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**ON THE PROBLEMS OF ELECTRONIC
CONTRACT CONCLUSION**

Abstract. This article emphasizes the relevance of an electronic contract nowadays, which is implemented through the Internet and is considered to be convenient, simple and fast means of contractual relations due to the development of information and communication technologies. Analyzing this problem, the author states that there are certain problems in the legal regulation of the electronic contract. So, the author notes that electronic commerce forms an independent system of civil law contracts aimed at the sale of goods, works and services of electronic trade turnover. The author also suggests introducing amendments to the Civil Code of the Republic of Kazakhstan, taking the Recommendations of the banks of the Republic of Kazakhstan as the basis.

Public relations in the field of electronic commerce are of a civil law nature, which creates the basis of legal regulation by the same rules that are applied to any civil legal relationship. They are based on unified features, and therefore these relations require a single basis - legal regulation. The particularity of electronic commercial relations is secondary in comparison with their civil nature and can only clarify the legal regulation. At the same time, the specificity of these relations led to the emergence of new types of contracts that have a civil law nature.

The formation of a system of civil contracts in the field of electronic commerce as a system of a certain group of relations contributes to the solution of a number of problems. Firstly, it enables to achieve the legislative goal - the creation of effective legislation. Secondly, the creation of a system of contracts involves the solution of the law enforcement problem.

Since the system of civil contracts is a system of a certain group of obligatory relations, the features of public relations themselves should be considered as system features.

In science of civil law, there is a widespread viewpoint which stipulates that civil law contracts can be divided into property and organizational ones. This classification is based on the special type of organizational relationship in the system of public relations, and they are regulated by the rules of the civil law. It concerns the relations in the group and between the groups that are not the subject of a commercial contract.

In the field of electronic commerce, based on the particularity of public relations, the group of property contracts, first of all, includes contracts for the paid transfer of goods into property and the receipt of value equivalent. The second group includes contracts aimed at organizing electronic trade activities (providing services for access to the information and communication network; organizing various forms of product market of electronic commerce; agreements between the counterparties concerning the use of types of communications in commercial transactions; providing services for forming funds for electronic trade, etc.).

Keywords: concept of a contract, electronic contract, electronic document, electronic signature, contract form, notary, terms for contract conclusion.

Due to the development and spread of information and communication technologies all over the world, the global Internet in particular, contracts in electronic form are becoming increasingly popular. The usual ways of concluding agreements between people are forced to transform under the influence of new technologies that provide more convenient ways of doing business. For example, today two entrepreneurs can conclude an agreement with each other completely remotely, being in different regions

of the country or the world, which will significantly save their time and resources. Today, e-commerce is actively developing, known in our country and abroad as e-commerce, e-business, etc.

Owing to the new ways of doing business, which became possible due to the development of information and communication technologies, conducting various kinds of business activities via the Internet has become more convenient, simpler and faster.

A contract is known to be the most important means of legal regulation of trade activity. A contract is an agreement of two or more persons regarding the establishment, amendment or termination of civil rights and obligations (Article 378 of the Civil Code of the Republic of Kazakhstan) [1]. In commercial activities, the contract consists of a group of legal actions conformed by the parties of the participants. The legally significant agreement of several persons is an integral object. The contract is intended to establish a legal relationship between the contracting parties, to determine their mutual rights and obligations. The agreement provides the entities with the opportunity to regulate interrelated activities of various terms and contents legally.

The concept of a contract is versatile. It can be considered from three points of view: as the basis for the emergence of a legal relationship; as the legal relationship arising from this basis; and, finally, as the form that the relevant legal relationship takes. M.F. Kazantsev noted that “for a comprehensive acquaintance with the essence of the contract, it should be studied as a legal fact, as a legal relationship, and as a form used in its conclusion” [2].

The progressive development of economic turnover and the diversity of social relations contribute to the creation of new types of contracts. The system of civil contracts, including in the field of electronic commerce, is constantly evolving. Since most of them do not contradict the law, the question arises of what legal norms can be used to regulate them. The answer to this question should be sought in the consistency of contract law. Any new type of contract is characterized not only by a new feature, which is not mentioned in the Civil Code of the Republic of Kazakhstan, but also by features that have already determined the legal regulation. Therefore, based on a systematic analysis of such contracts, it is necessary to highlight these features and consider the issue concerning the application of the legal norms stipulated by them.

