

Technology of Concluding Contracts via the Internet



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Abstract: *The article is dedicated to analyzing technical and legal means of concluding an agreement via the Internet. During their study, the authors have determined that there are two main ways to conclude these contracts: to conclude contracts by exchanging e-documents and to carry out implicative actions, each of which has its own characteristics. The correlation and analysis of civil legal relations and judicial practice have shown the possibility of both ways that can sometimes corroborate and replace each other. The authors have come to the conclusion that today a click-wrap agreement widely used when providing the access to content or services on the Internet is of particular popularity among users of Internet resources. At the end, the authors have drawn the conclusion that it is necessary to reduce the excessive impact of the state on the economy in the area of digital relations by creating public means of control, such as self-regulation. This can be achieved by providing such organizations with broad rights and powers, and at the same time establishing high responsibility for violating the law.*

Keywords: *click-wrap agreement, computer, e-commerce, e-document, electronic signature, Internet.*

I. INTRODUCTION

A. Introduction of the Problem

The problem on the availability of a signature as an obligatory condition for recognizing a contract concluded in writing is solved depending on the method specified in Art. 434 of the Civil Code of the Russian Federation and used to conclude the contract. Thus, in accordance with clause 2 of this article, the signature is necessary if the contract is drawn up as a single document. However, this form of concluding the contract is not typical for the e-commerce because it assumes parties to the contract to be in one place and at the same time for them to put their signatures in the same document. In case the contract is concluded on the Internet, the parties are located in different places and sign the document at different times.

Moreover, in this case the documents that are signed are not identical from a technical point of view because when sent online, as well as during the processes that take place at the software level of the computer of the party to the contract, they are only copies of the original document (even if in some cases they are fully reliable). In the above situation, it is more correct to speak about the exchange of documents (clause 2, Article 434 of the Civil Code of the Russian Federation).

In case of concluding the contract by exchanging documents, the law determines an additional condition for the compliance with the written form of the contract – the possibility to determine that the document comes from the party on the contract. It is possible to do so if the relevant party has put their signature whose legal force is recognized by the law. This follows from the provisions of Part 4, Art. 11 of Federal Law Mo. 140-FZ dated 27.07.2006 “On Information, Information Technologies, and Information Protection”, which link the compliance of the written form of the contract when it is concluded by exchanging documents and a signature.

As for the latter method of concluding the contract, in this case the law says nothing about the need in a signature. Its non-availability is replaced by implicative actions, i.e., the party’s behavior that indicates the will to conclude the contract. The terms and conditions of the contract itself are set forth in a written offer. Since the offer is not a transaction because it does not entail legal consequences in the form of the occurrence of contractual rights and obligations in the absence of the bill of acceptance, it is not subject to the requirements of Art. 160 of the Civil Code of the Russian Federation on the need to sign it with a handwritten signature or its equivalent. In addition, in some cases the information about a product (service) in an online store is recognized by the law and the judicial practice as a public offer without any signatures.

B. Importance of the Problem

The problematic issues related to the regulation of legal relations in the Internet environment were touched on in the fundamental works by A.N. Kucher (2005), L. Lessig (2006), N.A. Dmitrik (2007), A.I. Saveliev (2016) et al.

Some issues on regulating the circulation of e-documents are considered in the articles by V.M. Elin, A.K. Zharov (2012), A.Yu. Zak (2010) et al.

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II. PROPOSED METHODOLOGY

A. General Description

During the study, the authors were guided by general scientific and particular legal methods of cognition, for instance, technical, legal, comparative legal and other study methods.

The main method used herein was the systemic and structural one that made it possible to define the peculiarities of concluding transactions through the Internet. The technical and legal method was applied to analyze a set of legal rules that regulate the e-commerce.

B. Algorithm

The identification and study of problems and technologies of concluding contracts through the Internet were based on a branched algorithm that included successive stages (Fig. 1).

It was decided to consider two ways of concluding contracts through the Internet.

When studying the technology of concluding contracts through the Internet, special attention was paid to the technical problem of verifying (identifying) an individual.

Having defined the problems, the offers were made to improve the legislation in order to ensure full protection of interests and rights of legal entities and individuals.

