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International legal regulation of electronic document circulation

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Abstract: *Electronic documents are a type of document that exists only in digital form. These electronic documents are the information product of the latest electronic information technologies such as Internet technologies, WWW technologies, multimedia. Electronic document circulation is known as a system of electronic document management, the relations between the participants of which are regulated by national law and other regulatory legal acts. On the basis of international legislation and legislation of foreign countries, the analysis of the essence and content of electronic document circulation is carried out, the legal relations that make up this concept are defined, the concepts and use of electronic documents and electronic signatures are studied. The unification of rules on electronic documents and their use in contractual relations are the cause of economic and legal issues. The article examines and conducts a comparative analysis of the features and effectiveness of the laws of United Nations Commission on International Trade Law (UNCITRAL), the directives of the European Union and the Convention laws in the emergence of electronic document management.*

Key words: Directive; electronic commerce; electronic document circulation; unification; e-commerce; electronic signature; Convention; European Union; UNCITRAL

Introduction

The rapid development of information technologies has created the problem of complex automation of documentation support and the development of software products in it. In this regard, when organizing work with documents, such concepts as ‘electronic document’, ‘electronic digital signature’, ‘electronic government’, ‘electronic documentation’, ‘electronic document circulation’ have become widespread.

Electronic documents are a type of document that exists only in digital form. These electronic documents are the information product of the latest electronic information technologies such as Internet technologies, WWW technologies, multimedia. Electronic document circulation is known as a system of electronic

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document management, the relations between the participants of which are regulated by national law and other regulatory legal acts.

Electronic document circulation is an effective way to exchange information in different states. Ensuring legal legislation within a country is impossible without taking into account foreign methods of legal regulation of electronic document circulation. At the present stage, the development of electronic document circulation is hindered by the imperfection of legal regulation, i.e. ensuring the security of information, the ability of an electronic document to act as evidence, the legal force of the document, etc.

The rapid development of electronic telecommunications and e-commerce required the formation of legal norms for the newly emerged relations. At the beginning of this process, along with space and the high seas, an attempt was made to solve the problems of e-commerce by declaring open computer networks as cyberspace, or the fourth international space. In addition, there was a self-government movement on the Internet. Its essence was that due to the global nature of e-commerce, legislation had to be kept to a minimum, comply with international and transparent, clearly defined goals, and ensure reliability, efficiency, and uniform rules of conduct. The global and extensive nature of the economy, which uses electronic means of telecommunications, does not allow it to be regulated by any government or public authority. Therefore, as a result, preference was given to the method of self-regulation. The modern global business dialogue should be focused on providing clear and concrete solutions and developing rules and codes of conduct related to the norms of self-regulation in business, which should be formed on the basis of consultations with State governments and international organizations. However, at present, the company has made maximum progress in the issue of unification of the legislative regulation of relations in the field of e-commerce through work in international organizations.

Many organizations are more or less concerned with the issue of regulating electronic document circulation, which is associated with the increasingly expanding scope of e-commerce, that is, the implementation of transactions using the Internet. Here, an electronic document is the basis without which e-commerce cannot exist.

The main bodies that develop international requirements and recommendations on procedures and rules for electronic document circulation are the Commission on Enterprise, Business Facilitation and Development within the framework of the UN Conference on Trade and Development, the UN Commission on International Trade Law and the Center for International Trade Facilitation within the Economic Commission for Europe, the International Telecommunication Union, which is a specialized telecommunications agency under the UN. But it should be noted that the leading role in the development of electronic document circulation rules has historically belonged to the UNC and the European Council. It is necessary to consider two model laws of the UNCITRAL. Both of them, the *Law On Electronic Commerce*

and the Law *On Electronic Signatures* focus on ensuring their legal status when using electronic documents in electronic commerce.¹

Materials and methods

Taking into account the peculiarities of electronic document circulation, it is important to develop common material standards to ensure the need for the development of electronic document circulation in this area. As a result of the activities of international organizations, standards and rules for electronic documents and electronic document circulation have been developed. In the future, they should be applied to national legislation, so that there is a unified system of electronic document circulation and, consequently, e-commerce throughout the world. The United Nations Commission on International Trade Law (UNCITRAL) has played an important role in this regard. When writing the article, such scientific methods as general analysis, systematization, comparison, generalization were used in the study of the Legislative legal regulation of electronic document circulation. In addition, a number of international laws were grouped in a chronological system.

Discourses

The UNCITRAL laws *On Electronic Commerce*, *On Electronic Signatures*, *On the Use of Electronic Communications in International Contracts*, and the *European Union Directive on the Legal Framework of the European Community* were considered. The relations on the use of electronic documents, electronic digital signatures, electronic trade (commerce) to ensure the free movement of information services on certain legal aspects of the field of information services in the information services market related to the use of electronic digital signatures, consumer protection in relation to remote contracts are investigated in the scientific work.

