Регистрацию по данному способу получают «союзные знаки» на территории Европейского союза в управлении Европейского союза интеллектуальной собственности (EUIPO) в соответствии с Регламентом о товарных знаках Европейского союза № 2017/1001. EUIPO ежегодно регистрирует почти 135 000 товарных знаков11.

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УДК 347.4

ЦИФРОВЫЕ СДЕЛКИ: СОВРЕМЕННОЕ ПРАВОВОЕ РЕГУЛИРОВАНИЕ И ПРИМЕНЕНИЕ

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DIGITAL TRANSACTIONS: MODERN LEGAL REGULATION AND LAW ENFORCEMENT

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АННОТАЦИЯ

Данная статья посвящена вопросам правового регулирования и правоприменения в области цифровых сделок и электронной торговли. Рассмотрены законодательные акты на международном и национальном уровне, определены основные идеи развития законодательства и области правового регулирования электронной торговли, признаки цифровой сделки, проблемы правоприменения.

ANNOTATION

This article is devoted to the issues of legal regulation and enforcement in the field of digital transactions and electronic commerce. Legislative acts at the international and national level are considered, the main ideas of the development of legislation and the field of legal regulation of electronic commerce, signs of a digital transaction, and problems of law enforcement are identified.

Ключевые слова. Электронные сделки, электронная торговля, цифровые права, Гражданский кодекс РФ, проблемы правоприменения.

Keywords. Electronic transactions, electronic commerce, digital rights, the Civil Code of the Russian Federation, problems of law enforcement.

[11] Регламент Европейского Парламента и Совета Европейского Союза 2017/1001/(ЕС) от 14 июня 2017 г. о товарном знаке Европейского Союза (кодификация)

Introduction

Freedom of trade, proclaimed by the Decree of the President of the Russian Federation No. 65 of 29.01. 1992, marked a completely new stage in Russia's economic development. According to the estimates of the Ministry of Industry and Trade of Russia, the retail turnover of goods for 22 years, from 1999 to 2021, increased fivefold. The methods/forms of trade, production technologies have changed qualitatively, the range of goods has increased, and with it consumption, which is significantly different from the Soviet model of trade with its shortage of goods and their monotony, constant queues [4, p.167]. E-commerce has been developing for a long time, but since 2020 it has received a powerful incentive. The prospects for e-commerce were affected not only by the coronavirus. Life as a whole is becoming more and more "digitized". Much is being done in a mobile and portable format. The user is more likely to use the services of an online store than to go to a regular one. And, consequently, digital transactions will be concluded, and the term "smart contract" no longer sounds supernatural. E-commerce, e-commerce, e-business, these terms can be understood as identical and derived from e-commerce. Back in 2001 - 2004, the draft Federal Law No. 11081-3 "On Electronic Commerce" was in the State Duma. The draft contained a definition of electronic commerce, according to which electronic commerce is the conclusion by exchanging electronic documents of transactions provided for by the Civil Code of the Russian Federation, but not limited to them, but the bill was rejected and withdrawn from consideration [3].

Hypothesis

Legal regulation of electronic commerce in Russia is expanding, but law enforcement practice faces a number of problems that require further improvement of legislation in this area.

Research methods

In the process of writing the work, theoretical research methods were used: analysis and synthesis, from simple to complex.

Research results

As digital relations develop, legislators from different countries react to this, legislative acts are adopted.

It is impossible to bypass the experience of Western countries. In particular, in the EU there are: Directive 2000/31/EC "On certain legal aspects of information services in the domestic market, in particular, on e-commerce". The CIS member States have a Model Law on Electronic Commerce, which was adopted in St. Petersburg on 25.11.2008 by resolution 31-12. At the level of the EAEU, a number of documents are in force on the topic of the issue. One of the key ones are: The decision of the Supreme Eurasian Economic Council of October 11, 2017. No. 12 "On the Main directions of implementation of the Digital Agenda of the Eurasian Economic Union until 2025", by the Decision of the EEC Council dated 07/14/2021 No. 63, the Passport and the roadmap of the project "Digital Technical Regulation within the Framework of the Eurasian Economic Union" were approved.

In Russia, currently, the legal regulation of the concept of electronic transaction is indirectly disclosed in Articles 160 and 434 of the Civil Code of the Russian Federation:

«The written form of the transaction is also considered to have been complied with if a person commits a transaction using electronic or other technical means that allow the content of the transaction to be reproduced unchanged on a tangible medium, while the requirement for a signature is considered fulfilled if any method is used to reliably identify the person who expressed the will. The law, other legal acts and the agreement of the parties may provide for a special method of reliably determining the person who expressed his will» (paragraph 2, paragraph 1, Article 160 of the Civil Code of the Russian Federation).