C. Flow Chart

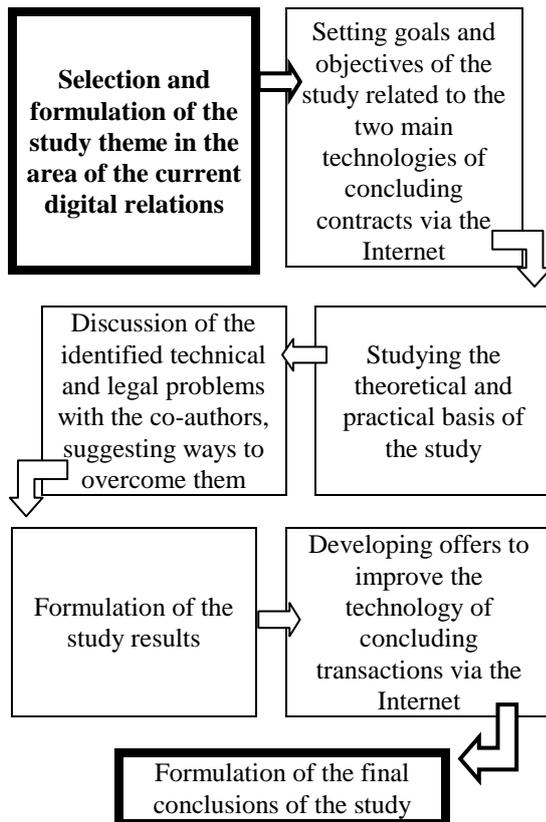


Fig. 1. Study Stages

III. RESULT ANALYSIS

It is revealed that traditional offline methods of identifying an individual (a handwritten signature, an organization stamp, paper documents issued by government agencies), even if digitized, will not have the same effect in the electronic

environment as in the ordinary life because it is impossible to verify them by relating to a real person. It is determined that in the conditions of electronic data interchange the original message cannot be distinguished from its copy, it does not have a handwritten signature, and is not a paper document. The actions performed on the Internet are not so explicitly tied to a certain person, and can be carried out by anyone.

The authors believe that since the problem of identifying an individual on the Internet is caused by the technical features of this network, it is necessary to solve this problem mainly technically. It is determined that electronic analogues of a handwritten signature became a solution. To a certain degree of accuracy, they allow making a conclusion that the message belongs to a certain person, generally referred to as "an electronic signature". In order to improve the legislation, it is offered to legally fix the procedure for concluding transactions via the Internet, which will ensure full protection of interests and rights of legal entities and individuals in relation to the complex procedure of proving the conclusion of an electronic transaction by carrying out, for example, certain tacit actions.

IV. DISCUSSION

In the Civil Code of the Russian Federation (Part 2, Article 434), the concept of an "e-document" is introduced into the civil law. It is interpreted as the "information prepared, sent, received, or stored by electronic, magnetic, optical, or similar means, including electronic data interchange and electronic mail". This concept is somewhat different from the one found in the Federal Law "On Information, Information Technologies, and Information Protection" where an e-document means the "documented information presented in an electronic form, i.e., in the form suitable for human perception by using computers, as well as for transmission over information and telecommunication networks or processing in information systems". The concept used in the Civil Code of the Russian Federation does not include the need for certain details in the document as a constitutive feature of an e-document, unlike the concept found in the above mentioned law that directly indicates the "documented" nature of the information encapsulated in the e-document. The approach of the Civil Code of the Russian Federation seems to a greater extent to meet international standards. According to N.A. Dmitrik and S. Levashov, the exchange of e-documents is considered to be almost the only possible way to conclude a contract on the Internet. This is probably due to the fact that technically any online communication is carried out by exchanging electronic messages. Entering a certain address in the browser, the user thereby sends an electronic message, and receives the same electronic response to it, reconstructed by the browser into the contents of the website [1], [2]. V.M. Elin and A.K. Zharova say that when pressing the computer buttons, the information is processed and transmitted in the form of electrical signals, electromagnetic impulses, etc., which should be unambiguously interpreted as an e-document.