Public relations in the field of electronic commerce are of a civil law nature, which creates the basis of legal regulation by the same rules that are applied to any civil legal relationship. They are based on unified features, and therefore these relations require a single basis - legal regulation. The particularity of electronic commercial relations is secondary in comparison with their civil nature and can only clarify the legal regulation. At the same time, the specificity of these relations led to the emergence of new types of contracts that have a civil law nature.

The formation of a system of civil contracts in the field of electronic commerce as a system of a certain group of relations contributes to the solution of a number of problems. Firstly, it enables to achieve the legislative goal - the creation of effective legislation. Secondly, the creation of a system of contracts involves the solution of the law enforcement problem [3].

Since the system of civil contracts is a system of a certain group of obligatory relations, the features of public relations themselves should be considered as system features.

In science of civil law, there is a widespread viewpoint which stipulates that civil law contracts can be divided into property and organizational ones. This classification is based on the special type of organizational relationship in the system of public relations, and they are regulated by the rules of the civil law. It concerns the relations in the group and between the groups that are not the subject of a commercial contract.

In the field of electronic commerce, based on the particularity of public relations, the group of property contracts, first of all, includes contracts for the paid transfer of goods into property and the receipt of value equivalent. The second group includes contracts aimed at organizing electronic trade activities (providing services for access to the information and communication network; organizing various forms of product market of electronic commerce; agreements between the counterparties concerning the use of types of communications in commercial transactions; providing services for forming funds for electronic trade, etc.).

While determining which features of public relations may be significant for law, it is necessary to base on the principle of “open list”. It is this position that the legislator stands by. The properties of public

relations reflected in the norms of the Civil Code of the Republic of Kazakhstan are diverse. This is also the goal pursued by the parties at the conclusion of the contract; and the nature of the subject of the contract; and special features of subjective structure; and economic inequality between the parties, and the connection of contracts with transportation, and a number of other features. Each of them has an independent normative significance and, serves as the basis for the formation of a system of civil contracts respectively.

Despite the growing popularity of contracts concluded in electronic form, the current legislation of the Republic of Kazakhstan does not pay proper attention to their legal regulation, there are disputes concerning the adequacy of legal definitions and the inclusion of the contract in electronic form in the system of civil law contracts.

The basis of the legal regulation for the contract conclusion in electronic form is the norms of Article 380 of the Civil Code of the Republic of Kazakhstan, which stipulates that the parties may conclude an agreement both provided and not provided for by law or other legal acts.

Article 394 of the Civil Code of the Republic of Kazakhstan stipulates that a contract in a written form may also be concluded by exchanging documents through the electronic communication, therefore, it is possible to conclude such contract. The analysis of the above norm enables to conclude that the electronic form of the contract is a written form.

As for the international legal regulation, first of all, it is necessary to mention the UNCITRAL Model Law on Electronic Commerce, which contains a rule which stipulates that information cannot be deprived of legal force, validity or enforceability since it is made up in the form of a data message. In this case, a data message means information prepared, sent, received or stored by electronic, optical or similar means, including electronic data interchange (EDI), e-mail, telegram, telex or telefax and other means. In addition, the UNCITRAL Model Law establishes relations in the field of electronic commerce on the basis of the exchange of electronic documents and messages [4]. This also indicates that electronic contracts are equivalent to a written transaction.

It seems that the contract concluded in electronic form can be considered as a transaction - the coinciding will of the participants, aimed at the establishment or amendment or termination of certain rights and obligations.

The concept of a contract as a type of transaction is contained in article 378 of the Civil Code of the Republic of Kazakhstan. The will on the Internet can be expressed in various ways, for example, by pressing the corresponding computer key, which is unambiguously defined as the transaction being completed by the relevant actions and is regulated by the rules of Article 151 of the Civil Code of the Republic of Kazakhstan. At the same time, when the computer buttons are pressed, information is processed and transmitted in the form of electrical signals, electromagnetic pulses, etc., which should be clearly interpreted as an electronic document [5].

One should agree that when making a transaction on the Internet, the form of expression of will also refers to the express and written form with the use of an electronic signature [6]. When proving a transaction, the parties may refer both to the fact of an electronic document with an electronic signature and to the information contained in the electronic exchange. It is important to emphasize that the exchange of electronic messages, each of which is signed with an electronic digital signature or another analogue of the handwritten signature of the sender of such message, in the procedure established by the laws of the Republic of Kazakhstan, is considered as an exchange of documents by the other regulatory legal acts or by agreement of the parties [7].