«A contract in writing may be concluded by drawing up one document (including electronic) signed by the parties, or by exchanging letters, telegrams, electronic documents or other data in accordance with the rules of the second paragraph of paragraph 1 of Article 160 of this Code» (paragraph 2 of Article 434 of the Civil Code of the Russian Federation). In addition, Federal Law No. 34 of 18.03.2019 introduced Article 141.1 on digital rights in the Civil Code of the Russian Federation. Digital rights are now classified as objects of civil law, they are a type of property rights based on Article 128 of the Civil Code of the Russian Federation. Making amendments to the provisions of Part 2 of the Civil Code of the Russian Federation by types of contracts, in Article 2 of Federal Law No. 34, the legislator clearly provided for the possibility of their electronic form types of contracts. The characteristics of such changes are given in Table 1.

Table 1

Types of contracts concluded in electronic form on the basis of Federal Law No. 34 [2]

	Name of the agreement	Article of the Civil Code of the Russian Federation	Features
1	Retail purchase and sale	493	The moment of conclusion of the contract in the proper form is the issuance by the seller to the buyer of both an ordinary cash or commodity receipt and an electronic document (electronic receipt) in confirmation of payment for the goods
		494 (п. 2)	The public offer of goods is recognized not only by their display at the point of sale, other demonstration of their samples, but also on the Internet
2	Nominal Account	860.2 (п.1)	The possibility of concluding a contract in the form of an electronic document or by exchanging electronic documents

	Agreement		according to the rules of paragraph 2, paragraph 1, Article 160 of the Civil Code of the Russian Federation
3	Insurance contract	940 (п.2)	A direct indication of the possibility to conclude an agreement in electronic form, as well as for a nominal account agreement

However, it will be impossible to make a will using electronic or other technical means. In this regard, a prohibiting norm has been established - paragraph 1 Article 1124 of Part 3 of the Civil Code of the Russian Federation as amended by Article 3 of Federal Law No. 34 [2].

On 31.07.2020, Federal Law No. 259-FZ "On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation" was adopted, which entered into force on 01.01.2021. In addition, on the basis of the Rules of the Decree of the Government of the Russian Federation dated 31.12.2020 No. 2463, electronic commerce is one of the types of remote [3]. Retail purchase and sale, provision of catering services, aggregator services directly fall under the legal regulation of e-commerce issues.

The main ideas of the development of legislation and the field of legal regulation of electronic commerce:

1. A handwritten signature is an anachronism that is "dying before our eyes";

2. A written form on paper may be without a signature, but this is not a basis for declaring the transaction invalid or the terms of the transaction inconsistent (public offer, rules for using a vending machine, announcement of remuneration).

3. The signature is not the only way to reliably identify the person who expressed the will (SMS message, code name, etc.).

4. Additional requirements to the procedure for identifying a person when making a transaction may be provided for by the contract.

5. The written form is broader than the concept of a document on paper or other material medium and includes electronic documents.

6. Signing of documents in electronic form can be carried out:

- simple electronic signature (login and password from the site, SMS code); unqualified enhanced signature (cryptography + the ability to identify a person);
- qualified enhanced signature (cryptography + ability to identify a person + verification key;
- by sending an appropriate document or electronic message.

Thus, the conclusion of a contract in the framework of electronic commerce by electronic means is equivalent to writing.

From the analysis of the civil legislation of the Russian Federation, it can be concluded that the signs of a digital transaction are: - immateriality (qualitative characteristic), procedural nature (the contract binds the parties to the process, i.e. the responses of each of the parties to the transaction are important, as well as the reaction of the system to the corresponding responses); remote nature of interaction, not related to the exchange of the parties to the contract on a tangible medium; the availability of a method for reliably determining the persons who expressed the will to conclude the transaction (for example, checking the electronic signature); fixing all the details of the transaction, including the essential conditions, with a "digital code" (digital image); the form of an electronic document (file or computer program); the ability to reproduce the contents of the contract on a tangible medium unchanged through additional actions on the part of the parties to the transaction.

Problems of law enforcement:

1. The lack of a uniform conceptual and terminological apparatus, the mechanisms of application of individual provisions are not clear. So, for example, Paragraph 16 of the Rules, approved by the Decree of the Government of the Russian Federation No. 2463 dated December 31, 2020 [3] indicates that the goods are recognized as unintended for remote sale if their sale on the website or in a computer program implies preliminary agreement of the terms of the contract, including: availability; name and quantity of goods; in other cases when the seller has clearly determined that the goods are not intended for sale remotely. However, when making consumer transactions between the seller and the buyer, the fact of the availability of goods in the seller's warehouse, its direct name and quantity are always pre-agreed, since it is these conditions that pre-determine the buyer's choice. That is, questions about how to apply. On law enforcement, there is a Resolution of the Plenum of the Supreme Court of the Russian Federation dated December 26, 2017 No. 57 «On some issues of the application of legislation regulating the use of documents in electronic form in the activities of courts of general jurisdiction and arbitration courts» [7], however, it does not answer all the questions that arise in practice.