These authors confirm their position by stating that on the Internet there is no specific contract form called implicitly-written, because, firstly, the Civil Code of the Russian Federation distinguishes only the oral and written forms of the contract, and secondly, it is not very clear what exactly is “written” in electrical signals and electromagnetic impulses [3].

According to A.I. Saveliev, the exchange of e-documents as a way to conclude a contract involves a certain degree of individualization of electronic messages: they are addressed to a certain person rather than to an indefinite circle of persons. In other words, according to clause 2, Art. 434 of the Civil Code of the Russian Federation, the conclusion of the contract assumes the targeted nature of the e-documents exchange (via e-mail, SMS, etc.). If the communication of one of the parties is intended for an indefinite number of persons and is carried out by using electronic agents, the contract is concluded by accepting a written offer by tacit actions of the other party (clause 3, Article 434 of the Civil Code of the Russian Federation). Thus, if a consumer places an order on a website by using the means of the website itself, the contract is concluded in accordance with clause 3, Art. 434 of the Civil Code, and if he had entered into correspondence with the owner or manager of the website when the essential terms and conditions of the contract were agreed, the terms and conditions of the contract are agreed in the e-mails exchanged by the parties and the contract is concluded according to clause 2, Art. 434 of the Civil Code [4].

This differentiation is quite clearly observed in the European legislation because it is associated with the specifics of implementing certain informational responsibilities of the entrepreneur, as well as the obligation to ensure the possibility of correcting mistakes made when placing an order. The Russian legislation does not explicitly contain this requirement, but it hints that an electronic message, which is part of the document exchange when concluding a contract, should make it possible to reliably determine that the message comes from the party under the contract, which presupposes personalized communications between the parties at the stage of concluding the contract [5], [6].

One of the main issues arising from applying clause 2, Art. 434 of the Civil Code of the Russian Federation is related to the means of identifying the person who sent the relevant message claiming the right-conferring status.

The problem of identifying a person on the Internet is one of the main problems. In the conditions when potential participants of the e-commerce have not previously had any contacts in the real physical world, and in some cases will not have them (if the contract is not only concluded, but fulfilled on the Internet), the problem of trusting the counterparty's personality comes to the fore [7]. As a rule, the data obtained from the counterpart via the Internet do not have any considerable identification characteristics. The IP address the communication was carried out from identifies only the end-user device it was made from, but not the person itself. The administrator of the domain name may not coincide with the operator of the online store operating under that domain. In the context of the electronic data interchange, the original message is indistinguishable from its copy; it does not have a handwritten signature, and is not a paper document. The

actions carried out on the Internet are not so explicitly tied to a certain person and can be carried out by anyone. According to L. Lessig, this is due to the fact that Internet protocols do not oblige users to identify themselves, and the information about the user's identity that is available at local Internet access points (such as a university campus or corporate network) is limited to these points and does not become a part of the transaction made on the Internet [8].

Besides, A.I. Saveliev says that the compliance with the requirements of clause 2, Art. 434 of the Civil Code of the Russian Federation and simultaneous availability or non-availability of a simple written form in the contract concluded via the Internet will depend on an electronic signature of any type provided for by the current legislation, and if any, its compliance with the requirements for its use. In this regard, printouts of the correspondence by e-mail, payment documents, signed acts of acceptance of the goods and other written evidences can serve as a basis for recognizing the contract as the one that took place, even despite the non-availability of a valid electronic signature on it. This means that subject to appropriate support for fulfilling the contract concluded in breach of the requirements for a written form, it is possible nevertheless to refer to its availability. The standards of the Russian legislation on the consequences of noncompliance with the written form are more liberal than the standards determining the requirements for this written form. It means that most e-commerce transactions made by exchanging documents are valid. Doubts about the compliance of their written form are efficiently eliminated by the documents related to the fulfillment of the contract by at least one party [4].