Results

Since the appearance of the electronic document in foreign practice, work has been carried out on legal support for the introduction of information technologies for document processing and electronic document circulation in relations between government agencies and citizens. Thus, in 1966, the United Nations Commission on International Trade Law, the UNCITRAL, was established to promote the development of international trade law and became a subsidiary body of the UN General Assembly. The Commission provides assistance to States in connection with the adoption of texts of legal acts.

¹ The *Model Law on Electronic Signatures* (2001).

The history of the *UNCITRAL Model Law On Electronic commerce* began with the consideration of the report of the Secretary-General on the *Legal aspects of automatic data processing* and the report of the Secretariat on the *Legal value of computer records* at the 17th session of UNCITRAL in 1984. In these documents, it is noted that the main problem of the widespread introduction of telecommunications in commercial activities is the requirement of paper documents contained in the national legislation of all countries. Therefore, it was shown that it is necessary to work on changing the legal norms of the member states to ensure equal legal force for paper documents, and new technical ways of signing electronic documents were recognized. The importance of these two reports for the further development of international legislation on electronic document circulation should be noted. They became the starting point of the legislative process, although their application in practice was difficult due to the lack of a mechanism for implementing the established rules.

The Model Law establishes the principle of cooperation between the parties: The certification authority must notify about possible problems related to the use of an electronic signature; the party who received the signed electronic document must contact the certification authority in a timely manner to verify the authenticity of the signature. The signature certified by the center is legally valid. The problem of verifying the authenticity of an electronic signature, that is, its certification, is related to the problem of the international nature of computer networks. As already mentioned, the Model Law identified the prospects for the unification of national legislation, as a result of which it would be possible to solve the problems of technology. But the fact that the legislation is identical does not mean that the law enforcement practice is the same. The Model Law, solving this problem, establishes a general rule: an electronic signature signed in another country must be recognized in the recipient country of the signed document. The main basis of certification is the similarity of signing methods. If the signature technologies are ‘substantially equivalent’, a signature signed in another country must have the same legal meaning as a national signature. The Model Law also establishes some general criteria that determine the similarity of the listed technologies. However, the procedure for recognizing the legal force of signatures abroad is not specified, which reduces its effectiveness and may further complicate international trade.²

In 1996, the *Model Law On Electronic Commerce* was adopted and put into effect in a number of countries and has become an important benchmark in the field of legislation related to electronic commerce. On the basis of the law, unified legislation on electronic commerce has been developed and adopted in Australia, Denmark, Italy, Luxembourg, Colombia, France, Slovenia and a number of other States. The further evolution of international legislation on electronic data exchange occurred through

² The *UNCITRAL Model Law on Electronic Commerce* (1996).

the creation of a Model Law. This approach has provided flexibility in the regulation of this area of relations. The new version of the Model Law is based on the concept of 'electronic information exchange', which means the exchange of information electronically from one computer to another using an agreed standard of information structure (Article 2(a)). However, in article 2 (b), the term 'data transmission' means "information that is created, stored or transmitted using electronic, optical or analog means of communication, including, but not limited to, electronic data exchange, electronic mail, telegram, telex or telefax".³

One of the conditions confirming the validity of an electronic document is its signing with an electronic signature. The Model law adheres to the criterion of technological impartiality in relation to the technology of creating an electronic signature. For this purpose, article 7 provides general principles for the recognition of the legal force of an electronic signature: it should identify the developer of the electronic document and provide a system level of security, taking into account the terms of the agreement between the parties to the e-commerce and the purposes of use. The first of the considered presumptions is the presumption of the addressee. In accordance with it, the addressee has the right to consider that the data transfer is the transfer of the initiator's data, if the addressee uses the provided procedure for verifying the validity of the message, as well as if the data transfer was made by a person on behalf of the initiator (Article 13 (3)).⁴

At the 37th session of UNCITRAL, held in Vienna from 18 to 29 September 2000, in order to promote the use of electronic signatures, the *UNCITRAL Model Law On Electronic Signatures* was adopted to implement the principles provided for in article 7 of the *Model Law On Electronic Commerce*, which specified a number of important issues that arise in the field of electronic commerce. In the accompanying documents published by the developers of this law, the purpose of its adoption is very precisely defined: a Model Law, including an electronic one, helps to overcome the shortcomings of fragmented national regulation that creates trade barriers, most of which are associated with the use of modern means of communication. The inequality and uncertainty of national regulatory regimes for electronic communications hinder the spread of business connections in international markets. The document consists of three parts: (1) criteria for the reliability and veracity of an electronic signature; (2) obligations of the parties to electronic commerce in legal relations related to the use of an electronic signature; (3) recognition of signatures of other states. In addition, the document contains other general provisions concerning the scope of application of this law, rules establishing the procedure for filling regulatory gaps

³ The *Model Law on Electronic Signatures* (2001).

