case when the signatory asks for that;

j) uses reliable systems for storing the qualified certificates, so that: only the authorized persons are allowed to insert and change the information found in such certificates; the accuracy of

the information is open for verification; the certificates can be analyzed by third parties only if the holder thereof agrees with that; any technical modification, which might endanger such security conditions, is identifiable by the authorized persons;

k) any other conditions established by the regulatory and supervising authority specialized in this field.

The party invoking before the court an extended electronic signature must prove that it fulfils the defining conditions of the extended electronic signature.

The extended electronic signature, based on a qualified certificate issued by an *accredited* certification service provider is presumed to fulfil the defining conditions stipulated for the extended electronic signature.

The party invoking a qualified certificate before the court must prove that the certification service provider which issued the respective certificate fulfils the legal conditions stipulated for the certification service provider in order to issue qualified certificates.

The *accredited* certification service provider is presumed to fulfil the legal conditions stipulated in relation to the certification service provider in order to issue qualified certificates.

The accreditation of certification service providers in Romania is a voluntary procedure and is made by the Ministry of Communications and Information Society, according to the Minister Order no. 473 from the 9th of June 2009 on the procedure for granting, suspending and withdrawing the decision concerning the accreditation of certification service providers[26].

For the time being, in Romania there are 3 accredited certification service providers[27]:

- TRANS SPED SRL;
- DIGISIGN S.A;
- CERTSIGN S.R.L.

The secure signature-creation-device is that device used for the creation of an electronic signature, which cumulatively fulfils the following conditions:

a) the signature creation data, used for generating the signature, appears only once and is confidential;

b) the signature creation data, used for the signature generation, cannot be inferred;

c) the signature is protected against falsification by the technical means available at the time of its generation;

d) the signature creation data is effectively protected by the signatory against the use thereof by unauthorized persons;

e) it does not change the electronic data, which must be signed, and it does not prevent it from being submitted to the signatory prior to the completion of the signing process.

The party invoking before the court a secure signature-creation-mechanism must prove that it fulfils the above conditions.

The secure signature-creation-device, homologated based on this law, is presumed to fulfil the above conditions.

The homologation of the secure signature-creation-device in Romania is performed by the homologation agents, public or private law legal entities, agreed by the Ministry of Communications and Information Society.

[26] M.Of. nr. 411 din 16/06/2009.

[27] Ministerul Comunicaţiilor şi Societăţii Informaţionale, accessed at January 31, 2012 at: http://www.mcsi.ro/Minister/Domenii-de-activitate-ale-MCSI/Tehnologia-Informatiei/Servicii-electronice/Semnatura-electronica/Registrul-furnizorilo-de-servicii-de-certificare-P.

In conclusion, a qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device fulfils the highest safety standards, being presumed to be valid.

An qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device is not equivalent under any circumstance with a valid signature, but is **relatively presumed as being valid**. For example, in the case of digital signatures, there is the possibility to use the "private key" without the right to, either by the certification service provider, or by a person which gains possession thereof, without authorization.[28]

If one of the parties fails to recognize the data in electronic form or the electronic signature, the court will always order that the verification is made through a specialized technical expertise.

For this purpose, the expert or the specialist has the duty to ask for qualified certificates, as well as any other necessary documents, according to the law, for the identification of the author of the writ, of the signatory or of the certificate holder.

The electronic signature is a means of signing a data in electronic form and it may not be invoked as the proof of signing of a document in physical form. The document in physical form must bear a handwritten signature. For this purpose, recently, the courts of law which were faced with requests for ascertaining the absolute nullity of the minutes for acknowledging the offence of driving on public roads without a vignette, delivered in physical form and not bearing a handwritten signature, rejected the defence of the acknowledging agent, who stated that the minutes were signed with an electronic signature and cancelled the respective minutes for lacking a signature, motivating that an electronic signature can only accompany a data in electronic form, not a document in physical form[29].

In practice, several methods for signing data in electronic form have been developed, which vary from very simple methods (e.g. the inserting of the scanned image of a hand signature in a text processing document), to very advanced methods (e.g. using cryptography).

The electronic signatures based on the "encrypting of a public key" are called digital signatures and are considered as crucial for certain applications, such as official communications with public institutions. A digital signature can be beneficial because it ensures a single identified person and it makes the connection between the signature and the writ. It guarantees both the signatory's identity and the contents of the signed document.

Among the private persons, the electronic commerce has developed without the use of an qualified electronic signature, because the costs for such signature would exceed the benefits brought by such transactions, the majority of which are of low value.

This is why the regulation of the electronic signature has not been developed, and the private persons continue to use the "click and accept" means of purchasing.[30]

Obviously, the contracts concluded by electronic means, which in majority are sale-purchase contracts, are valid in the Romanian law, because they are consensual contracts. The absence of a

[28] Tiberiu Gabriel Savu, op.cit., 227.