A.Yu. Zak says that far from all electronic contracts are concluded by exchanging e-documents. As mentioned before, the conclusion of the contract by exchanging documents involves the individualized nature of the documents exchanged by the parties. If the contract with an online store is concluded on the basis of a public offer, in this case there is no exchange of documents for the purposes of clause 2, Art. 434 of the Civil Code of the Russian Federation, and the contract is concluded under clause 3, Art. 434 of the Civil Code of the Russian Federation (the offer acceptance by implicit actions). The automatic confirmation of accepting the order carried out by the store will be a proof of the acceptance obtained by the consumer from the provider [9].

The contract is concluded under clause 3, Art. 434 of the Civil Code of the Russian Federation on the basis of the person's will expressed in his behavior rather than in his formal written statements.

The recognition of the contract concluded in such cases brings flexibility and efficiency to the process of its conclusion, which is vital for e-commerce. In e-commerce, the contract concluded by implicit actions may take the form of agreements concluded by clicking with the mouse (click-wrap) and agreements concluded by using the website (browse-wrap). A click-wrap agreement is a contract concluded electronically by clicking the “Agree” button that comes with the text of such contract with one of its parties.

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These agreements first arose in software licensing, and replaced the so-called wrapping licenses when the terms and conditions of the contract were provided on the packaging of the tangible media of a computer program. Nowadays, click-wrap agreements are widely used in other areas that are not related to licensing computer programs, for example, when providing access to online content or services.

Taking into account a rather unusual way to conclude the contract in terms of the classical doctrine of the treaty law and a number of associated legal problems, it is not surprising that since such agreements appeared, there have been debates about their legal validity.

The judicial practice and the doctrine of European countries also declare in favor of the viability of the click-wrap design. Art. 9 of Directive 2000/31/EU “On E-Commerce” became the basis for the conclusion about the validity of such mechanism for concluding contracts. It requires the EU member states to ensure the possibility of concluding contracts in an electronic form in their national law, and pay special attention to the fact that the existing provisions on the procedure for concluding contracts do not interfere with the legal force of electronic contracts [10].

The contract concluded by means of a mouse click (click-wrap) is recognized as valid in England, Italy, France, Germany, Canada and a number of other countries.

The Russian law does not contain special provisions on the contracts concluded by a click of the mouse. Therefore, this mechanism for concluding the contract should be evaluated through the prism of general provisions on concluding the contract.

In accordance with clause 3, Art. 434 of the Civil Code of the Russian Federation, the written form of the contract is considered to be complied with if the written proposal to conclude the contract was accepted in the manner provided for by clause 3, Art. 438 of the Civil Code of the Russian Federation. In its turn, this clause provides that the actions to fulfill the terms and conditions of the contract specified in it (shipment of goods, provision of services, execution of works, payment of the relevant amount, etc.) by the person who received the offer within the period established for its acceptance are considered to be an acceptance unless otherwise provided by the law, other legal acts, or not specified in the offer. Thus, for the contract to be considered concluded under clause 3, Art. 434 of the Civil Code of the Russian Federation, it is necessary 1) to have a written offer and 2) to carry out actions on fulfilling the terms and conditions specified in it. Dmitrik N.A. says that when concluding a click-wrap agreement, there is a proposal to conclude a contract that comes from the right holder (provider). This proposal is set out in writing, i.e., it uses the alphabet, a set of letters, and other written characters. Such proposal can be regarded as an offer because, as a rule, it contains indications of its legally binding nature and the intention of the provider to consider himself bound by it if it is accepted by the user. It also usually contains the necessary essential terms and conditions of the relevant contract either directly or incorporating them by referring to other documents [1]. Since the agreement has indications that by clicking on the “Agree” button, the user expresses his agreement with the terms and conditions of the agreement, such actions are an

action on fulfilling the terms and conditions specified in the offer, i.e., the acceptance of the written offer by tacit actions. It is necessary to note that Russian courts usually recognize the validity of agreements concluded on the click-wrap model. This is related to both arbitration courts and courts of general jurisdiction. Various kinds of Internet platforms are especially successful in terms of click-wrap agreements. They act as intermediaries between the parties to contracts, creating organizational and technical conditions for their conclusion. Often, subsequently users try to make demands arising from the nonfulfillment or improper fulfillment of such contracts to such platforms that in their turn refer to the provisions of user agreements and emphasize the reference and informational nature of their services.