⁴ ANANKO, 2001.

(general principles of law), as well as the principle of independence of the will of the parties.⁵

The requirements for an electronic signature are divided into two parts. The first one establishes the concept of an electronic signature, which completely repeats what is specified in the *Model Law On Electronic Commerce*. The second creates the conditions under which a specific signature under a specific electronic document is recognized as legally significant. First, the data representing the electronic signature must be directly linked to the person who signed the document. This means that you should avoid ambiguities about who signed it. Second, the signature, when there is one, is only under the control of the signer. It is assumed that a person, expressing his will, signs a document and no one can sign it without his consent. If someone acts on behalf of another person or persons, the general provisions on representation apply. Third, any change in the electronic signature can be detected after it is signed. This requirement, firstly, does not apply to changing the signed document, and secondly, does not mean that the changed signature loses its legal force. Only all changes must be known to the counterparty, and he will make the decision himself. Fourth, if by law an electronic signature is required to confirm the integrity of the signed document, then any changes made to it are determined after signing. In addition, in addition to these legal requirements, the *Model Law On Electronic Signatures* contains a provision that the government can recognize a certain signature technology as reliable. Thus, the presumption is created that all documents signed using this technology are legally valid.⁶

At the third stage of international legal unification in the field of electronic document circulation, the *UN Convention On the Use of Electronic Communications in International Contracts* was adopted on November 23, 2005. The essence of the convention is aimed at removing barriers to the use of electronic communications in the conclusion and execution of international contracts. At the same time, it creates conditions for the involvement of many states in the trade turnover, and not only the participants of regional associations. At this stage, it was necessary to adopt uniform rules aimed at removing obstacles to the use of electronic communications in international treaties. The main purpose of the Convention is to provide solutions to legal issues related to the use of electronic communications related to international treaties. The Convention consists of an explanatory framework that allows for the adaptation of existing provisions, facilitating the conclusion of contracts using electronic communications.

Directive 97/7/EC dated from 20 May 1997 dealt with consumer protection issues for remote contracts. The consumer is provided with additional rights and guarantees, detailed regulations for the provision of information, the term

⁵ DUTOV, 2002.

⁶ SOLOVYANENKO, 1997.

of performance and the right to refuse performance. An important rule of the directive was the recognition of legally valid contracts concluded without direct contact of the parties, that is, using remote means. This Directive is aimed at developing trade and improving the competitiveness of the countries of the European Union (hereinafter referred to as the EU). The purpose of this directive is any services provided remotely, using electronic means of processing and storing data and at the personal request of the service recipient.⁷

In order to create such a system for the provision of information society services, the *Directive On Electronic Commerce* creates a legal framework to address the following issues:

- regulation of the activities of information service providers;
- use of electronic documents;
- conclusion of contracts using electronic means;
- responsibility of intermediaries;
- dispute resolution in the field of e-commerce;
- implementation of the provisions of the directive in the legislation of the participating States.

As already mentioned, the Directive regulates legal relations in the field of information society services, but it does not apply to the following:

- issues in the field of taxation;
- issues related to the activities of the information society covered by Directives 95/46/EC and 97/66/EC;
- issues related to agreements or practices regulated by antitrust law;
- issues related to the activities of notaries and persons of similar professions;
- issues of protection of the client's interests in court;
- questions of game activity (Article 5 (1)).

In general, it can be concluded that these Model Laws (both the Directive and the Model Law) have developed the necessary guidelines for the development of legislation on electronic document circulation in the national legislations of different countries, which is a necessary condition for the development of e-commerce. Currently, Belarus, Turkmenistan, and Italy have adopted regulations on electronic documents. Similar bills exist in the United Kingdom, Sweden, France, Spain, the Netherlands, Denmark, Austria and other countries.⁸

⁷ DIRECTIVE 97/7/EC.

⁸ DIRECTIVE 1999/93/EC.

Another important European instrument in the field of electronic document circulation is the *Directive 1999/93/EC On Electronic Signature* dated from 13 December 1999. In terms of content, the Directive often resembles the *Model Law of the United Nations On Electronic Signatures*, but they are somewhat different in structure. If the Model Law pays special attention to the issues of the validity of an electronic signature, defines the rights and obligations of the parties, then the Directive seeks, first of all, to create an organizational apparatus that works with electronic signatures, to establish the framework for the functioning of this apparatus. In itself, the harmonization of national legislation in the directive is not a priority, which leads to the need to harmonize its provisions with the requirements of national legislation in the field of electronic signature. To understand the complexity of the problem, it should be remembered that the goal of the European Union is not to create a single legislative order, but to promote trade, investment development and freedom of movement of citizens.⁹

These directives have established common concepts and principles of legal regulation. On their basis, new national acts of the EU member States have been revised, amended or adopted. If we compare the documents of two international organizations, the *UNCITRAL Model Law* and the *EU Directive On Electronic Signatures*, we can find both commonality and difference in approaches to regulation. On the one hand, they define the concept of an electronic signature in the same way, and create the same structure of legal relations in e-commerce: sender – recipient – certification authority. But on the other hand, the directive's approach is more precise and strict. It establishes the rights, obligations, and responsibilities of the parties, defines the criteria for the recognition of an electronic signature, which are in the nature of a closed list, and focuses on the certification of signatures. This leads to unification within the European Union, but makes it difficult to interact with other states.

