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THE PROBLEM OF THE ELECTRONIC CONTRACT AS EVIDENCE IN CIVIL RELATIONS

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Summary: The paper considers the problem of e-contract as evidence in legal proceedings. It addresses the main aspects of legal regulations both in international law and in various national legal systems.

Key words: E-commerce, electronic contract, validity, digital signature.

Анотація: В статті розглядається проблема електронного договору, як доказу у судовому процесі. Розглядаються основні аспекти правового регулювання, як у сфері міжнародного права, так і в різних національних системах права.

Ключові слова: електронна торгівля, договір в електронному вигляді, юридична сила, електронний підпис.

Аннотация: В статье рассматривается проблема электронного договора, как доказательства в судебном процессе. Затрагиваются основные аспекты правового регулирования, как в области международного права, так и в различных национальных системах права.

Ключевые слова: электронная торговля, договор в электронном виде, юридическая сила, электронная подпись.

E-commerce as an effective means of conducting operations in international trade is rapidly developing now. Its use for commercial and administrative purposes has already received a significant attention in several key industries in Europe, North America, Australia, New Zealand and Asia.

The growing use of electronic commerce is radically transforming the international trade practice, replacing traditional trade based on paper documents by alternative electronic systems. Instead of sending and receiving of the original written documents signed by hand, members of trade operations transfer structured business data from one computer system to another by electronic means, using electronic signatures more often.

However, domestic and international law can provide a very different rule on the admissibility of replacing paper documents with electronic messages. Many conventions and agreements related to international trade do not provide for possible use of electronic documents. This is largely due to the fact that during the development of these international conventions and agreements electronic documents simply did not exist and therefore some necessary changes should be made. Many national laws also raise uncertainty as to the validity of electronic documents or inconsistency in their approach to new technologies. Jurisprudence is more conservative. To adopt a new law regulating new, not previously encountered relationships, it is necessary to conduct extensive preparatory work that can take years. The result is the situations which have become standard for us, do not exist in terms of law.

Speaking about the electronic documents in Ukraine, the law which regulates these relations [1][2] was adopted only in 2003. By this time the Internet has long been spreading ads, negotiated and concluded agreements.

So, are the agreements sent by an e-mail considered valid? If there is no dispute with the counterparty, you shouldn't worry. The basis for resolution of potential problems is a private trust. But if you have transferred a certain amount of money, and your partners are not in a hurry to fulfill their obligation, what is to be done? To protect your interests it is necessary to claim to the court. Here a problem of the evidential value of electronic documents arises.

Nowadays lawyers are increasingly facing the situations where correspondence is conducted through the electronic document. It means they should have effective means of protection when computers are actively used in business.

If the partners do not have sustainable long-term relationship then the contract, which is drawn for a single transaction, may include approximately the following: "The Parties recognize the equal validity with the originals of correspondence and documents received by fax, internet and other electronic means of communication." The presence of such a rule in the contract will be of great value in the event of a lawsuit.

From a procedural point of view it is necessary to prove that the letter was sent with an authorized person and received by an authorized person. The computer stores information which letters have been sent, when and to whom. And if this information does not change or remove, such computer data could be evidence. However, to refer to them, it is necessary to conduct a forensic examination of the computer equipment. Then it can be even more difficult. Facts of sending messages from your computer and receipt of messages by the recipient's computer are proved. But your ex-partner states that he personally did not receive this letter. How to prove the opposite? Article 11 of the Law of Ukraine "On electronic documents" says that in case the author (addresser) does not receive confirmation, the electronic document is considered not received by the addressee. The above-described evidentiary methods are associated with great technical and material costs. The court also assesses the evidence collected in conjunction with the position of their adequacy. Thus, the more arguments in support of their case you submit the more convincing will your position be.

Although Ukraine (as well as Russia) has gained very little experience in legal regulation of electronic document management and application of relevant law, these relations have already been given significant attention in the UN and the European Union. Two model laws have been developed by the United Nations Commission on International Trade Law – UNCITRAL [3][4]. The European Union has also adopted two directives: Directive on electronic commerce and the Directive on electronic signatures. Countries of the European Union are trying to organize relations with regard to electronic documents.

This goal is pursued, for example, in German proposal on the basis of Digital Signature Act of August 16, 2000, adopted by the Bundesrat on March 9, 2001. Electronic document management, in particular electronic signature is an

independent sphere of activity in the telecommunications industry, along with television broadcasting, providing access to the Internet, and, according to the German legislator relations in this sphere should be placed under strict state control. German approach to giving effect to contracts in an electronic form such as legal force of treaties with the handwritten signature is to construct a fairly strict order on the basis of regulating the use of cryptography, public or private key in the process which addresses the technical requirements for certification bodies, which must fully comply with the law in order to obtain a permit to operate. The main emphasis is on the law creating the infrastructure for digital signatures, rather than on the recognition of legal validity of contracts in electronic format.

On March 13, 2000 in France amendments [5] were enacted, which mainly concerned the form and evidential value of the contracts. These changes are aimed at establishing common rules that allow to equalize the legal force of electronic signatures in documents and signatures in paper documents in all aspects of relationships.

Evidence in electronic form by which the person who can reveal the data and the way they have been created can be identified to a sufficient degree of certainty, in case of conflict with paper documents, signed by his own hand, is estimated by the court, which determines which of them have great probative value, based on a thorough examination of all circumstances and in an unbiased attitude to the media you are using. Keeping to the principle of functional equivalence is much more liberal than in German law, which recognizes the validity of a specific type of electronic signatures. Electronic documents are valid and can be reliably assessed by the court without reference to the technological nature of the document and the associated electronic signature.

Thus, France's position is even more liberal than the provisions of the Directive on electronic signatures because in France, electronic documents have the same recognition of their validity as signed paper documents without reference to specific technological means.

In the United Kingdom implementation of the two Directives of the European Union began with the Act on Electronic Communications, which received Royal Assent on May 25, 2000. Being intermediary between legislation in France and Germany, the Act proposes to extend the legal recognition of electronic signatures that meet certain general criteria and the criterion of functional equivalence. The act has simply created a guarantee that the documents signed with electronic signature will be accepted in the court.

As concerns Ukraine and Russia, the application of laws on electronic document, is still difficult in practice. If the parties have previously agreed in a written form, for example, in the master agreement, to use electronic digital signature (EDS) in their subsequent transaction, it can serve as a basis for the partners, third parties and the court to consider the deal, sealed with EDS, made. However, for this transaction to be recognized as legally significant the parties must properly execute the contract on the use of EDS. Conditions and procedures for electronic documents and EDS used by the parties should be clearly defined in the contract.

Given that the arbitration practice in the use of digital signature at the conclusion of business transactions (contracts) has not been developed yet to date, summarizing some practical results, including the judiciary results, we note that arbitration while clarifying the issue of concluding a contract, pays a special attention to the following circumstances: negotiation between the parties to the contract of the terms on the recognition of legal validity of documents exchanged by fax (e-mail or another form of communication); body of evidence confirming the expression of will of the Parties to the agreement on the conclusion and execution of the disputed contract (business correspondence of the parties, invoices, payment orders, the acts of reconciliation, evidence of the parties, etc.).

Today, the law does not clearly regulate drawing contracts through electronic communications. Consequently, the issue of electronic contracts requires a more detailed and thorough study, both from the regulatory and practical aspects of electronic contracts application in civil law relations.

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