According to A.N. Kucher and L. Lessig, in order to improve the chances of recognizing the click-wrap agreement, it is reasonable to take into account the circumstances taken into account by foreign courts when taking decisions on the availability of a valid click-wrap agreement between the parties [8], [11].

Firstly, the user must be provided with the opportunity to preliminarily read the terms and conditions of such contract before it is deemed to be concluded. In this case, it is desirable for the “Agree” button to be located at the end of such agreement which can only be activated if the entire text is scrolled from its beginning to the end. It is possible to strengthen the expression of the person’s consent with the terms and conditions of the agreement by adding the phrase “I have read and agree with the terms and conditions of the contract”. Secondly, the user must be able to refuse to accept its terms and conditions and to complete the transaction accordingly. The freedom of decision on concluding or not concluding a contract is an important element of the autonomy of the person’s will, especially if this contract falls into the category of contracts of accession. The fact that, having the opportunity to refuse to conclude the contract under the terms and conditions the person might previously read, the person nevertheless continued concluding the contract is a strong argument in favor of a real will on his part to conclude such contract. Accordingly, when placing an order, the online store interface should provide the possibility of moving to the previous stages (“Back” popup box), and the terms and conditions of the agreement must come with the possibility to refuse from them (“Disagree” popup box, etc.). Thirdly, the acceptance of the terms and conditions of the agreement should be a necessary technical condition for obtaining the service, access to the information resource, and a software product. It is impossible to further conclude the contract (place an order) or obtain access to the benefits the contract provides without the user’s agreement with the terms and conditions of the contract. Only such approach allows eliminating one of the main problems of click-wrap agreements – the problem of proving the fact of acceptance of its terms and conditions by a certain client. If technically it is impossible to place an order in any other way than accepting its terms and conditions by the client,

the dispute occurring in relation to the execution of the order inevitably implies that the relevant client accepted the terms and conditions of the click-wrap agreement. At the same time, the technical impossibility of accepting the order, if there is no clients' agreement with the terms and conditions of the click-wrap agreement, can be confirmed, in particular, by letters from the organization developing the website of the online store, or by expert (specialist) opinions.

Fourth, taking into account the fact that when placing an order supported by the conclusion of click-wrap agreements, automated tools are used, at the stage of concluding the contract there is an increased possibility of the mistakes made during the data entry. This is especially true for the consumers who fill out the appropriate form on the website. In this regard, many e-commerce laws provide for special provisions aimed at minimizing possible mistakes. EU Directive No. 2000/31/EU "On E-Commerce" states that the national legislation should include the obligation to ensure the availability of special means to correct mistakes made during the entry (Art. 11 (2)). Such special mechanisms should in any case be provided for in the contracts with consumers. In the business contracts, the parties may exclude their use by their agreement. Such mechanisms may include the ability to edit the terms and conditions of the order at each stage of its formation, as well as to introduce special confirmation pages with a question like "Is the order correct?" Despite the fact that there are no such provisions in Russia at the moment, special mechanisms that provide the possibility to correct mistakes can be taken into account when determining the "quality" of the consumer's will to conclude the relevant contract.

Fifthly, it is extremely important to ensure the possibility of printing out and saving the terms and conditions of such agreement. The need to ensure such possibility is provided by the European and American law. There are even separate initiatives for the standardization of technical means used in creating click-wrap agreements that would allow saving each such agreement to the user's hard drive with each click on the "Agree" button, which could be very useful, taking into account that such agreements tend to change from time to time unilaterally by the entrepreneur.

V. CONCLUSION

Legal entities and individuals entering into electronic transactions must be confident in their legality and security in terms of their faithful fulfillment by their parties. Therefore, their detailed regulation is required at the legislative level.

In this regard, offers for improving the current civil law are formulated in the article. Their implementation may strengthen the position of the parties in the electronic transaction and will cause the conclusion of a larger number of transactions via the Internet.

In the work such raised issues as rights, obligations, and responsibility of the parties on the electronic transaction, and the legal nature of the electronic signature have not been touched on. These questions may be the subject for the subsequent study by the authors.

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