The adoption of the directives has led to the fact that European countries have updated and unified their laws in this sphere. The implementation of the EU directives in England began on 25 May 2000 with the adoption of the Electronic Communications Act. The Law allows the use of electronic signatures as evidence to establish the authenticity and integrity of an electronic message.

In France, on 13 March 2000, Chapter VI of the French Civil Code *On the provision of information technologies with evidentiary force and electronic signatures* was amended, namely: electronic documents and electronic signatures were recognized as legal as an alternative type of documents and traditional signatures. The Decree on Electronic Signature, adopted on 30 March 2001, added a new protected type of electronic signature. It should only be created by means under

⁹ DIRECTIVE 2000/31/E.

the control of the signatory, and any change made after signing the document should be easily identified.¹⁰

In 2001, Germany adopted a new version of the law *On Electronic Signatures*. Germany has abandoned the mandatory licensing of activities in this area. Declaring the freedom to choose an electronic signature, it establishes certain conditions under which a certain type of electronic signature must be used imperatively in order to increase confidence in the use of an electronic signature in civil legal relations. For example, if the form of a written contract prescribed by law is replaced in electronic form, then each of the parties must sign the document leaving it with a qualified electronic signature.

Conclusion

The adoption of the EU directives and their introduction into the national legislation of the EU member states led to the fact that, although initially electronic document circulation was widespread in the United States, later it became more popular in Western European countries. Thus, it can be stated that significant results have been achieved in international law in the unification of the norms on electronic document circulation.

The national laws of specific countries are based on global and pan-European Model Laws designed to develop common rules for electronic document circulation in legal relations. However, the current rules and regulations do not solve all the problems set before them, in addition, many countries adapt Model Laws to their situation, which further complicates the solution of the problem of legal regulation of new legal relations. In practice, the process of creating an effective legal mechanism for the use of an electronic document is not yet complete.

This is due to the fact that legal relations on the use of electronic means of telecommunications have emerged relatively recently, in this area there is no effective legislation in force in any country. Therefore, the unauthorized direction of the process of forming the relevant norms is extremely unjustified. First of all, state control is necessary. In addition, it is necessary to take into account the economic situation in Kazakhstan and the level of development of the legal system, which differ significantly from the situation in other countries. As a result, simply copying foreign legislation without taking into account national specifics can lead to significant negative consequences.

¹⁰ SIMONOVICH, 2002.

Bibliography

Sources

DIRECTIVE 97/7/EC <http://all-docs.ru/index.php?page=7&vi1=16391.000> (data retrieved: 11.08.2020).

DIRECTIVE 1999/93/EC <https://base.garant.ru/2570145/> (data retrieved: 11.08.2020).

DIRECTIVE 2000/31/E <http://www.eurasiancommission.org/ru> (data retrieved: 11.08.2020).

The *UNCITRAL Model Law on Electronic Commerce* (1996),

https://www.uncitral.org/pdf/russian/texts/electcom/05-89452_Ebook.pdf (data retrieved: 11.08.2020).

The *Model Law on Electronic Signatures* (2001), <https://www.uncitral.org/pdf/russian/texts/electcom/ml-elecsig-r.pdf> (data retrieved: (11.08.2020).

Literature

ANANKO, A. (2001) 'Electronic form of transaction in international trade', [Electron.resource] URL:<http://www.russianlaw.net/law/doc/a124.htm> (data retrieved: 11.08.2020).

DUTOV, M. (2002) 'Comparative analysis of the European legislation in the field of electronic document circulation', [Electron.resource] URL:<https://www.russianlaw.net/law/edoc/esign/a147/> (data retrieved: 11.08.2020).

SOLOVYANENKO, N. (1997) 'Making transactions by electronic data exchange', [Electron.resource] URL: <https://uristy.ucoz.ru/publ/2-1-0-650> (data retrieved: 11.08.2020).

SIMONOVICH, P. S. (2002) 'Regulation of electronic digital signatures by the norms of law: international experience', [Electron.resource] URL: <https://uristy.ucoz.ru/publ/2-1-0-644> (data retrieved: 11.08.2020).

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