2. The problem with the establishment of the place of conclusion of the transaction;

3. The problem of proving the fact of concluding a transaction, as well as unchanged and stored data fixed in a specific contract;

4. The problem of confirming the fact that the document comes from the party to the transaction, i.e. the difficulty of identifying participants in online transactions;

5. Ensuring the security of information exchange. Lack of guarantees of punishment for the confidentiality of information concluded in a specific contract, the possibility of hacking, fraud.

6. Determination of the legality of state intervention in the relations developing in the virtual sphere. I.e., the problem of the correlation of self-regulation and state regulation.

Judicial practice

Court cases clearly demonstrate various grounds for the emergence of rights and obligations under electronic transactions.

Example 1. Information sent from a corporate e-mail is a confirmation of the commission of appropriate actions on behalf of the organization: «... receiving or sending a message using an e-mail address known as the person's own mail or the official mail of his competent employee, indicates that these actions were committed by the person himself, until proven otherwise (when establishing compliance with the procedure for verification and seizure of evidence) ...» [6].

Example 2. The fact of concluding a contract can be confirmed by a message of numbers and letters received in an SMS message, via Telegram, via social. The network is in contact.

«... The Civil Code of the Russian Federation does not establish the obligations of the parties to use any specific information technologies and (or) technical devices when concluding an agreement in electronic form. Thus, the types of information technologies and (or) technical devices used should be determined by the parties independently. Thus, despite the actual absence of a paper contract and the borrower's signature, the contract was signed between the parties using electronic technologies, in particular, an analogue of the debtor's handwritten signature consisting of numbers and letters in an SMS message. The fact of signing the contract is the introduction in the form of an application for a loan (loan) of an electronic signature of the code received to the mobile phone number specified in the loan offer ...» [8].

Example 3. The fact of concluding a contract can be confirmed by a message of numbers and letters received via Telegram: «... After reviewing the application and receiving personal data, if the borrower agrees with the individual conditions, the contract is concluded through the borrower's personal account or through the Webbankibot_bot company service in the Telegram instant messaging system. The contract is signed by the applicant/ borrower using an electronic signature (SMS code), while the applicant gives consent to the use of an electronic signature (SMS code) in accordance with the terms of the Rules. The payment schedule is an appendix to the contract and is provided to the borrower simultaneously with it. The applicant/borrower understands and agrees that the electronic documents signed by him through the use of an electronic signature are sufficient to recognize such documents as equal in legal force with documents drawn up on paper and signed with a handwritten signature. The proof of acceptance by the borrower of the fact of the conclusion of the contract is the fact that the borrower has received a microloan through the method of receiving funds chosen by him. The contract is considered concluded from the moment the company transfers the amount of the microloan to the borrower's bank card indicated by him in his personal account on the company's website /in the mobile application "WEBBANKIR", or from the moment of receipt (demand) of the amount of the microloan in cash through the CONTACT system at its service points ...» [9].

Example 4. The fact of the conclusion of the contract can be confirmed by the message of numbers and letters received through Social networks (ВКонтакте): «... The court established and confirmed by the case materials that in December 2017, an agreement for the retail sale of adenium plants was concluded between IP M. (seller) and S. (buyer) via ВКонтакте social networks. As an advance payment to S., IP M. was transferred funds in the amount of 30,000 rubles, which is also not disputed by the defendant in the case. Resolving the dispute, the court was guided by Article 497 of the Civil Code of the Russian Federation, art. 26.1 of the Law of the Russian Federation «On Consumer Rights Protection» and came to the correct conclusion about the existence of grounds for satisfying the claims, collecting from IP M. in favor of S. the funds paid under the contract in the amount of 30,000 rubles, since the plaintiff refused to fulfill the contract before the delivery of the goods, in connection with which the contract is considered terminated and the defendant has no grounds for withholding the funds received from the plaintiff ...» [10].

Conclusions:

1. The legal doctrine considers the issue of electronic commerce and the creation of legal regulation of relations in this area to be relevant;
2. The legal regulation of electronic commerce is currently overwhelmingly at the stage of model rules;
3. The details of transactions are regulated by analogy with the same transactions in the «normal» trading activity;
4. Judicial practice and the actually developing relations between the participants of the turnover demonstrate the wide involvement of e-commerce in people's lives;
5. The need for turnover, as well as the existence of disputes between the parties to the agreements, creates an impetus for the development of separate platforms for resolving disputes arising as a result of electronic commerce, as well as improving the legislation of the Russian Federation in this area.

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ПРАВОПРИМЕНЕНИЕ ПО ЗАЛОГОВЫМ ОБЯЗАТЕЛЬСТВАМ (ИПОТЕКА): СОВРЕМЕННОЕ СОСТОЯНИЕ, ПРОБЛЕМЫ И ПУТИ ИХ ПРЕОДОЛЕНИЯ

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ENFORCEMENT OF COLLATERAL OBLIGATIONS (MORTGAGE): CURRENT STATE, PROBLEMS AND WAYS TO OVERCOME THEM

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