The contract concluded in electronic form can also be considered as an obligation, but one should keep in mind the unresolved issue of the completeness and the unconditionalness of acceptance when concluding a transaction online. On the one hand, an electronic document is the same documented information, i.e. its tangible carrier recorded on a tangible medium by documenting the information with details that make it possible to determine such information or, in cases established by the legislation of the Republic of Kazakhstan. On the other hand, when disclosing an agreement concluded in electronic form as an obligation, the moment of occurrence of obligations for each of the parties should be clearly defined. And finally, a contract concluded in electronic form can be considered as a document in which the rights and obligations of the parties are fixed. The image of a document (contract) on the monitor screen does not fundamentally differ from a paper document.

The image on the monitor is essentially a specific technology for making an analog document, along with handwritten, typewritten, typographic one. Thus, despite the different storage medium (paper, monitor), these documents will record the same information: the rights and obligations of the parties to the legal relationship. Civil law defines a document as a written act made up by a competent person in the form prescribed by the relevant legal act or contract, containing details that enable to identify the information embodied in it that establishes or confirms legal facts [8]. According to the Law of the Republic of Kazakhstan "On electronic document and electronic digital signature", an electronic document is a document in which information is presented in electronic digital form [9].

Therefore, the contract concluded in electronic form is a document in which information concerning the rights and obligations of the parties to the legal relationship is presented in electronic digital form. The first problem of concluding a contract in electronic form concerns the insufficient regulation of this issue at the legal level mentioned above: besides the general rules contained in the Civil Code of the Republic of Kazakhstan that indicate only the possibility of concluding a contract in electronic form, there is no clear and apprehensible legal regulation regarding the conclusion of such contracts.

According to the recommendations for concluding an agreement in electronic form, one must fulfill two requirements of the law: firstly, in accordance with the Civil Code of the Republic of Kazakhstan, the transaction must be signed by the person who makes it. When concluding an agreement in electronic form, an electronic signature (simple or enhanced) can be used. In addition to the electronic signature, it is possible to use the other analogues of the handwritten signature of legal entities (Reuter's system of user codes, dealer code, various ciphers and personal identification number of the owner of a credit or debit payment card (PIN)). They fulfill the same function as electronic signature when the application of the latter is impossible or impractical. Secondly, it is necessary that both parties to the agreement can reliably establish that the document comes from their counterparty.

The second problem of contracts concluded in electronic form, arising from insufficient regulation by law, is the problem of proper identification of the subject and the uncertainty of the subject structure, which is expressed in the fact that the reliability of the identification of a participant in electronic relations (for example, Internet relations) is possible only when the subject uses the enhanced electronic signature. In all other cases: the use of a simple electronic signature, IP address, domain name, logins and passwords, the identification of the person involved in these relations is unreliable. The uncertainty of the subject structure leads to the invalidity of the transaction. Thus, when concluding contracts in electronic form, the problem of uncertainty of the subject structure remains with unreliable or insufficient identification of the parties to the contract.

The solution to this problem is possible by contacting a notary. The notarization of transactions is when one participant to a transaction personally attends a notary and performs all the actions provided for by legislative acts, and then the notary certifies them electronically with his digital signature and sends it to the other participant of the transaction. The other participant of the transaction performs exactly the same actions in the other place with "his" notary in order to accept the electronic project and sign the transaction, and then he gives it back to the provider via the Internet, and thus the transaction can be concluded in compliance with all requirements of civil law.

According to I.G. Medvedev, "... the dematerialization of contractual relations shocks the fundamentals of evidence law, the bearer of which is a notary" [10]. In this case, the main means of overcoming the negative consequences and guaranteeing the reliability of both the electronic transaction itself and its notarial certification nowadays is considered to be an electronic digital signature.

Kazakhstani notary is not involved in the development of the legal and technical infrastructure of electronic documents and electronic transactions yet. As of 2007, a Project was launched to introduce the Notary electronic state database (SDB), but it has not been implemented so far. The close interaction of this electronic system in the "electronic government" system was supposed with the receipt of information by notaries from the information systems of the Tax Committee, the Registration Service Committee of the Ministry of Justice, SDB "Real Estate Register", SDB "Legal Entities" and SDB "Individuals". The pilot projects were planned to be implemented initially in Astana city and Karaganda region.

Nevertheless, taking into account the above mentioned, we propose to make appropriate amendments and additions to the Law of the Republic of Kazakhstan "On Notaries" and to the Instruction on the procedure for performing notarial actions. It is also necessary to supplement article 154 of the Civil Code

of the Republic of Kazakhstan “Notarial certification of a transaction” with part 3 which says: “Persons carrying out notarial certification of transactions are required to receive electronic digital signature certificates in the procedure prescribed by law”.