[29] Judecătorii anulează amenzile pentru că procesele-verbale au semnătura electronică a CNADNR şi nu semnătură olografă, accessed at January 22, 2012 at: http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_264018/Judec%C4%83torii-anuleaz%C4%83-amenzile-pentru-c%C4%83-procesele-verbale-au-semn%C4%83tura-electronic%C4%83-a-CNADNR-%C5%9Fi-nu-semn%C4%83tur%C4%83-olograf%C4%83.html.

[30] Study on the Economic Impact of Electronic Commerce Directive, accessed at January 12, 2012 at: http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_appendix%20c.pdf.

qualified electronic signature attached to such contracts does not attract their nullity, but the impossibility to prove them, in case of litigation.

In Romania, the prove of contracts concluded by electronic means must be done in accordance with the provisions of NCC (which state that a contract can be proved only through a document), the provision of NCPrCiv (which recognised the data in electronic form as a document) and the provisions of the Law no. 455/2001 on the electronic signature (which establish the force of evidence for data in electronic form).

The providers of certification services must comply with the legislation regarding the protection of data and the right to privacy.

However, in order to enjoy a universal acceptance of their probationary value, electronic signatures must be fit for use as evidence before the court of law in all countries.

The international recognition of the probationary value of the electronic signature may face difficulties in international transactions, because the accreditation of the certification service provider is not regulated by a worldwide norm establishing international standards applicable at universal level. The certification service providers who perform certification services for the public must observe the national norms on professional liability.

For the development of the electronic commerce at international level, international agreements should be concluded, guaranteeing the worldwide interoperability by the mutual recognition of the certification services.

IV. Conclusions

We have analyzed the legal provisions, relevant case law, and the doctrine existing in Romania in the field of contract law, in general, and in the field of electronic contracts in particular, focusing on the legal recognition of the validity of contracts concluded by electronic means and on the proof of this type of e contracts in case of litigation.

The results of this research adds to the actual state of of the art in the contract law, by providing a first coherent and critical interpretation of the national laws and jurisprudence regarding the validity and proof of a contract concluded by electronic means.

In Romania law, a contract concluded by electronic means for which the special law did not impose a special form *ad validitatem*, is presumed to be valid and produce all the effects that the law acknowledges in relation to that contract, independently of the type of electronic signature incorporated, enclosed or attached to it.

In the cases when, according to the law, *the written form* is requested as a probationary condition or as a condition of validity, contracts concluded by electronic means fulfil this requirement if an extended signature based on a qualified certificate and created by a secure signature-creation-device was logically incorporated, enclosed or attached to it.

Only a qualified electronic signature generated by an accredited certification service provider and created with a homologated secure signature-creation-device is presumed to be valid. For the rest, the party that prevails itself of an qualified electronic signature must prove all its definitory legal conditions.

In our research we formulate some opinions that could help the practitioners in law at the interpretation of the unclear disposition of law, as:

- the term “special law” mentioned in art. 1245 from the NCC designates the law applicable to the contract concluded by electronic means, according to its essence and nature, and not the law which regulates the data in electronic form;

- the wording of art. 262 paragraph (2) from the NCPrC, that stipulates that "an electronic signature is not valid unless it is reproduced in the conditions stipulated by the law" contradicts art. 5 paragraph 2 from the Directive on electronic signatures;
- contracts concluded by electronic means to which an simple electronic signature was logically incorporated, enclosed or attached, but on whose grounds the parties started executing their mutual obligations, are the subject of Art 6 from Law no. 455/2001 which stipulates that "data in electronic form, to which an electronic signature was logically incorporated, enclosed or attached *recognized* by the person against whom it is enforceable, has the same effect as the *authentic act* between the ones subscribing to it";
- a written document with handwritten signature can be amended by a data in electronic form if the latter has a qualified electronic signature logically incorporated, enclosed or attached to it.

Also, we formulate some proposals de *lege ferenda* in order to remove the errors appeared in the legislative procedures, as:

- Art. 7 from the Law no. 455/2001 should be complemented with the provision that the qualified certificate on which the extended signature is based must be "unsuspended and non-revoked" when the written form is requested as a probationary condition or as a condition of validity of a legal act;
- the text of art. 262 paragraph 2 from NCPrC which contradicts art. 5 paragraph 2 from the Directive on electronic signature must be harmonised by replacing it with the following: "The force of evidence of an electronic signature is regulated by the special law on electronic signatures".

As a theme of further research, the author intends to complement the analysis of the validity of the contract concluded by electronic means by concentration on the international recognition of the probationary value of the electronic signature both between the Member States and between a Member State and a third country.

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