The Kazakhstani legislation in the field of electronic commerce, electronic contract and electronic transactions must comply with international standards, including the requirements of the WTO. For this purpose, the Law of the Republic of Kazakhstan “On Regulation of Trading Activities” includes Article 29 “Electronic Commerce”, according to which electronic commerce is carried out by concluding trade transactions on the basis of an agreement (contract) of electronic commerce participants for the purchase-sale of goods using electronic means of communication [11].

Despite the fact that the possibility of contacting a notary solves the problem of the authenticity of a document in electronic form, this method is not always convenient, since it involves a lot of time and money. Another problem is the uncertainty of the location of the parties, which may cause problems with the law used. The problem here is not only that the parties of the agreement concluded in electronic form can be located in different countries, but also in the servers on which the provider can place the offer. The server can be located anywhere in the world. In addition, the acceptor may send the acceptance from a laptop, for example, while on the airplane board. A business entity on the Internet may not have a trading room or office; the only his identifying feature will be the address of the Internet site and web server in this case.

It is obvious that in the legislation of the Republic of Kazakhstan such issues are not properly resolved. The appropriate amendments are proposed to be made which enable to determine the law to be applied when concluding a contract in electronic form. The above mentioned refers to legal entities with respect to individuals whose citizenship and place of residence is determined by their personal law, there are no difficulties connected with determining the place of business activities on the Internet.

In order to solve the above mentioned problems, it is necessary to include new standards in the Civil Code of the Republic of Kazakhstan, since the current version has insufficient regulation and, as a result, there is a gap in the legislation. These Recommendations of the banks of the Republic of Kazakhstan can be the basis. In this regard, it is proposed to make amendments in the Civil Code of the Republic of Kazakhstan: to supplement it with Article 394, which must indicate in what ways a contract concluded in electronic form can be signed, as well as to determine the range of evidence that must be provided when using simple or unqualified electronic signature.

Therefore, an electronic contract can also be considered as a liability. And, finally, a contract concluded in electronic form can be considered as a document in which information concerning the rights and obligations of the parties to the legal relationship is presented in electronic digital form.

It should be noted that having the special features of public relations the electronic commerce forms an independent system of contracts, which can be represented as: contracts aimed at the sale of goods, works and services; agreements aimed at organizing electronic trade turnover. This system is a subsystem of the system of trade contracts, which, in its turn, forms an element of the system of civil law contracts.

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ЭЛЕКТРОНДЫҚ ШАРТ ЖАСАУДЫҢ КЕЙБІР МӘСЕЛЕЛЕРІ

Аннотация. Мақалада қазіргі уақыттағы электрондық шарттың өзектілігі көрініс табады, ол ақпараттық-коммуникациялық технологияларды дамытумен интернет желісі арқылы жүзеге асырылады және шарттық қатынастарды жүзеге асырудың ыңғайлы, қарапайым және жылдам құралы болып саналады. Автор осы мәселені талдай келе, электрондық шартты құқықтық реттеудегі белгілі бір проблемалары бар екенін көрсетеді. Яғни автор электрондық сауда-саттық электрондық сауда айналымының тауарларын, жұмыстарын және қызметтерін өткізуге бағытталған азаматтық-құқықтық шарттардың дербес жүйесін құратынын атап

өтті. Сондай-ақ автор Қазақстан Республикасы банктерінің ұсыныстарын негізге алып отырып, Қазақстан Республикасының Азаматтық кодексіне толықтырулар енгізуді ұсынды.

Электрондық сауда саласындағы қоғамдық қатынастар азаматтық-құқықтық табиғатқа ие, бұл оларды кез келген азаматтық құқықтық қатынастарға қолданылатын нормалармен құқықтық реттеудің негізін құрайды. Олардың негізінде бірыңғай белгілер жатыр, сондықтан бұл қатынастар өз негізінде бірыңғай құқықтық реттеуді талап етеді. Электрондық коммерциялық қатынастардың ерекшелігі – олардың азаматтық-құқықтық табиғатымен салыстырғанда, екінші реттік және тек құқықтық реттеуді нақтылауы мүмкін. Сонымен қатар бұл қатынастардың ерекшелігі – азаматтық-құқықтық табиғаты бар шарттардың жаңа түрлерінің пайда болуына себепші болды.

Электрондық сауда саласында азаматтық шарттар жүйесін қалыптастыру қатынастардың белгілі бір тобының жүйесі ретінде бірқатар міндеттерді шешуге ықпал етеді. Біріншіден, құқық шығармашылық мақсатқа – тиімді заңнама құруға қол жеткізуге мүмкіндік береді. Екіншіден, шарттар жүйесін құру құқық қолдану міндетін шешуді көздейді.

Азаматтық шарттар жүйесі – бұл міндетті қатынастардың белгілі бір тобының жүйесі болғандықтан, жүйелі белгілер ретінде қоғамдық қатынастардың өздерінің ерекшеліктері қарастырылуы тиіс.

Азаматтық құқық ғылымында азаматтық-құқықтық шарттар мүліктік және ұйымдастырушылық болып бөлінуі мүмкін, ондай көзқарас кеңінен таралып отыр. Аталған негіздер азаматтық құқық нормаларымен реттелетін қоғамдық қатынастар жүйесінде ұйымдастырушылық қатынастардың ерекше түрін бөлуге негізделген. Мәселе коммерциялық шарттың объектісі болып табылмайтын шаруашылық ішілік және шаруашылықаралық қатынастар туралы болып отыр.

Электрондық сауда саласында, қоғамдық қатынастардың ерекшелігіне сүйене отырып, мүліктік келісімшарттар тобына негізінен тауарларды ақыға меншікке беру және құн баламасын алу туралы шарттар жатады. Екінші топқа электрондық сауда қызметін ұйымдастыруға бағытталған шарттар (ақпараттық-коммуникациялық желіге қол жеткізу бойынша қызметтер көрсету; электрондық сауданың тауар нарығының әртүрлі нысандарын ұйымдастыру; коммерциялық операцияларды жүзеге асыру кезінде байланыс түрлерін пайдалану туралы мәміле контрагенттері арасындағы келісімдер жатады және т.б.).

Түйін сөздер: шарттың ұғымы, электрондық шарт, электронды документ, электрондық қолтаңба, шарттың түрлері, нотариус, шарт жасаудың талаптары.

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О ПРОБЛЕМАХ ЗАКЛЮЧЕНИЯ ЭЛЕКТРОННОГО ДОГОВОРА

Аннотация. В данной работе отмечается актуальность электронного договора в наше время, которое с развитием информационно-коммуникационных технологий осуществляется посредством сети Интернет и является удобным, простым и быстрым средством осуществления договорных отношений. Анализируя эту проблему, автор указывает на то, что существуют определенные проблемы в правовом регулировании электронного договора. Так, автор отмечает, что электронная торговля образует самостоятельную систему гражданско-правовых договоров, направленных на реализацию товаров, работ и услуг электронного торгового оборота. Также автор предлагает ввести дополнения в Гражданский кодекс Республики Казахстан, взяв за основу Рекомендации банков Республики Казахстан.

Общественные отношения в сфере электронной торговли имеют гражданско-правовую природу, что создает основу правового регулирования их теми же нормами, которые применяются к любым гражданским правоотношениям. В их основе лежат единые признаки, и потому эти отношения требуют единого в своей основе – правового регулирования. Специфика электронных коммерческих отношений вторична по сравнению с их гражданско-правовой природой и может лишь уточнять правовое регулирование. В то же время специфика этих отношений обусловила появление новых видов договоров, имеющих гражданско-правовую природу.

Формирование системы гражданских договоров в сфере электронной торговли как системы определенной группы отношений способствует решению ряда задач. Во-первых, позволяет достичь правотворческой цели – создания эффективного законодательства. Во-вторых, построение системы договоров предполагает решение правоприменительной задачи [3].

Поскольку система гражданских договоров – это система определенной группы обязательственных отношений, в качестве системных признаков должны рассматриваться особенности самих общественных отношений.

В науке гражданского права широкое распространение получила точка зрения, в соответствии с которой гражданско-правовые договоры могут быть подразделены на имущественные и организационные. Указанная классификация основана на выделении в системе общественных отношений, регулируемых нормами гражданского права, особого вида организационных отношений. Речь идет о внутривозрастных и межхозяйственных отношениях, не являющихся объектом коммерческого договора.

В сфере электронной торговли, исходя из специфики общественных отношений, к группе имущественных договоров, прежде всего, относятся договоры на возмездную передачу товаров в собственность и получение стоимостного эквивалента. Ко второй группе относятся договоры, направленные на организацию электронной торговой деятельности (оказание услуг по доступу в информационно-коммуникационную сеть; организацию различных форм товарного рынка электронной торговли; соглашения между контрагентами сделки об использовании видов связи при осуществлении коммерческих операций; оказанию услуг по формированию средств электронной торговли и т.д.).

Ключевые слова: понятие договора, электронный договор, электронный документ, электронная подпись, форма договора, нотариус, условия заключения договора.

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